



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

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<b>Applicant:</b>	<b>Mr Ryan Shaw</b>
<b>Agency:</b>	<b>NSW Department of Premier and Cabinet</b>
<b>OIC reference:</b>	<b>11-187</b>
<b>Date review request received:</b>	<b>24 June 2011</b>
<b>Date of review report:</b>	<b>17 April 2012</b>

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**Summary of this report**

1. Mr Shaw is seeking access to information held by the NSW Department of Premier and Cabinet (DPC) about the tender process for the operation of services at Jenolan Caves. Mr Shaw's company submitted a tender proposal. He has told us that he wants access to the information to see whether DPC followed relevant commercial and legal advice about the process.
2. This review has raised several issues, particularly about Cabinet information and the ways in which agencies can satisfy the Information Commissioner that information is of the type described in clause 2 of schedule 1 of the GIPA Act. It also raised questions about client legal privilege and the application of the public interest test.
3. As outlined in this report, we have found the following:
  - a. we are unable to either uphold or recommend against the decision that there is a conclusive presumption against disclosure of the information in records A1 and A3 because it is Cabinet information;
  - b. we are not satisfied that DPC has shown there to be an overriding public interest against disclosure of the information in record A2;
  - c. we agree that there is a conclusive presumption against disclosure of the information in records A5 to A45 because it is subject to legal professional privilege and DPC has decided not to waive that privilege; and
  - d. we do not agree that there is a conclusive presumption against disclosure of the information in record A4.
4. We therefore recommend that DPC make a new decision about certain parts of Mr Shaw's access application.

## Our review

5. On 24 May 2011, Mr Shaw made a formal access application to DPC under the *Government Information (Public Access) Act 2009* (GIPA Act). He asked for the following information:

“All external legal, financial and commercial advice provided to the DPC in respect of the (now terminated) tender process in respect of the operations of Jenolan Caves which was run by the DPC during 2010. Specifically, this includes (but is not limited to):

- Legal advice relating to the proposed terms of the lease set out in the tender.
- Commercial advice from third party experts in the accommodation and tourism areas, including (but not limited to) advice provided by Jones Lang LaSalle.
- Advice that was procured from PricewaterhouseCoopers in relation to the tender process and the financial viability of the site.”

6. In a notice of decision dated 24 June 2011, DPC identified 45 documents containing information within the scope of Mr Shaw's request. DPC refused access to the information for the following reasons:

Document	Reason for refusing access
Record A1	Conclusive presumption against disclosure of Cabinet information (clause 2(1)(b) of Schedule 1 of the GIPA Act)
Records A2 and A3	Conclusive presumption against disclosure of Cabinet information (clause 2(1)(b) of the GIPA Act)  AND  Overriding public interest against disclosure of information.
Records A4 – A45	Conclusive presumption against disclosure of information that would be privileged from production in legal proceedings on the ground of client legal privilege (legal professional privilege)

7. On 29 June 2011, Mr Shaw asked us to review DPC's decision not to provide access to the information. This is a reviewable decision under section 80(d) of the GIPA Act.
8. During the course of this review, it became evident that DPC incorrectly classified record A2 as Cabinet information. DPC sent a revised notice of decision to Mr Shaw on 7 February 2012, notifying him of the administrative error and amending its decision about record A2. The revised decision is that there is an overriding public interest against its disclosure. DPC also provided us with a copy of the revised decision.
9. This review addresses the following issues:
- a. DPC's decision that there is a conclusive presumption against disclosure of the information in records A1 and A3 because it is Cabinet information;
  - b. DPC's decision that there is a conclusive presumption against disclosure of the information in records A4 – A45 because it is subject to client legal privilege;

- c. DPC's application of the public interest test and decision that there is an overriding public interest against disclosure of the information in record A2, and
- d. the scope and interpretation of Mr Shaw's access application.

