



**Report on Information Commissioner's review of agency decisions under the  
*Government Information Public Access Act 2009* ('GIPA Act')**

<b>Applicant:</b>	<b>Australian Financial Review</b>
<b>Agencies:</b>	<ul style="list-style-type: none"><li>• <b>Department of Treasury</b></li><li>• <b>Department of Premier and Cabinet</b></li><li>• <b>Department of Transport</b></li><li>• <b>Department of Planning &amp; Infrastructure</b></li><li>• <b>Department of Industry and Investment</b></li></ul>
<b>OIC references:</b>	<b>11-098, 11-099, 11-104, 11-111, 11-117</b>
<b>Date of report:</b>	<b>21 September 2011</b>

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**A Summary of report**

1. The information sought in these matters comprised the incoming government briefing folders ('the folders') provided by the five agencies to the new State Government in March 2011. The folders were described by each agency as being 'prepared for Cabinet'. The agencies characterised the contents of the folder as Cabinet information to which a conclusive presumption of an overriding public interest against disclosure applied pursuant to Schedule 1 to the GIPA Act ('the conclusive presumption'). None of the information was released.
2. Following negotiations with the Department of Premier and Cabinet, a redacted version of its folders was provided to the OIC. The information provided to our office was all factual material and the Information Commissioner does not consider it can be characterised as Cabinet information. To the extent that the information provided to the OIC represents the nature of information in any of the five agencies' folders, the Information Commissioner's recommendations apply to all of the agency decisions.
3. The Information Commissioner therefore makes the following recommendations in relation to the agencies' decisions:
  - a. The agencies reconsider their decision to refuse access to the information sought and make a new decision.
  - b. In making a new decision, the agencies assess whether Schedule 1 clause 2(1)(b) applies to any or all of the information within the folder

**promoting open government**

and consider releasing that material which would not be Cabinet information because of the application of Schedule 1 clause 2(4).

- c. The agencies should consult with the applicant with regard to the scope of the application, particularly the extent to which particular information can be extracted from the folders, if that is relevant to their determination of the decision.

## **B What has the Information Commissioner reviewed?**

4. The applicant sought the advisory documents that each of the five departments 'is preparing for the incoming government'. All of the agencies responded to the applicant that, as the folders were prepared for submission to Cabinet they are Cabinet documents and therefore would not be released.
5. The applicant sought external review of the decision by the OIC pursuant to section 80(d) of the GIPA Act.
6. I requested the GIPA file from each agency to conduct the reviews. In each case, while the file relating to the decision was provided, the information sought by the applicant, the briefing folders, was not provided to the OIC, on the basis that it is Cabinet information and the Information Commissioner is not able to require its production.
7. While the Information Commissioner has the power to demand production of information in its conduct of reviews and investigations, the Commissioner cannot require the production of any information certified by the Department of Premier and Cabinet as Cabinet information pursuant to section 30(2) of the *Government Information (Information Commissioner) Act 2009*. This would have limited the OIC's response in these matters to requiring a certificate for the five agency folders and upholding the decisions on the basis that the conclusive presumption applied to this type of information.
8. Following several meetings between the OIC and the Department of Premier and Cabinet ('DPC') it was agreed that the Information Commissioner would deal with the DPC's folders only as a representative sample of the folders of the five agencies, as captured by the applicant's request.
9. In return, the DPC conducted its own review of its folders and provided a certificate which applied to only select sections of its folders. The remainder of the information was provided to the OIC.

## **C Agency process**

10. Each of the five agencies provided similar responses to the application. All agencies referred to guidelines for the folders which make clear the information was prepared for Cabinet, in accordance with the Premier's Memo M2010-15, 'Caretaker Conventions and Other Pre-Election Practices 2011 General State Election' which states:

## 6.2 Incoming Ministers Folders

In the lead-up to the election, the Director General of the Department of Premier and Cabinet will issue a memorandum requesting all Departmental Directors General to prepare and collect together incoming Ministers' folders for agencies within their clusters. Two sets of folders are usually prepared – the first for the Government, should it be returned, and the second for the Opposition, should it be invited to form Government.

These folders are prepared for submission to Cabinet. Both sets of folders should be lodged with the Cabinet Secretariat *before* the election, for submission to Cabinet *after* the election.

11. The agencies used this reference as the basis for their decision that, as the folders have been prepared for the dominant purpose of being submitted to Cabinet, Schedule 1, clause 2(1)(b) to the GIPA Act applied:

### 2 Cabinet information

- (1) It is to be conclusively presumed that there is an overriding public interest against disclosure of information (referred to in this Act as **Cabinet information**) contained in any of the following documents:

...

- (b) a document prepared for the dominant purpose of its being submitted to Cabinet for Cabinet's consideration (whether or not the document is actually submitted to Cabinet),

12. Given the nature of the folders, it was likely that they contained extensive factual information. Of particular interest, therefore, was the agencies' deliberation process to determine that such information would not be caught by Schedule 1 clause 2(4) which provides, relevantly:

*Information is not Cabinet information to the extent that it consists solely of factual material unless the information would:*

- a. reveal or tend to reveal information concerning any Cabinet decision or determination, or
- b. reveal or tend to reveal the position that a particular Minister has taken, is taking or will take on a matter in Cabinet.

