



1 Overview

Applicant:	Peter Birrell	Request date:	20 September 2012
Agency:	Department of Education and Communities (NSW)	Report date:	25 July 2013
		Our reference:	IPC12/R000108

1.1 Issue

Mr Birrell asked us to review a decision made by the Department of Education and Communities (**DEC**) under the *Government Information (Public Access) Act 2009 (GIPA Act)*.

The decision made by DEC was to refuse Mr Birrell access to the Price Waterhouse Coopers (**PWC**) “*Local Schools Local Decisions Initiative – Resource Allocation Model Stage 1 Report*” (**stage 1 report**) on the basis of an overriding public interest against disclosure.

A decision to provide access or to refuse to provide access to information in response to an access application is a reviewable decision under section 80(d) of the GIPA Act.

1.2 Our findings & recommendations

We have reviewed DEC’s notice of decision and the PWC report. In our view DEC has not justified its decision that there is an overriding public interest against disclosure of the stage 1 report, because it did not show how the public interest considerations against disclosure apply to the report.

Under section 93 of the GIPA Act we recommend DEC reconsider its previous decision and make a new decision.

Under section 94 of the GIPA Act we recommend against DEC’s decision that there is an overriding public interest against disclosure of information categorised as statements of fact, findings and sources of information contained in the report.

1.3 Next steps

This review is now closed.

If Mr Birrell is dissatisfied with the outcome of our review, he may ask the Administrative Decisions Tribunal (**ADT**) to review the original decision. Please refer to section 8 of this report for further information about applying for a review by the ADT.

2 Context

2.1 Original application

On 17 August 2012, Mr Birrell, on behalf of the Avalon P&C, made a formal application under the GIPA Act for access to:

Price Waterhouse Coopers consultant's report "NSW Department of Education and Communities developing a New Resource Allocation Model Stage 1, review the current resource allocation systems & processes" released December 2011

2.2 DEC's decision

DEC decided there was an overriding public interest against disclosure of the PwC report. Consequently DEC refused Mr Birrell access to the entire PwC report.

2.3 Request for review

On 20 September 2012 we received Mr Birrell's request for review of DEC's decision to refuse access to the entire report.

2.4 Our review

During the course of this review we have:

- a. examined the notice of decision dated 14 September 2012;
- b. considered the submission made by Mr Birrell on 16 February 2013 and the attached progress update paper by PwC dated May 2012;
- c. discussed the decision to refuse access to the stage 1 report with the information access unit at DEC. DEC told us that they would accept a recommendation under section 93 of the GIPA Act and reconsider its decision of 14 September 2012;
- d. considered DEC's GIPA file and the information in issue.

This report sets out:

- the elements that DEC must show in order to establish that the considerations it has identified apply to the information contained in the stage 1 report;
- requirements for notices of decisions under section 61;
- our findings and recommendations.

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3 Public interest test

A person who applies to access government information has a legal right to access it unless there is an overriding public interest for it not to be disclosed. An agency must weigh considerations for and against releasing information before making its decision.

This is known as the public interest test, which is outlined in the GIPA Act:

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. (Section 13)

Balancing considerations

The GIPA Act does not provide a set formula for working out the weight of considerations for or against disclosure, or deciding if one set of considerations outweighs the other.

Decision makers may take their own approach, as long as they act in good faith and are consistent with the Act. They may weigh questions of fact or degree differently, coming up with different answers without being wrong.

However, an agency must follow the principles in section 15:

- agencies must exercise their functions in a way that promotes the object of the Act
- agencies must bear in mind any applicable Information Commissioner guidelines
- it is irrelevant if disclosure might cause embarrassment to, or loss of confidence in, the agency
- it is irrelevant if any disclosed information might be misinterpreted or misunderstood
- agencies cannot put conditions on the use of disclosed information for a formal access application.

Considerations for and against disclosure

Section 12(2) does not limit the considerations in favour of disclosure that might be relevant, but gives some examples. Section 14 sets out the considerations against disclosure.