## Conclusive presumption against disclosure of information

10. It is to be conclusively presumed that there is an overriding public interest against disclosure of any of the government information in schedule 1 to the GIPA Act (section 14(1) of the GIPA Act). For the purposes of this report, we will refer to this as a 'conclusive presumption against disclosure'.

## Cabinet information – clause 2 of schedule 1

### Cabinet information generally

11. Clause 2 of schedule 1 to the GIPA Act sets out the types of documents that contain Cabinet information. If information falls within one of those categories, then it may be that there is a conclusive presumption against its disclosure. However, before deciding that a conclusive presumption applies, an agency must first consider whether the information contained in such documents is solely factual in nature. Clause 2(4) of schedule 1 to the GIPA Act provides:

- (4) 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.

12. Under section 97 of the GIPA Act, it is an agency's responsibility to justify a decision that information is Cabinet information. Before we can uphold a decision to refuse access to the information, or make recommendations against a decision, we must be independently satisfied that information has been properly categorised by the agency. There are three ways in which agencies can show us that information is Cabinet information:

- a. by providing the information to the Information Commissioner;
- b. by providing the Information Commissioner with a Cabinet certificate, as described in section 30(2) of the *Government Information (Information Commissioner) Act 2009*; or
- c. by providing the Information Commissioner with a detailed description of the information and evidence to show that it falls within clause 2 of schedule 1 to the GIPA Act.

13. The Information Commissioner cannot require the production of Cabinet information (section 30(1) of the GIIC Act). We note that if an agency chooses to provide the information to the Information Commissioner it will not be disclosed, in accordance with section 91 of the GIPA Act.

## DPC's decision

14. DPC decided that there is a conclusive presumption against disclosure of records A1 and A3 because they contain Cabinet information. DPC categorised the information in those records as information which is of the type described in clause 2(1)(b) of Schedule 1 to the GIPA Act, being:

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).

15. For the purposes of the GIPA Act, *Cabinet* includes a committee of Cabinet and a subcommittee of a committee of Cabinet (clause 2(5) of schedule 1 to the GIPA Act).

16. To show that the conclusive presumption against disclosure applies in this instance, we need to be satisfied that:

- a. the information in records A1 and A3 was prepared for the dominant purpose of its being submitted to Cabinet; and
- b. the information is not purely factual, or if it is, that its release would have the effect outlined in clause 2(4)(b) of schedule 1 to the GIPA Act.

17. We asked DPC to provide us with a certificate issued by the Director-General or Deputy Director-General (General Counsel), as conclusive evidence that the records contain or would reveal Cabinet information (section 30(2) of the GIIC Act).

18. DPC declined to provide a Cabinet certificate and asked if it could instead satisfy us, using extrinsic information, that the conclusive presumption against disclosure applies to the information. From conversations with DPC, it initially seemed we might have enough information to be satisfied that the records contain Cabinet information. However, on closer examination, we decided that there is not sufficient evidence to independently satisfy us that the information is Cabinet information.

19. DPC has provided us with further details about the information, which will not be discussed in detail in this report as the Information Commissioner cannot disclose information if an agency claims there to be an overriding public interest against its disclosure (section 91 of the GIPA Act).

## Record A1

20. In its notice of decision, DPC advised that record A1 is a report that was prepared for the dominant purpose of its being submitted to Cabinet for Cabinet's consideration. We have spoken with DPC about the report and we consider it likely that some or all of the information in record A1 is Cabinet information. However, without seeing the report, or evidence of why it was prepared, we still cannot be satisfied that the conclusive presumption applies.

## Record A3

21. Record A3 is a report produced by Procure Group, dated 30 September 2010. DPC originally decided that the report was Cabinet information as it was prepared for the dominant purpose of its being submitted to Cabinet (clause 2(b) of schedule 1 to the GIPA Act). On review, DPC provided us with further information about the report and its purpose and use. We were not satisfied that it was necessarily prepared for the dominant purpose of its being submitted to Cabinet.

