

Review report under the *Government Information (Public Access) Act 2009*

Applicant:

Agency: Department of Premier and Cabinet

Report date: 10 June 2015

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breach of confidence – diminish competitive commercial value
– prejudice legitimate business interests – exempt documents
under interstate FOI legislation

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Summary

1. The Applicant applied for information from the Department of Premier and Cabinet (the Agency) under the *Government Information (Public Access) Act 2009* (GIPA Act).
2. The Agency refused access to the information because of an overriding public interest against its disclosure.
3. The Information Commissioner is satisfied the Agency's decision is justified pursuant to section 97 of the GIPA Act and makes no recommendations against the decision. We refer the Agency to our recommendation at paragraph 67, with respect to dealing with future applications to which the consideration at clause 7(1) of the table to section 14 of the GIPA Act is said to apply.

Background

4. On 26 November 2013 the Applicant applied under the GIPA Act to the Agency for access to a report prepared for the Victorian Government by ABN AMRO Australia Ltd (ABN AMRO) in relation to Mineralogy Limited's "Austeel Project" (the Report).
5. On 2 April 2014, in its initial decision the Agency decided to refuse access to the Report under section 58(1)(d) of the GIPA Act.
6. On 2 May 2014, the Applicant requested internal review of the Agency's decision.
7. On 5 November 2014, the Agency decided to refuse access to the Report.
8. On 17 December 2014, the Applicant sought external review by the Information Commissioner of the Agency's decision to refuse access to the Report.
9. In his application for review, the Applicant advised that:
 - a. a request for the Report under the *Freedom of Information Act 1982 (Vic)* (FOI Act) to the Victorian Department of State Development, Business and Innovation (Victorian DSDBI) was met with a determination that it was exempt from release;
 - b. the Victorian DSDBI determination is now the subject of a review by the Victorian Civil and Administrative Tribunal, following a review under section 49A of the FOI Act by the Freedom of Information Commissioner, who decided on 2 September 2014 that the Applicant be provided with access to the Report in part.
10. On 31 March 2015, at the request of the Agency, the Information Commissioner issued a formal notice for information relating to the decision under review, pursuant to section 25 of the *Government Information (Information Commissioner) Act 2009*.
11. The decision to refuse access to the Report is a reviewable decision under section 80(d) of the GIPA Act.

The public interest test

12. The Applicant has a legally enforceable right to access the information requested, unless there is an overriding public interest against disclosing the

information (section 9(1) of the GIPA Act). The public interest balancing test for determining whether there is an overriding public interest against disclosure is set out in section 13 of the GIPA Act.

13. The general public interest consideration in favour of access to government information set out in section 12 of the GIPA Act means that this balance is always weighted in favour of disclosure. Section 5 of the GIPA Act establishes a presumption in favour of disclosure of government information.
14. Before deciding whether to release or withhold information, the Agency must apply the public interest test and decide whether or not an overriding public interest against disclosure exists for the information.
15. Section 13 requires decision makers to:
 - a. identify relevant public interest considerations in favour of disclosure,
 - b. identify relevant public interest considerations against disclosure,
 - c. attribute weight to each consideration for and against disclosure, and
 - d. determine whether the balance of the public interest lies in favour of or against disclosure of the government information.
16. The Agency must apply the public interest test in accordance with the principles set out in section 15 of the GIPA Act.

Public interest considerations in favour of disclosure

17. Section 12(1) of the GIPA Act sets out a general public interest in favour of disclosing government information, which must always be weighed in the application of the public interest test. The Agency may take into account any other considerations in favour of disclosure which may be relevant (s12(2) GIPA Act).
18. In its notice of decision, the Agency listed the following public interest considerations in favour of disclosure of the information in issue. That release of the information could be expected to:
 - a. promote open discussion of public affairs [or] enhance government accountability (section 12(2)(a) of the GIPA Act);
 - b. inform the public about the operations of agencies (section 12(2)(b) of the GIPA Act); or
 - c. ensure effective oversight of the expenditure of public funds (section 12(2)(c) of the GIPA Act.)
19. The notice of decision concludes that the strongest considerations in favour of disclosure are those at paragraphs 18b and 18c above, given that the Report was cited in Parliament as a document that informed the NSW Government's decision to pursue an agreement with Austeel.
20. We agree that these are relevant considerations in favour of disclosure of the Report.

Public interest considerations against disclosure

21. The only public interest considerations against disclosure that can be considered are those in schedule 1 and section 14 of the GIPA Act.