Section 14(1) says that if information falls within the scope of any of the clauses in schedule 1, its release is not in the public interest. This means the

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agency does not have to balance the considerations before refusing access to the information.

Section 14(2) says that the only other relevant considerations against disclosure are those in the table to section 14. If the agency raises any of the public interest considerations against disclosure in clauses 1 to 6, it must establish that disclosing the information ‘... could reasonably be expected to have ... the effect’ outlined in that table. The agency must therefore:

- identify the information
- show that it falls within a clause in the section 14 table
- provide evidence that disclosing the information could have the effect outlined in the table.

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4 PWC Report

Information	Agency decision	Our findings and recommendation
Local Schools Local Decisions Initiative – Resource Allocation Model	Withheld	<p>We are not satisfied that the DEC applied the public interest test to the stage 1 report.</p> <p>We recommend under section 94 of the GIPA Act against DEC’s decision to refuse access to information categorised as statements of fact, findings and sources of information.</p> <p>We recommend under section 93 of the GIPA Act, DEC reconsider its decision and make a new decision.</p>

In its notice of decision the DEC state that it applied the public interest test by balancing the public interest considerations in favour of disclosure provided for by section 12 of the GIPA Act against five public interest considerations against disclosure found in the table to section 14 of the GIPA Act.

We are not persuaded that DEC applied the public interest test based on information contained in its GIPA file because it did not show how the elements of the five public interest considerations against disclosure applies to the information contained in the stage 1 report or attribute any weight to them.

4.1 Considerations in favour of disclosure

DEC’s notice of decision restates the public interest considerations in favour of disclosure set out in section 12 of the GIPA Act.

Section 12(1) provides that there is a general public interest in favour of the disclosure of government information. This is weighty consideration as it supports the presumption in favour of disclosure and the object of the GIPA Act. Section 12(2) provides that public interest considerations in favour of disclosure are not limited to the example considerations set out in the notes to the Act.

Mr Birrell is the president of the Avalon Public School P&C Association. In his request for external review he told us that he was heading a project to reconcile school funding on behalf of the Northern Sydney Regional Council of P&C associations (167) in public schools in Northern Sydney. He also told us that the access application was driven by DEC’s inability to explain the following:

- significant differences identified between the Australian Curriculum Assessment and Reporting Authority (ACARA) reported funding and school’s actual funding;

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- significant differences between financial information published in schools' reports and ACARA reported funding;
- significant anomalies between schools of similar composition and socio-economic background; and
- significant shortfalls between gross funding amounts and figures derived from relevant budget papers.

He also told us that it is in the public interest that the existing public funding model be understood and funding reconciled, particularly with the Government introducing "Local Schools Local Decisions" where all NSW public schools will have significantly increased responsibility for spending and accountability for their funding.

We agree that there is a notable public interest in the P&C's ability to reconcile school funding.

We also note the *Education Act 1990* states that P&C Associations are established to:

- assist in providing facilities and equipment for the school and promoting the recreation and welfare of the students at the school; and
- report, when requested by the Minister, on the material requirements of the school, alterations and additions to school facilities and the selection of new sites (amongst various other purposes).

Given the responsibilities placed upon P&C's under the *Education Act 1990* we are of the view that there is a significant public interest in P&C's (generally) possessing an understanding of the existing resource allocation model for school funding by DEC.

We also consider there to be a broader public interest in the disclosure of the stage 1 report as disclosure of the report could reasonably be expected to ensure the effective oversight of expenditure of public funds.

4.2 Considerations against disclosure

The table to section 14(2) provides the only considerations against disclosure that may be taken into account in applying the public interest test.