22. DPC has subsequently told us that record A3 should have been identified as information falling within clause 2(e) of schedule 1 to the GIPA Act, being:

a document prepared before or after Cabinet's deliberation or decision on a matter that reveals or tends to reveal the position that a particular Minister has taken, is taking, will take, is considering taking, or has been recommended to take, on the matter in Cabinet.

23. It may be that the information is Cabinet information because it is of the type set out in clause 2(e). However, without seeing the information or further evidence, we cannot be independently satisfied that the conclusive presumption applies.
24. We also note that information is not Cabinet information merely because it is contained in a document attached to a document referred to in clause 2(1) of schedule 1 to the GIPA Act (clause 2(3) of schedule 1 to the GIPA Act).
25. DPC also decided that in the event that the information in record A3 is not Cabinet information, there is an overriding public interest against its disclosure. As we have not been able to review the information, we cannot comment on DPC's application of the public interest test or whether we agree that there is an overriding public interest against its disclosure.

### **Factual nature of the information**

26. We have not been able to inspect the records and cannot comment on whether the information consists solely of factual material. However, to the extent that information contained in records A1 and A3 is solely factual, it may be that it should be released.
27. Cabinet confidentiality applies to the *information* contained in the document, not to the document or record as a whole. That means that to show us that all of the information is subject to that confidentiality, and is not solely factual, without providing us with the information or a certificate, is a very difficult task for an agency. So while we consider it likely that records A1 and A3 may contain Cabinet information, we cannot confidently uphold nor recommend against DPC's decision without some further verification of the contents of those records.
28. In the interests of promoting greater public access to government information, DPC should carefully consider whether any of the information could be released to the Mr Shaw because it is solely factual and its release would not have the effect described in clause 2(4)(a) or (b) of the GIPA Act.

### **Client legal privilege – clause 5 of schedule 1**

29. DPC decided that there is a conclusive presumption against disclosure of the information contained in records A4-A45 because that information is subject to client legal privilege.
30. Clause 5(1) of schedule 1 to the GIPA Act states that it is to be conclusively presumed that there is an overriding public interest against disclosure of information:

that would be privileged from production in legal proceedings on the ground of client legal privilege (legal professional privilege), unless the person in whose favour the privilege exists has waived the privilege.

31. Client legal privilege, or legal professional privilege, is a rule of law that protects confidential communications between a lawyer and a client made for the *dominant purpose* of legal advice or existing or anticipated legal proceedings. Sections 118 and 119 of the *Evidence Act 1995 (NSW)* set out when a document is privileged from production in legal proceedings. To establish that information is subject to client legal privilege, an agency must show:

- a. the existence of a client and lawyer relationship;
  - b. the confidential nature of the communication or document; and
  - c. the communication or document was for the dominant purpose of the lawyer providing the client with legal advice or legal services in relation to a proceeding.
32. DPC decided that the information in records A4 to A45 is "...subject to client legal privilege (legal professional privilege) as they are confidential documents that were prepared by Clayton Utz for the dominant purpose of providing legal advice to the Department."
33. We have reviewed records A4 to A45 and we are satisfied that the information is confidential information, produced in the existence of a client and lawyer relationship, for the dominant purpose of Clayton Utz providing legal advice to DPC. The information therefore attracts client legal privilege.

