



**Report under the
Government Information (Public Access) Act 2009**

Applicant:	Mr A
Agency:	Sydney Water Corporation
OIC reference:	11-374
Date review request received:	2 November 2011
Date of this report:	31 May 2012

Summary of report

1. On 27 September 2011, Mr A submitted an access application to Sydney Water Corporation (**Sydney Water**) requesting access to government information identified as follows (only the relevant information identified in the application is set out here):

Can you please provide all property information relating to a certain property and in particular but not limited to:
 - *All external advice (including the brief of engagement) relating to the claim for property damage at the above location. This should include but not limited to legal advice and any expert advice relating to the property damage.*
2. On 19 October 2011 or later, Sydney Water issued a notice of decision granting access to 10 documents identified as Attachments to the notice of decision. The notice of decision refused access to one document relevant to the government information Mr A had applied to access (as set out above) under the *Government Information (Public Access) Act 2009 (GIPA Act)*.
3. On 2 November 2011, the Information Commissioner received Mr A's request for an external review under section 89 of the GIPA Act. Sydney Water's decision refusing access is a reviewable decision under section 80(d) of the GIPA Act.
4. We clarified with Mr A that his request for review related solely to the document not provided to him. In every other respect Mr A is satisfied with the response that he has received from Sydney Water and the information provided to him. We would like to

acknowledge the assistance that Mr A has given us in narrowing the issues that were raised in this review as this has greatly assisted us in finalising this matter.

5. We would also like to acknowledge the timely and considered response that Sydney Water provided us. This has also significantly assisted us in finalising this matter.
6. We recommend that Sydney Water consider the guidance in this report in respect of any future notices of decision issued by Sydney Water, and when applying the public interest test to information considered for release in response to access applications under the GIPA Act.

Our Review

7. In conducting our review it became clear to us that a conclusive presumption of an overriding public interest against disclosure may have applied to the information at issue. We formed the view that this may have been overlooked by Sydney Water and raised this with them.
8. Clause 5 of Schedule 1 of the GIPA Act sets out the conclusive presumption of an overriding public interest against disclosure that we raised with Sydney Water:

5 Legal professional privilege

- (1) 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.
 - (2) If an access application is made to an agency in whose favour legal professional privilege exists in all or some of the government information to which access is sought, the agency is required to consider whether it would be appropriate for the agency to waive that privilege before the agency refuses to provide access to government information on the basis of this clause.
 - (3) A decision that an agency makes under subclause (2) is not a reviewable decision under Part 5.
9. Sydney Water have advised us that they claim Legal Professional Privilege in respect of the information, and that the privilege has not previously been waived in respect of the information.
 10. Sydney Water has also advised us that it has considered waiving privilege but that it would not be appropriate to do so, thus satisfying the consideration required by clause 5(2) of Schedule 1 of the GIPA Act.
 11. Under the GIPA Act, the decision not to waive legal professional privilege required in clause 5(2) of schedule 1 of the GIPA Act is not a reviewable decision.
 12. The information that we have been supplied by Sydney Water has satisfied us that the conclusive presumption of an overriding public interest against disclosure under clause 5 of schedule 1 to the GIPA Act applies to the information. Accordingly, Mr A has properly been refused access to the information by Sydney Water even though Sydney

Water did not identify the correct reason for that refusal in the notice of decision. We have decided not to recommend that Sydney Water issue a new notice of decision to Mr A even though we do not think that the notice of decision properly justified the decision to withhold the information.

13. This concludes our consideration of the issue between the parties. The balance of this report is for the benefit of Sydney Water in dealing with other access applications that it may receive and deal with.

Guidance

14. We provide the following information to assist Sydney Water in understanding the process it is required to follow in applying the public interest test and deciding whether or not to release information that is the subject of an access application.

Applying the public interest test to access applications

15. 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.
16. Before deciding whether to release or withhold information, Sydney Water must apply the public interest test in order to decide whether or not an overriding public interest against disclosure applies to the information sought by the applicant.
17. 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.
18. The public interest test requires that Sydney Water undertake the following steps:
 - 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.

These steps are discussed in further detail below.
19. Sydney Water must apply the public interest test in accordance with the principles set out in section 15 of the GIPA Act.