DEC's notice of decision lists five public interest considerations against disclosure from the table to section 14(2) of the GIPA Act, which provide that there is a public interest consideration against disclosure of information if disclosure of the information *could reasonably be expected to*:

- clause 1(e) – reveal a deliberation conducted, or an opinion, advice or recommendation given, in such a way as to prejudice a deliberative process of the agency;

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- clause 1(f) – prejudice the effective exercise by the agency of its functions;
- clause 1(h) – prejudice the conduct, effectiveness or integrity of any audit, test, investigation or review conducted by or on behalf of an agency by revealing its purpose, conduct or results (whether or not commenced and whether or not completed);
- clause 4(c) – diminish the competitive commercial value of certain information within the document;
- clause 4(d) - prejudice any person’s legitimate business, commercial, professional or financial interests.

The words ‘could reasonably be expected’ are given their ordinary meaning, as opposed to a meaning that is irrational, absurd or ridiculous. The test to be applied is an objective one, approached from the view point of the reasonable decision-maker.

DEC did not show in its notice of decision how the elements of these considerations apply to the various categories of the stage 1 report nor did it attribute any weight to them. Therefore we are not satisfied that it applied the public interest test to the stage 1 report.

Reveal recommendations in such a way as to prejudice a deliberative process

This public interest consideration against disclosure is found at clause 1(e) of the table to section 14(2) of the GIPA Act.

In its notice of decision DEC stated that releasing the stage 1 report “will reveal information that is still subject to ongoing deliberation by the Department. It can reasonably be expected to seriously prejudice the process of receiving and considering the completed PwC report”.

For this consideration against disclosure to apply it must be relevant to particular information and the following elements must be met:

- reveal an opinion, advice or recommendation given
- in a way that would prejudice
- a deliberative process of an agency (whether in a particular case or generally)

In the context of access to information the word “prejudice” is commonly given its ordinary meaning as: “to cause detriment or disadvantage” or to “impede or derogate from”.

On its face we can see that this consideration against disclosure might apply to some of the information in the report, that is, information that might be categorised as an opinion, advice or recommendation. While DEC have explained the deliberative process we are not satisfied that it has explained

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the prejudice that would be caused by revealing the recommendations in the stage 1 report.

If the decision making process is still on foot this may be taken into consideration by DEC. Conversely, if a final decision about the stage 1 report has been made, the weight of this consideration is likely to reduce.

During the course of this review DEC told us that the stage 1 report remains subject to ongoing discussions. We recommend in making its new decision DEC:

- undertake internal consultation to establish when the final decision with respect to any opinions (not statements of fact), advice or recommendations contained in the report might be made; and
- consider deferring access under section 78 of the GIPA Act to this category of information, up to and only then, if appropriate.

Prejudice the effective exercise by the agency of its functions

This consideration is found at clause 1(f) of the table to section 14(2) of the GIPA Act.

DEC's notice of decision states disclosure of the stage 1 report is "likely to prejudice the Department's assessment, consideration and implementation of initiatives under the Local Schools, Local Decision, which would amount to a serious interference with the Department exercising its functions".

DEC did not explain how its functions would be affected or what the prejudice would be.

Prejudice the conduct, effectiveness or integrity of any review conducted by an agency by revealing its purpose, conduct or results (whether or not commenced and whether or not completed)

DEC's notice of decision states that the "release of potentially inaccurate information prior to the release of the completed report will likely misinform the public and *adversely affect the integrity and effectiveness* of the Department's review into its resource allocation model".

Clause 1(h) of the table at section 14(2) of the GIPA Act is a public interest consideration against disclosure. For this consideration to apply to the information in the stage 1 report, the following elements must be met:

- prejudice the conduct, effectiveness or integrity of the review
- by revealing its purpose, conduct or results
- whether or not commenced and whether or not completed

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DEC has not explained how the review will be prejudiced. Its statement that revealing potentially inaccurate information would prejudice the effectiveness or integrity of the review because the information will likely misinform the public if released, is irrelevant. This is because section 15(d) of the GIPA Act provides that:

The fact that disclosure of information might be misinterpreted or misunderstood by any person is irrelevant and must not be taken into account.