### **Waiver of privilege**

34. Having established that information is subject to client legal privilege, an agency must consider whether that privilege has been waived, either expressly or impliedly through some action that resulted in waiver of privilege. If privilege has been waived, then it ceases to exist and the conclusive presumption against disclosure will not apply to that information.
35. In this instance, it appears that privilege has been waived with respect to record A4. That record is described in the notice of decision as "Clayton Utz – Request for Detailed Proposals dated 12 July 2010 in addition to a number of emails from Clayton Utz." From our inspection of the documents provided to us by DPC, A4 appears to be the final version of the Request for Detailed Proposals (RFDP) and does not include any emails. If this is the case then that information has already been given to Mr Shaw, when he was invited to submit a detailed proposal. If client legal privilege has been waived then the conclusive presumption against disclosure from clause 5 of schedule 1 to the GIPA Act will not apply. The information should therefore be released to Mr Shaw (though we do note that he may already have it). We have discussed this with DPC and it has confirmed that privilege has been waived. DPC should therefore make a new decision about record A4.
36. If information is shown to be subject to legal professional privilege, and that privilege has not been waived, then an agency must consider whether it is appropriate to waive privilege before refusing to provide access to the information (clause 5(2) of schedule 1 to the GIPA Act). A decision made under that subclause is not a reviewable decision. However, we encourage agencies to carefully consider if it is appropriate to waive privilege, and to waive privilege where appropriate, to promote increased access to government information.
37. DPC turned its mind to whether it would be appropriate to waive the client legal privilege attached to the information in records A5 to A45. This satisfies the requirement to do so under clause 5(2) of schedule 1 to the GIPA Act. We are therefore satisfied that there is a conclusive presumption against disclosure of the information contained in records A5 - A45 on the grounds of legal professional privilege.

## The public interest test

38. A person who makes an access application for government information has a legally enforceable right to access the information requested unless there is an overriding public interest against disclosing the information. Unless it is established that there is a conclusive presumption against disclosure of information (as discussed above), an agency must apply the public interest test to the requested information in order to determine whether there is an overriding public interest against its disclosure.
39. Having decided that there was a conclusive presumption against disclosure of the information in records A1 to A45, DPC was not required to apply the public interest test to the information in those records. DPC did, however, apply the public interest test to records A2 and A3. Given DPC's decision that record A3 contains Cabinet information, we have not seen that information and we cannot comment on the public interest considerations raised against its disclosure. In any event, if it is shown that there is a conclusive presumption against its disclosure then DPC is not required to go beyond that.
40. During the course of this review, DPC told us that categorising record A2 as Cabinet information was an administrative error and that the correct decision is that there is an overriding public interest against its disclosure. DPC subsequently provided us with a copy of that information. We have looked at the information, the notice of decision and whether DPC appropriately applied the public interest test.

41. Section 13 of the GIPA Act sets out the public interest test as follows:

There is an overriding public interest against disclosure of government information for the purposes of this Act if (and only if) there are public interest considerations against disclosure and, on balance, those considerations outweigh the public interest considerations in favour of disclosure.

42. The public interest test involves the following steps:

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|--------|--|
| Step 1 | identify the public interest considerations in favour of disclosure;   |
| Step 2 | identify the public interest considerations against disclosure; and  |
| Step 3 | determine the weight of the public interest considerations in favour of and against disclosure and where the balance between those interests lies. |

43. The public interest test must always be applied in accordance with the principles set out under section 15 of the GIPA Act:

- agencies must exercise their functions so as to promote the object of the GIPA Act;
- agencies must have regard to guidelines issued by us;
- it is irrelevant if the disclosure of information might cause embarrassment to, or loss of confidence in, the agency;
- it is irrelevant that information disclosed might be misinterpreted or misunderstood; and
- disclosure, in response to formal access applications, cannot be made subject to any conditions on the use of the information.

## Public interest considerations in favour of disclosure

44. Section 5 of the GIPA Act provides that there is a general presumption in favour of the release of government information. There is also a general public interest in favour of disclosing government information, from section 12(1) of the GIPA Act.
45. DPC failed to identify or articulate any specific considerations in favour of disclosure, other than the presumption in favour of release of information.
46. The GIPA Act does not limit the other public interest considerations in favour of disclosing information that may be taken into account when applying the public interest test.
47. The notes to section 12(2) of the GIPA Act set out some examples of public interest considerations in favour of disclosure. We consider the following are relevant considerations 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 informed debate on issues of public importance.
  - (b) Disclosure of the information could reasonably be expected to inform the public about the operations of agencies and, in particular, their policies and practices for dealing with members of the public.
  - (c) Disclosure of the information could reasonably be expected to ensure effective oversight of the expenditure of public funds.
48. The individual characteristics of the applicant may also be relevant considerations in the application of the public interest test, including in favour of disclosure (s55 of the GIPA Act). Mr Shaw's involvement in the tender process can be taken into account where appropriate.