22. In order for the considerations against disclosure set out in the table to section 14 of the GIPA Act to be raised as relevant, the Agency must establish that the disclosure of the information *could reasonably be expected to have the effect* outlined in the table.
23. The words “could reasonably be expected to” should be given their ordinary meaning. This requires a judgment to be made by the decision-maker as to whether it is reasonable, as distinct from irrational, absurd or ridiculous, to expect the effect outlined.
24. In its notice of decision the Agency raised six public interest considerations against disclosure of the information, deciding that its release could reasonably be expected to:
 - a. prejudice the supply to an agency of confidential information that facilitates the effective exercise of that agency’s function (clause 1(d) of the table to section 14 of the GIPA Act);
 - b. prejudice the effective exercise by an agency of the agency’s functions (clause 1(f) of the table to section 14 of the GIPA Act);
 - c. found an action against an agency for breach of confidence or otherwise result in the disclosure of information provided to an agency in confidence (clause 1(g) of the table to section 14 of the GIPA Act);
 - d. diminish the competitive commercial value of any information to any person (clause 4(c) of the table to section 14 of the GIPA Act);
 - e. prejudice any person’s legitimate business, commercial, professional or financial interests (clause 4(d) of the table to section 14 of the GIPA Act); and
 - f. that notice has been received from a government of another State that the information is exempt matter within the meaning of a corresponding law of that State (clause 7(1) of the table to section 14 of the GIPA Act).
25. I will discuss each of these considerations in turn.

Consideration 1(d) – prejudice the supply to an agency of confidential information that facilitates the effective exercise of that agency functions

26. Clause 1(d) of the table at section 14 states:

There is a public interest consideration against disclosure if disclosure of the information could reasonably be expected to prejudice the supply to an agency of confidential information that facilitates the effective exercise of that agency’s functions (whether in a particular case or generally).
27. In order for this to be a relevant consideration against disclosure, the Agency must be satisfied that:
 - a. the information was obtained in confidence;
 - b. disclosure of the information could reasonably be expected to prejudice the supply of such information to the Agency in future; and
 - c. the information facilitates the effective exercise of the Agency’s functions.
28. Although the GIPA Act does not use the phrase “future supply”, the nature of the prejudice that this consideration deems to be contrary to the public interest, is implicit. This future effect is one aspect of the abstract nature of the enquiry.

- The other abstract element is supply in a general sense and whether disclosure will impact supply of similar information by persons to the agency in the future.
29. It is commonly understood that information will have a confidential quality if the person was not bound to disclose the information but did so on the basis of an express or inferred understanding that the information would be kept confidential.
 30. We have examined the Report and are satisfied that it contains a confidentiality clause and that it was prepared using commercial information provided in confidence by business.
 31. Information provided by the Agency in the course of this review:
 - a. refers to the “advice to government” and “business engagement” roles of the Victorian DSDBI; and
 - b. the Victorian Government’s concern that release of the Report may harm its business relations and therefore its ability to perform its functions.
 32. The Agency articulates concerns that release of the information in question may:
 - a. harm the Agency’s relations with the Victorian Government; and
 - b. diminish the Agency’s ability to obtain confidential information in future from the Victorian Government and other stakeholders, that facilitates the exercise by the Agency of the Agency’s functions.
 33. The Information Commissioner is satisfied that it is reasonably expectable that the release of the Report could prejudice the future supply of similar confidential information to an agency, in a general sense, whose effective function benefits from and relies upon access to confidential information.

Consideration 1(f) – prejudice the effective exercise by an agency of the agency's functions

34. Clause 1(f) of the table at section 14 states:

There is a public interest consideration against disclosure if disclosure of the information could reasonably be expected to prejudice the effective exercise by an agency of the agency's functions.
35. To show that this is a relevant consideration against disclosure, the agency must establish:
 - a. the relevant function of the agency;
 - b. that is or would be prejudiced by release of the information.
36. The meaning of the word prejudice is to “cause detriment or disadvantage’.
37. We acknowledge in paragraphs 31-32 above, that the Agency provided information about the functions of the Victorian Government and expressed concerns about expected prejudice to its own function.
38. However, the notice of decision needs to explain which of the Agency’s functions would be prejudiced by release of the Report and how. On these elements the notice of decision is silent and the Information Commissioner is therefore not satisfied the Agency has established the relevance of this consideration against disclosure.

Consideration 1(g) – found an action against an agency for breach of confidence or otherwise result in the disclosure of information provided to an agency in confidence

39. Clause 1(g) of the table at section 14 states:

There is a public interest consideration against disclosure if disclosure of the information could reasonably be expected to found an action against an agency for breach of confidence or otherwise result in the disclosure of information provided to an agency in confidence (whether in a particular case or generally).