We are not satisfied that DEC has established that this consideration applies. Although possible misinterpretation of information is not relevant, DEC may wish to proactively disclose some contextual information alongside the report, if it is released, to minimise the likelihood of misinterpretation by the public.

Diminish the competitive commercial value of any information to any person

Clause 4(c) of the table to section 14(2) provides that there is a public interest consideration against disclosing the information if disclosing the information could reasonably be expected to diminish the competitive commercial value of any information to any person.

In its notice of decision DEC state that *“disclosing the document will reveal PwC’s investigation, assessment and analysis methodologies*

We can see that this consideration may apply but only in so far as it would reveal PwC’s methodology. However, we have reviewed the information and we do not consider that disclosure of the information would put PwC at a significant disadvantage to that of its competitors. Therefore it is a question of weight to be attributed to this consideration and we note that DEC did not consult with PwC before making its decision.

Section 15(b) of the GIPA Act provides that agencies must have regard to any relevant guidelines issued by the Information Commissioner when determining whether there is an overriding public interest against disclosure.

When making its new decision DEC office should have regard to our *Guideline 5 – Consultation on public interest considerations under section 54 of the Government Information (Public Access) Act 2009 (NSW)* released in February 2012, which deals with how section 54 relates to the public interest test.

Paragraph 2.4 of the Guideline states that the Information Commissioner considers that the views of third parties may “reasonably be expected” to be relevant to the question of whether there is a public interest consideration against disclosure in two respects:

1. Third parties can help establish if a public interest consideration against disclosure exists; and

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2. They can assist an agency to decide how much weight to give those considerations.

When making its new decision we recommend DEC consult with PwC to establish the weight (if any) to be attributed to this consideration before applying the public interest test to this category of information.

Prejudice any person's legitimate business, commercial, professional or financial interests

Clause 4(d) of the table to section 14(2) 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.

It is our view that the relevant meaning of "legitimate" for the purposes of this consideration is its ordinary meaning, that is genuine and not spurious (Macquarie Australian Encyclopedic Dictionary, 2006).

DEC's notice of decision states that disclosing the stage 1 report "...*may also reveal inaccurate statements by PwC*" and therefore releasing the report "...*could reasonably be expected to diminish the competitive commercial value of any information about PwC's methodologies and prejudice its legitimate business, commercial, professional and/or financial interest*" because of statements made by PwC that DEC considers to be inaccurate.

DEC's did not identify which interest (specifically) will be prejudiced by disclosure of the information contained in the stage 1 report, nor does not explain how or what prejudice would be caused.

In order to show that the elements of this consideration are met, the Premier's office should consider questions such as:

1. The information relates to a person's legitimate business, commercial, professional or financial interests
 - who?
 - what are these interests?
 - how does the information relate to them?
2. Disclosure of the information could reasonably be expected to prejudice these interests
 - how?
 - what prejudice would be caused?

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We are not persuaded that this consideration would apply to the statements of fact, findings and sources of information in the stage 1 report. As previously mentioned in this report, DEC did not consult with PwC before deciding to refuse access to the entire stage 1 report and we note that the PwC progress update paper dated May 2012, provided by Mr Birrell, states “The first stage was to review the current resource allocation systems and process...”. This category of information is drawn by PwC from DEC’s own systems and processes as they existed at the time the information was collected.

Therefore we consider this information to be factual. We note that section 15(c) of the GIPA Act says that whether disclosure of information might cause embarrassment to, or a loss of confidence in, the Government is irrelevant and must not be taken into account. Section 15(d) of the GIPA Act says that whether disclosure of the information might be misinterpreted or misunderstood by any person is irrelevant and must not be taken into account. As previously stated, DEC may wish to proactively disclose some contextual information alongside the report, if it is released.