## Public interest considerations against disclosure

49. The only public interest considerations against disclosure that may be considered when applying the public interest test are those set out in the table to section 14 of the GIPA Act. To raise these as relevant considerations, the agency must show that the disclosure of the information "...could reasonably be expected to have ....the effect" outlined in the table.
50. Record A2 is a report prepared for DPC by the Tourism & Transport Forum (the Forum) in June 2009. DPC identified two public interest considerations against disclosure of the information in the report and decided that its release could reasonably be expected to:
  - prejudice any person's legitimate business, commercial, professional or financial interests (clause 4(d)), and
  - expose any person to an unfair advantage or disadvantage as a result of the premature disclosure of information concerning any proposed action or inaction of the Government or an agency (clause 5(e)).

### **Prejudice any person's legitimate business, commercial, professional or financial interests (clause 4(d))**

51. DPC decided that the release of the information in the report could reasonably be expected to prejudice any person's commercial or financial interests. In its notice of decision, DPC did not show how or why this consideration applies to the information.
52. During this review, DPC provided us with further information about the report. However, that still did not show how or why a person's commercial or financial interests would be prejudiced. DPC did not show a link between the release of the information and any foreseen prejudice and we are not satisfied, based on the reasoning given so far, that this consideration against disclosure applies to the information in the report.

### **Expose any person to an unfair advantage or disadvantage (clause 5(e))**

53. DPC also decided that the release of the information could reasonably be expected to "expose any person to an unfair advantage or disadvantage as a result of the premature disclosure of information concerning any proposed action or inaction of the Government or an agency" (clause 5(e) of the table to section 14 of the GIPA Act).
54. DPC reasoned that the release of the information would expose past and present proponents to an unfair advantage or disadvantage as future opportunities in relation to the management and operation of the Jenolan Caves facilities were under consideration.
55. This does not show how releasing the information in the report, which is from 2009, would result in the premature disclosure of information concerning any proposed action or inaction of the Government or an agency. Further, we are not satisfied that this would result in an unfair advantage or disadvantage for any party.
56. We also note that it is open to DPC to release the information in the report to other parties, making it equally available to all and eliminating any perceived advantage.

### **Balancing the public interest test**

57. As discussed, we are not satisfied that DPC has properly established any public interest considerations against disclosure. This means that DPC did not properly apply the public interest test to the information in record A2 and has not shown there to be an overriding public interest against all of the information in the report.
58. We consider that some parts of the report are factual and that the public interest considerations against disclosure raised by DPC do not bear strong weight in relation to that information. Further, it is likely that Mr Shaw, through his involvement in the tender process, already knows some of the information.
59. We recommend that DPC make a new decision about access to the report by re-applying the public interest test to the information that it contains. We note that the considerations and the test should be applied to the information, and not to the report as a whole. That means that while there may be an overriding public interest against disclosure of some parts of the information, there will not necessarily be an overriding public interest against the whole report.
60. If DPC decides that there is an overriding public interest against disclosure of parts of the report, then those parts could be redacted in order to facilitate access to the information (see section 74 of the GIPA Act). Any information for which there is no overriding public interest against disclosure should be released to Mr Shaw.

## **The scope of Mr Shaw's application**

61. This review also raised questions about the scope of Mr Shaw's application and whether DPC had identified all information that it holds that falls within that scope.