13. In the files provided to me by the five agencies, only one, the Department of Transport, referred to clause 2(4) of Schedule 1 in its deliberations. Its decision noted that:

While I cannot provide particulars concerning the nature of documents, I can advise that they contain factual and statistical information. In my view, it is not possible, nor practical to separate the factual and statistical data from the other information without revealing the position a particular Minister or Ministers may take on a matter before the Cabinet. As such, I have determined that the documents cannot be released – either in whole or in part.

14. The other four agencies relied on Schedule 1 clause 2(1) as sufficient basis to withhold the folders.

## **D Our process**

15. If the information was properly characterised as Cabinet information and certified as such then there was no role for the OIC in relation to this review save for confirmation of the conclusive presumption of an overriding public interest against disclosure. As all five agencies had stated the information was Cabinet information, the Information Commissioner required certification from the DPC if the folders were not to be provided to the OIC.
16. As noted above, an alternative approach was agreed to in this review, in which the OIC was given partial access to the DPC's folders, with the selectively certified information withheld. This has provided an opportunity to scrutinise information prepared for Cabinet to determine whether it should be subject to the Schedule 1 conclusive presumption.
17. While it added significantly to the time taken to deal with our review of these matters, this has been an important exercise to maintain the rigour of the Cabinet information classification and to promote of the GIPA Act's objective of increased transparency. Further, *NSW 2021, the NSW State Plan* refers explicitly to improved government transparency. Goal 31 of the plan, for which the Premier is accountable, refers to the importance of increasing access to government information.

## **E Conclusive presumption**

18. On the basis that the DPC folders are representative of the information contained within all of the agency folders, it is apparent that a conclusive presumption applies at least in part to the information in each agency folder. The DPC provided certification over specific pages in its folders, which it described as including 'the most extensive or sensitive analysis and advice'.
19. The DPC noted, however, that the certification could have applied to the entirety of the folders but, to assist the Information Commissioner to form her own view, provided the remainder of the information to the OIC. So long as an agency asserts an overriding public interest against disclosure in relation to any information provided to the OIC, our office cannot disclose that information, thus all such material is always provided to our office on a confidential basis.
20. The DPC noted that, while clearly there was factual information within the folders, as distinct from, say briefings or advice, the context in which the information had been selected and provided by each agency, distinguished it from mere factual information that may have been caught by the conclusive presumption because it happens to only be contained within a Cabinet document. I have quoted the following from the agency's response as it raises issues central to the review of this application:

If an applicant has specifically requested access to a Cabinet document, they would in most cases not be interested in the factual information that might happen to be contained in the document, unless that factual information reveals something meaningful about Cabinet's deliberations. However, if the disclosure of the information would reveal something about Cabinet's deliberations, then the information would cease to attract the carve-out for solely factual material under clause 2(4).

Indeed, in most cases solely factual material would be characterised as such because the material adds nothing to matters that are already generally observable or otherwise in the public domain. That being the case, the information is likely to be of little interest to the applicant, or to the public generally (which already has access to the information through other publicly available sources).

A close examination of every line of every page of a document to identify those parts which might be able to be said to be factual, and to reveal nothing more either explicitly or implicitly that goes beyond the merely factual, would require an intensive dedication of agency resources to a task that would appear to offer little if any public benefit.

21. The DPC characterised this application as one where the applicant is not 'seeking particular factual information that happens to be contained in a Cabinet document. Instead, the applicant is seeking Cabinet documents, as such and in their entirety'. The agency also commented that the applicant had not identified any particular factual information being sought and it considered it was not a 'requirement of the GIPA Act nor is it appropriate having regard to the objects of the Act and the proper management of agency resources, for the Department to engage in a line-by-line review of the documents to determine whether particular information may be characterised as factual'.
22. In none of the folders provided to the OIC was there any evidence of consultation with the applicant in this matter. To the extent that the above comments by the DPC may be referring to the issue of diversion of resources, it is a requirement of the GIPA Act to consult with an applicant as to whether an application may be amended or reduced in scope before refusal on this basis.
23. As noted above, only the Department of Transport made any reference to the issue of diversion of resources as forming part of its reason for refusal. The DPC only referred to this point in its further response to this review. It may be that, upon consultation, the agencies could make a determination as suggested by the DPC in its comments above, that there would be no point to the diversion of resources in extracting purely factual information because this is not what the applicant was interested in. Given the absence of any consultation, however, the agencies could not properly make that determination.
24. As to what the exercise would involve, it is relevant to consider whether it would impose an unfeasible requirement on an agency to sift through material captured by a request. If the exercise required it to extract single sentences, phrases and so on which may not be Cabinet information in accordance with Schedule 1 clause 2(4), it would be open to an agency to rely on section 60(1)(a), under which it may refuse to deal with an access application if it

would require an unreasonable and substantial diversion of the agency's resources.