Aside from this, based on the information before us we understand some of the information in the stage 1 report is already publicly available. Under section 94 of the GIPA Act we recommend against DEC’s decision to refuse Mr Birrell access to information within the stage 1 report that can be categorised as statements of fact, findings and sources of information.

5 Drafts, internal working documents and records

The notice of decision states that PwC and DEC intended the stage 1 report to be an internal working document the purpose of which was to introduce discussion on issues; “paving the way for the completed PwC report”.

Whether or not the PwC report is considered by DEC and PwC as an internal working document is immaterial. The GIPA Act does not concern itself with internal working documents or draft documents but rather *records*.

Clause 10 of schedule 4 to the GIPA Act defines record to mean any document or other source of information compiled, recorded or stored in written form or by electronic process, or in any other manner or by any other means.

The right of access provided for in section 9 of the GIPA Act applies to all records, whether or not they are internal working documents.

6 Findings & recommendations

6.1 Findings

Further to our review and the reasons outlined in this report:

1. We are not satisfied that DEC adequately applied the public interest test to the methodology of the stage 1 report. This is because DEC has not shown:
 - a. how disclosure of the methodology would disadvantage PwC; and
 - b. the weight of that disadvantage.
2. We are not persuaded that there is an overriding public interest against disclosure of the statements of fact, findings and sources of information contained in the stage 1 report. This is because we hold the view that this information is derived from DEC's systems and processes as it existed at the time it was collected and the factors in favour of disclosing this type of information are significantly weighty.
3. We are not satisfied that DEC established that the public interest consideration against disclosure of the recommendations in the stage 1 report applies. This is because DEC has not shown that release of the recommendations would prejudice any ongoing deliberation.

6.2 Recommendations

Under section 94 we recommend against DEC's decision that there is an overriding public interest against disclosure of the statements of fact, findings and sources of information contained in the stage 1 report.

Under section 93 of the GIPA Act, we recommend DEC make a new decision by way of internal review, following the procedures and requirements outlined in Part 5, Division 2 of the GIPA Act.

If DEC implements our recommendation to reconsider its decision, we recommend, it consult with internal stakeholders and affected third parties before finalising its decision.

Following consultation the decision maker will be better equipped to decide the weight of any public interest consideration against disclosing information in the stage 1 report.

7 Requirements for notices of decision

We draw DEC's attention to section 61 of the GIPA Act. Section 61 of the GIPA Act outlines what an agency must include in its notice of decision not to release information because of an overriding public interest against disclosure.

DEC did not comply with section 61 of the GIPA Act because it did not provide:

- a. detailed reasons for its decision
- b. its findings on any material questions of fact underlying its reasons for refusing access to the information, or reference to the sources of information on which those findings are based

However, DEC did identify the general nature and format of the record it identified in response to Mr Birrell's access application as required by section 61(c) of the GIPA Act.

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8 What happens next

8.1 Applying for a further review

Our recommendations are not binding and cannot be reviewed under the GIPA Act. However, the original decision of the agency can be reviewed by the Administrative Decisions Tribunal (ADT).

If Mr Birrell is dissatisfied with either our recommendations or DEC's response to our recommendations, he may ask the ADT to review the original decision.

Mr Birrell must apply to the ADT within 20 working days of the date of this report. After that, the ADT can only accept the application if it agrees to extend the deadline. For information about the process and costs of an ADT review, please contact:

Administrative Decisions Tribunal	Phone	(02) 9377 5711
Level 10, 86 Goulburn Street	Fax	(02) 9377 5723
Sydney NSW 2000	TTY	(02) 9377 5859
www.lawlink.nsw.gov.au/adt	Email	ag_adt@agd.nsw.gov.au

If DEC makes a new decision because of our review, Mr Birrell will have:

- new rights of review for that new decision
- 40 working days from the date of the new decision to request a review by us or the ADT.

8.2 Questions?

This file is now closed.

If you have any questions about this report please contact us on 1800 472 679 or email ipcinfo@ipc.nsw.gov.au