### **Information generated by PricewaterhouseCoopers**

62. In his access application, Mr Shaw specifically requested "[a]dvice that was procured from PricewaterhouseCoopers in relation to the tender process and the financial viability of the site". DPC did not identify any information generated by PricewaterhouseCoopers in its notice of decision and did not comment on whether it holds any information falling within that description.

63. During the conduct of this review, we spoke with DPC about whether it holds any information of this description. DPC told us that it does not hold such information. A member of the Jenolan Caves Trust, who was involved in the whole tender process, confirmed that no advice or reports were procured from PricewaterhouseCoopers in relation to that process.

64. Based on the available evidence, we are satisfied that DPC does not hold any information that matches Mr Shaw's request for "advice procured from PricewaterhouseCoopers". However, given that Mr Shaw specifically requested that information, DPC should address his request and, if applicable, tell him that the information he asked for is not information that is held by DPC (which is a decision available under section 58(1)(b) of the GIPA Act).

### **Information generated by Jones Lang LaSalle**

65. Mr Shaw also specifically requested "[c]ommercial advice from third party experts in the accommodation and tourism areas, including (but not limited to) advice procured by Jones Lang LaSalle." In its notice of decision, DPC did not identify any information generated by Jones Lang LaSalle and did not comment on whether it holds any such information.

66. DPC has told us it holds some information generated by Jones Lang LaSalle, but that it does not consider it to be "commercial advice" and therefore it is not within the scope of Mr Shaw's application. This interpretation of his access application is reasonable and it is open to DPC to interpret the application in that way. To assist Mr Shaw, DPC should address his specific request and tell him if it does not hold that information.

### **General scope of application**

67. We encourage agencies to interpret access applications in a way that promotes the greatest access to government information. DPC looked at all information that it considered to be "commercial, legal or financial advice" as requested by Mr Shaw. We are satisfied that DPC took a reasonable approach to Mr Shaw's access application and the scope of his request.

68. If Mr Shaw is looking for other information, such as internal correspondence about the tender process or information generated by Jones Lang LaSalle, then it is open to him to make a new access application for that information. We encourage DPC to assist Mr Shaw in identifying information that he may be seeking. We also note that under section 76 of the GIPA Act, DPC is authorised to provide access to government information in response to an access application that is in addition to the information applied for, unless there is an overriding public interest against disclosure.

## Our recommendations

69. We recommend:

- a. DPC make a new decision about the release of record A2;
- b. DPC reconsider its decision about records A1 and A3, in particular the extent to which any information that is solely factual may be released;
- c. DPC provide Mr Shaw with a subsequent decision within 15 working days of the date of this report.

70. We ask that DPC advise Mr Shaw and us by **24 April 2012** of the actions it intends to take in response to our recommendations.

## Review rights

71. Our recommendations 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 Administrative Decisions Tribunal (ADT) for a review of that decision.

72. If Mr Shaw is dissatisfied with:

- a. our recommendations, or
- b. DPC's response to the recommendations,

then he may ask the ADT to review DPC's original decision.

73. An application for ADT review can be made up to 20 working days from the date of this report. After this date, the ADT can only review the decision if it agrees to extend this deadline.

74. For information about the process and costs associated with a review by the ADT, please contact the ADT. The ADT's contact details are:

Administrative Decisions Tribunal  
Level 10, 86 Goulburn Street,  
Sydney, NSW, 2000  
Telephone (02) 9377 5711  
Facsimile (02) 9377 5723  
TTY (02) 9377 5859  
Internet <http://www.lawlink.nsw.gov.au/adt>  
e-mail [ag\\_adt@agd.nsw.gov.au](mailto:ag_adt@agd.nsw.gov.au)

75. If DPC makes a new reviewable decision as a result of our review, Mr Shaw will have new review rights attached to that new decision, and 40 working days from the date of the new decision to request an external review at the OIC or ADT.

## Questions?

76. This review is now closed.

77. If you have any questions about this report please contact us on 1800 472 679.