25. Such an intricate exercise would not necessarily be required for an agency to properly respond to its obligations under the GIPA Act, however. It would be sufficient if an agency were able to demonstrate that it had assessed the individual sections making up the information to determine whether it could practically extricate the purely factual information.
26. Whether the applicant would still be interested in the purely factual information, as raised by the DPC in its response, is only a relevant consideration for the agency if it has been addressed in consultation with the applicant. It is not for the agency to unilaterally determine this issue.
27. For example, it is a requirement of the GIPA Act for an agency to consult with an applicant regarding the scope of the application, pursuant to section 60(4) of the Act, before refusing an application because it would cause an unreasonable diversion of resources.
28. Such consultation could include discussion of the need for an agency to take a practical approach to assessing the information such that it could not undertake a line-by-line analysis but could provide those sections of the information which are merely descriptive of agency functions and personnel. It would be a matter for consultation then to determine whether this would still be of interest to the applicant.
29. A further issue raised by the DPC is the question of context: the selection of factual material in itself may reveal some value judgment. It was suggested that, by its selection, the material may 'reveal opinions and value judgments, as well as the broader strategies and policy focuses of the decision-making body to which the summary is being provided'. While that may be true in some circumstances I do not consider that it would be the case in this matter.
30. It is clear that all of the folders were prepared pursuant to a uniform convention which applied to all agencies: to provide a briefing to an incoming government, not yet elected. There was no 'broader strategy or policy focus' of Cabinet lying behind the request as the folders were provided in a policy vacuum, given the government or Cabinet to which they were being provided was not yet in place.
31. It is therefore a matter for each agency dealing with this application to determine whether the release of any or all of its selection of information for its briefing folder would 'reveal or tend to reveal information concerning any Cabinet decision or determination', as provided by Schedule 1 clause 2(4)(a). This could be the only basis for still applying the conclusive presumption to factual information contained within the folders. The agency could then legitimately remove any information to which the conclusive presumption still applied, pursuant to section 74 of the GIPA Act.

**F Other considerations: the public interest test**

32. Any information to which the conclusive presumption does not apply may be released by the agencies, subject to the application of the public interest test. Section 12(1) of the GIPA Act provides that there is a general public interest in favour of the disclosure of government information. The notes to section 12(2) of the GIPA Act set out some examples of public interest considerations in favour of disclosure. The following is a particularly relevant consideration in this application:

- (a) Disclosure of the information could reasonably be expected to promote open discussion of public affairs, enhance Government accountability or contribute to positive and informed debate on issues of public importance.

33. The only considerations against disclosure are those provided in the table to section 14(2). As all of the agencies relied on the conclusive presumption, no other considerations were referred to. In its further response, the DPC listed considerations from the table that may be of relevance:

*Prejudice to the deliberative process of government, and to the effective exercise of agencies' functions*

*Personal information, commercial information and other information affecting third parties*

34. Any information within the folders that would enliven the consideration of 'prejudice to the deliberative process of government' may be caught by the conclusive presumption. If this is not the case but the release of the factual material does still raise this issue, it will be for the agency to apply the public interest test to the consideration. To do so it must establish that the disclosure of the information 'could reasonably be expected' to have the effect outlined in the table. It must then determine whether this effect outweighs the public interest in favour of disclosure.

35. If the information does contain 'personal information, commercial information and other information affecting third parties' then, again, the agency is required to determine the effect of disclosure and weigh up considerations for and against release. In dealing with these considerations the agency should assess whether material can and should be redacted and also consult with third parties where relevant, pursuant to section 54 of the GIPA Act.

36. The agencies may still find that, while the conclusive presumption does not apply to some or all of the folders, on application of the public interest test, there is still an overriding public interest against disclosure. They can, however, impose a condition as to how a right of access may be exercised if this overcomes the overriding public interest against disclosure. Section 73(2) of the GIPA Act allows agencies to impose conditions in these circumstances, and suggests 'a condition that prevents an applicant making notes from or taking a copy of a record that is made available for inspection'.

## **G Recommendations**

37. The Information Commissioner makes the following recommendations in relation to the agencies' decisions:
- a. The agencies reconsider their decision to refuse access to the information sought and make a new decision.
  - b. In making a new decision, the agencies assess whether Schedule 1 clause 2(1)(b) applies to any or all of the information within the folder and consider releasing that material which would not be Cabinet information because of the application of Schedule 1 clause 2(4).
  - c. The agencies should consult with the applicant with regard to the scope of the application, particularly the extent to which particular information can be extracted from the folders, if that is relevant to their determination of the decision.

## **H Review rights**

38. This review is now closed.
39. The Information Commissioner's recommendations are not binding and are not reviewable under the GIPA Act. If the applicant is dissatisfied with the Information Commissioner's recommendations or with an agency's response to the recommendations, the applicant can ask the Administrative Decisions Tribunal (ADT) to review the original decision of the agency. An application for ADT review can be made within four weeks from the date of this report.
40. The ADT can be contacted at:
- Administrative Decisions Tribunal  
Level 15, 111 Elizabeth Street  
Sydney NSW 2000  
Phone: (02) 9223 4677  
Fax: (02) 9233 3283
41. If you have any questions about this review please contact the IPC on 1800 472 679.