40. To show that this is a relevant consideration against disclosure, the Agency must establish:

- a. the information was obtained in confidence; and
- b. disclosure of the information could reasonably be expected to found an action against an agency for breach of confidence; or
- c. otherwise result in the disclosure of information provided.

41. In raising this public interest consideration against disclosure the Agency needs to ensure the information is in fact confidential.

42. Once satisfied that the information is confidential information, the agency should then turn its mind to what constitutes a breach of confidence. A breach of confidence arises out of an unauthorised disclosure of, or other use of information, which is subject to an obligation of confidentiality.

43. We refer to our comments under consideration 1(d) above. The Information Commissioner is satisfied as to the confidential nature of the information and that it is reasonably expectable that an action could be brought against the Agency for a breach of confidence, should the Report be released.

Consideration 4(c) - diminish the competitive commercial value of any information to any person

44. Clause 4(c) of the table to section 14 of the GIPA Act provides:

There is a public interest consideration against disclosure of information if disclosure of the information could reasonably be expected to diminish the competitive commercial value of any information to any person.

45. To rely on this clause as a consideration against disclosure, an agency must show that releasing the information could reasonably be expected to have the effect outlined and base this on substantial grounds.

46. In particular, an agency must identify why the information has a competitive commercial value, and how that value would be adversely affected if the information was disclosed.

47. Person is defined in Schedule 4(1) to the GIPA Act as including an agency. It can also include a corporation, pursuant to section 21 of the *Interpretation Act 1987*.

48. The notice of decision submits that:

- a. the Report contains commercial information relevant to the interests of a number of third parties and others;

- b. it is apparent the Report was prepared with the benefit of confidential business relationships and information sharing between third parties;
 - c. it is relevant that the Austeel Project appears to remain on foot, as it is listed as a current project on the Austeel webpage; and
 - d. the Agency is not satisfied that the age of the information in the Report diminishes its commercial relevance, particularly that which is independent of financial costings and projections.
49. We have examined the withheld information, and accessed the website of Mineralogy Pty Ltd, which affirms that the Austeel Project is ongoing.
50. The Information Commissioner is satisfied the Agency has established that 4(c) is a relevant consideration against disclosure.

Consideration 4(d) – prejudice legitimate business interests

51. Clause 4(d) of the table to section 14 of the GIPA Act provides:
- There is a public interest consideration against disclosure of information if disclosure of the information could reasonably be expected to prejudice any person's legitimate business, commercial, professional or financial interests.*
52. For this consideration to apply, the Agency must:
- a. identify the relevant legitimate interest; and
 - b. explain how the interest would be prejudiced if the information was disclosed.
53. Our view is that the relevant meaning of “legitimate” for the purposes of this consideration is its ordinary meaning, that is genuine and not spurious.¹
54. Mineralogy Pty Ltd is a private company engaged in the exploration and development of mineral resources², with an interest in operating for profit. The Mineralogy Ltd website claims that
- “Austeel is developing a world-class steel operation capable of competing with the low cost high quality producers in the world. Austeel’s extensive iron ore deposit in the Pilbara Region of Western Australia will produce a very high quality iron concentrate which can be further processed into direct reduced iron for conversion into final steel products.”³*
55. We refer to the statements from the notice of decision reproduced at paragraph 48 above and the Agency’s contention that whether or not the commercial information remains relevant today does not diminish the risk of damage to confidential business relationships and business interests if the Report were to be released.
56. The Information Commissioner is satisfied this is a relevant consideration against disclosure of the information in question.

¹ Macquarie Dictionary 6th ed, October 2013

² Mineralogy Ltd website <http://www.mineralogy.com.au> accessed 23 April 2015

³ Mineralogy Ltd website <http://www.mineralogy.com.au/projects.html>, accessed 23 April 2015

Consideration 7(1) – exempt documents under interstate Freedom of Information legislation

57. The notice of decision states that it is a relevant consideration against disclosure that notification has been received from the Victorian Government that the Report is an exempt matter under Victoria FOI legislation.
58. Clause 7(1) of the table to section 14 of the GIPA Act provides:

There is a public interest consideration against disclosure of information communicated to the Government of New South Wales by the Government of...another State if notice has been received from that Government that the information is exempt matter within the meaning of a corresponding law of...that other State.
59. This clause has the effect that, if another Government notifies an agency that the information is exempt under the FOI law of another State or the Commonwealth, then that is a public interest against disclosing the information pursuant to an application for access made in NSW.
60. In *Smolenski v Commissioner of Police (NSW) [2015] NSWCATAD 21* at [48], clause 7 was found to apply to information that is:
 - a. communicated to the Government of New South Wales;
 - b. by the Government of the Commonwealth or of another State; and
 - c. a notice has been received from the Government of the Commonwealth or State that the information is 'exempt matter' within the meaning of a corresponding law of the Commonwealth or that other State.
61. The notice of decision is silent as to how the information was communicated to the Government of New South Wales.
62. We have examined the Agency's working GIPA file, which indicates that the Agency located a copy of the Report in Austeel-related files which were retrieved from archives.
63. Given that the Report was prepared for the Victorian Government in 1996, and taken into account by the NSW Government in considering engagement with Austeel, according to Hansard 11 March 2004, it *may* be the case that the Report was communicated to the Government of New South Wales by the Government of Victoria.
64. However, to satisfy the first element of this consideration against disclosure, the notice of decision needs to show in this case that the Report was communicated to the Government of New South Wales by the Government of Victoria.
65. The second element of this consideration is satisfied by the Agency's confirmation that notice has been received from the Victorian government that the Report is an exempt matter under Victoria FOI legislation.
66. The notice of decision acknowledges that the decision of the Victorian Information Commissioner affirmed that information contained in the Report was an exempt matter, before deciding that access was to be provided to a redacted copy of the Report.
67. The Information Commissioner recommends pursuant to section 95 of the GIPA Act that in future notices of decision to which clause 7(1) is said to apply, the Agency take the step of establishing all elements of the consideration as articulated at paragraph 60 above.

Third party consultation

68. Pursuant to section 54 of the GIPA Act, the Agency consulted with two third parties, the companies whose business information is captured by the application. Mineralogy Pty Ltd, the parent company of Austeel and the Royal Bank of Scotland (RBS) the legal successor of ABN AMRO Australia Ltd.
69. The purpose of third party consultation under section 54 is to ascertain whether the parties have any objection to disclosure of the information and the reasons for the objection. The Agency must take any third party objection into account in making its decision as to whether there is an overriding public interest against disclosure of government information.
70. During the course of this review, we inspected the consultation correspondence and confirm that it grounds the objections to release cited in the notice of decision; that disclosure would prejudice legitimate business, commercial, professional or financial interests and diminish the competitive commercial value of the information.
71. The Information Commissioner is satisfied that the notice of decision adequately explains the reliance on consultation in weighing up the considerations for and against disclosure of the Report.

Balancing the public interest

72. The notice of decision concludes that the considerations against disclosure outweigh the public interest considerations in favour and accordingly determines to refuse access to the Report.
73. The Agency determined that because the Report remains an exempt matter under Victorian FOI legislation there remains a strong public interest consideration against releasing it, or releasing it in part, as at the time of the decision there remained a right of appeal available to relevant third parties under the Victorian legislation before the redacted Report was due to be released.
74. The notice also submits that providing access to inspect the Report (but not to make copies) is not considered appropriate in this case due to the confidential nature of the information
75. The Information Commissioner is satisfied that the Agency has considered the factors for and against disclosure of the Report and carried out the public interest test in keeping with section 13 of the GIPA Act.

Recommendations

76. The Information Commissioner is satisfied that the decision of the Agency is justified, pursuant to section 97 of the GIPA Act and makes no recommendations against the decision.
77. The Information Commissioner recommends pursuant to section 95 of the GIPA Act that in future notices of decision to which clause 7(1) is said to apply, the Agency take the step of establishing all three elements of the consideration as articulated at paragraph 60 above.

Review rights

78. Our reviews are not binding and are not reviewable under the GIPA Act. However a person who is dissatisfied with a reviewable decision of an agency may apply to the NSW Civil and Administrative Tribunal (NCAT) for a review of that decision.
79. The Applicant has the right to ask the NCAT to review the Agency's decision.
80. An application for a review by the NCAT can be made up to 20 working days from the date of this report. After this date, the NCAT can only review the decision if it agrees to extend this deadline. The NCAT's contact details are:

NSW Civil and Administrative Tribunal
Administrative and Equal Opportunity Division
Level 10, John Maddison Tower
86-90 Goulburn Street,
Sydney NSW 2000

Phone: 1300 006 228

Website: <http://www.ncat.nsw.gov.au>

Completion of this review

81. This review is now complete.
82. If you have any questions about this report please contact the Information and Privacy Commission on 1800 472 679.

Elizabeth Tydd
Information Commissioner