Step 1 - Public interest considerations in favour of release of the information

20. Section 12(1) of the GIPA Act provides that there is a general public interest in favour of the disclosure of government information. This consideration must always be weighed in the application of the public interest test. The nature and scope of other public interest considerations in favour of disclosure which may be relevant in the application of the public interest test are not limited (s12(2) GIPA Act).
21. Section 12 of the GIPA Act sets out examples of public interest considerations in favour of disclosure, including but not limited to:
 - a. promoting open discussion of public affairs, enhancing government accountability or contributing to positive and informed debate on issues of public importance;
 - b. informing the public about the operations of agencies and their policies and practices for dealing with the public;
 - c. ensuring effective oversight of the expenditure of public funds;
 - d. the information is personal information of the person to whom it is to be disclosed; and
 - e. revealing or substantiating that an agency (or officer of an agency) has engaged in misconduct or negligent, improper or unlawful conduct.
22. Sydney Water may also take into account other public interest considerations in favour of disclosure that it deems to be relevant.
23. The personal factors of the application may also be relevant considerations in the application of the public interest test (section 55 of the GIPA Act), including:
 - a. the applicant's identity and relationship with any other person,
 - b. the applicant's motives for making the access application, and
 - c. any other factors particular to the applicant.
24. When writing a notice of decision in response to an access application, Sydney Water should list the considerations in favour of disclosure that it has taken into account and explain why the considerations identified apply to the information sought.

Step 2 - Public interest considerations against the release of the information

25. While the public interest considerations in favour of the disclosure of government information are not limited, the public interest considerations against disclosure are limited to those considerations set out in section 14 of the GIPA Act.

26. Sydney Water should have particular regard to the reference to Schedule 1 in section 14 of the GIPA Act as these are types of government information where an agency may conclusively presume that there is an overriding public interest against disclosure of any such government information. It is, in fact, one of these considerations that Sydney Water overlooked in their original decision.
27. In order for the considerations against disclosure set out in the table to section 14 of the GIPA Act to be raised as relevant considerations, Sydney Water must establish that the disclosure of the information "...could reasonably be expected to have...the...effect" outlined in the table.
28. Therefore before applying a consideration against disclosure to the information, Sydney Water must:
 - a. identify the information;
 - b. characterise it as information to which a public interest consideration against disclosure set out in the table to section 14 of the GIPA Act applies, and
 - c. prove that disclosure of the information could have the effect deemed not to be in the public interest.

Personal factors of the application

29. Under section 55, the personal factors of the application are only relevant considerations against disclosure if (and only to the extent that) those factors are relevant to the agency's consideration of whether the disclosure of the information concerned could reasonably be expected to have any of the effects referred to in clauses 2–5 (but not clauses 1, 6 or 7) of the table to section 14.

Step 3 - Balancing the public interest

33. The GIPA Act does not provide a set formula for weighing individual public interest considerations or assessing their comparative weight. Whatever approach is taken, these questions may be characterised as questions of fact and degree to which different answers may be given without being wrong, provided that the decision-maker acts in good faith and makes a decision available under the GIPA Act.
34. Sydney Water should:
 - a. set out the considerations in favour of disclosure, identify the evidence that affects the weight to be given to each consideration, and give weight to each consideration;
 - b. set out the considerations against disclosure, identify the evidence that affects the weight to be given to each consideration, and give weight to each consideration;
 - c. make a decision about which way the balance lies, in light of the weight in favour and against

30. If at this stage Sydney Water considers that there is an overriding public interest against disclosing the information, the GIPA Act contains a number of provisions that may apply to mitigate the effect of, or reduce the weight of, public interest considerations against disclosure or even avoid an overriding public interest consideration against disclosure altogether (see for example sections 72 to 78 of the GIPA Act). It is consistent with the objects of the GIPA Act that these provisions be considered, where relevant, before a decision is made to not disclose information because there is an overriding public interest consideration against disclosure.
31. To assist Sydney Water in applying the public interest test, we refer them to the OIC publication "*How to Apply the Public Interest Test*" that can be found on our web site [here](#)¹.

Requirements for notices of decisions

32. Section 61 of the GIPA Act sets out the requirements for a notice of decision when an agency refuses to release information falling within the scope of an access application.
33. Sydney Water's notice of decision may not have complied with section 61 of GIPA Act in relation to the information it refused access to because:
 - a. it does not include detailed reasons for its decision;
 - b. it does not include findings on any key questions of fact, and the source of the information on which the findings are based; and
 - c. it does not include a schedule of the documents identified as falling within the scope of Mr A's application that contains the specified details of the information to which Mr A has been refused access.

Review rights

34. 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 Administrative Decisions Tribunal (**ADT**) for a review of that decision.
35. If Mr A is dissatisfied with:
 - a. our review, or
 - b. Sydney Water's response to the recommendations,

Mr A may ask the ADT to review the original decision of Sydney Water.

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http://oic.nsw.gov.au/agdbasev7wr/_assets/oic/m15000112/knowledge_update_public_interest_test_june2010.pdf

36. 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. 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

Closing our file

47. This file is now closed.
48. If you have any questions about this report please contact the Information and Privacy Commission on 1800 472 679.