



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

Applicant: The Applicant
Respondent: NSW Trade and Investment
Report date: 10 December 2013
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Catchwords: Government information – overriding secrecy laws

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Summary

1. The Applicant applied for access to information from NSW Trade and Investment (the Agency) under the *Government Information (Public Access) Act 2009 (GIPA Act)*.
2. The Agency decided to refuse access to the information requested.
3. The Agency has justified its decision to refuse access to the information requested.

Background

4. On 3 January 2013, the Applicant applied under the GIPA Act to the Agency for access to the information that led to the Independent Liquor and Gaming Authority (**ILGA**) having concerns about his suitability to hold a special employee licence under the *Casino Control Act 1992 (CC Act)* and subsequently denying his application for the licence.
5. The ILGA sits under the umbrella of NSW Trade and Investment. NSW Trade and Investment conducts right to information functions on behalf of the ILGA.
6. In its notice of decision issued on 5 February 2013, the Agency decided to refuse to provide the information to the Applicant pursuant to section 58(1)(d) the GIPA Act.
7. In seeking a review of the decision by the Information Commissioner, the Applicant confirmed that he is seeking the information that led to the ILGA having concerns about his suitability for a licence. The Applicant clarified that he is not seeking access to a document, the ILGA's reasons for its decision or the source of the information.

Decisions under review

8. The decision under review is the Agency's decision to refuse to provide the Applicant with access to the information pursuant to section 58(1)(d) of the GIPA Act.
9. This is a reviewable decision under section 80(d) of the GIPA Act.

Schedule 1 – Information for which there is a conclusive presumption of overriding interest against disclosure

10. Section 14(1) of the GIPA Act states that it is to be conclusively presumed that there is an overriding public interest against disclosure of government information if that information is of the kind described in Schedule 1 to the GIPA Act. Because of the conclusive presumption, an agency that relies on Schedule 1 of the GIPA Act it is not required to apply the public interest test found in section 13 of the GIPA Act.
11. The Agency relied on clause 1(1) of Schedule 1 of the GIPA Act to refuse to provide access to the information on the grounds that there is an overriding public interest against disclosure.
12. Clause 1(1) of Schedule 1 to the GIPA Act deals with information covered by secrecy laws in other legislation. It relevantly states:

It is to be conclusively presumed that there is an overriding public interest against disclosure of information the disclosure of which is prohibited by any of the following laws (which are referred to in this Act as **overriding secrecy laws**), whether or not the prohibition is subject to specified qualifications or exceptions and whether or not a breach of the prohibition constitutes an offence:

...

Gaming and Liquor Administration Act 2007 – section 17 (Secrecy)

13. For the Agency to rely on clause 1(1) of Schedule 1 of the GIPA Act to decide to refuse access to the information it must establish that the disclosure of the information is prohibited by legislation listed in the clause.
14. The Agency identified section 17 of the *Gaming and Liquor Administration Act 2007* (**GLA Act**) as the applicable overriding secrecy law. Specifically it identified subsections 17(8)(a)(ii) and (iii), and 17(8)(b)(ii) of the GLA Act as the provisions allowing the non-disclosure of the information to the Applicant in accordance with the GIPA Act. These subsections relevantly state:

(8) This section does not prevent a person being given access to a document in accordance with the *Government Information (Public Access) Act 2009*, unless the document:

(a) contains matter the disclosure of which could reasonably be expected to do any of the following:

...

(ii) enable the existence or identity of any confidential source of information, in relation to the enforcement or administration of the law, to be ascertained,

(iii) prejudice the effectiveness of any lawful method or procedure for preventing, detecting, investigating or dealing with any contravention or possible contravention of the law (including any revenue law), or

(b) is a document the disclosure of which would disclose any of the following information:

(i) information concerning the business, commercial, professional or financial affairs of an applicant for a casino licence under the *Casino Control Act 1992* or a licence under Part 4 of that Act,

(ii) information obtained in the course of an investigation of an application for such a licence,

15. There are two issues that must be addressed to determine whether the information is subject to section 17 of the GLA Act. They are:
 - a. Is information collected in the exercise of the CC Act subject to section 17 of the GLA Act generally?
 - b. Does subsection 17(8) of the GLA Act apply to the Applicant's information access application?

Is section 17 of the GLA Act applicable?

16. The Applicant made an application for a special employee licence under the CC Act and seeks access to information relating to that application.
17. Section 17 of the GLA Act deals with information acquired in the exercise of functions under the 'gaming and liquor legislation'. Gaming and liquor

legislation is given meaning in section 4 of the GLA Act and includes the CC Act.

18. Therefore the information, collected for the purpose of assessing a special licence application under the CC Act, is of a kind covered by section 17 of the GLA Act. Consequently it is subject to Schedule 1 of the GIPA Act.

Does subsection 17(8) of the GLA Act apply to the information?

19. The Applicant has stated that he is seeking access to information, not a document. Section 17(8) of the GLA Act refers to accessing documents while the GIPA Act is concerned with accessing government information contained in a record held by a NSW public sector agency.
20. In our view, this difference does not mean that section 17(8) does not apply to the Applicant's access application. When dealing with an application such as in the present case, we consider that the terminology used in the GIPA Act should be preferred. This is because section 17(8) of the GLA Act specifically deals with requests for information under the GIPA Act. Therefore it should be read as being concerned with access to government information contained in a record.
21. The question then for consideration is whether the Agency has properly applied subsections 17(8)(a)(ii) and (iii), and 17(8)(b)(ii) of the GLA Act to the Applicant's access application?

Did the agency properly apply subsection 17(8) of the GLA Act?

22. Section 17(8) of the GLA Act allows access to information in accordance with the GIPA Act unless allowing access would have certain effects.
23. In the notice of decision the Agency asserts that the disclosure of the information is prevented by subsections 17(8)(ii) and (iii) of the GLA Act. The Agency does not provide an explanation or reasoning to support this assertion.
24. In its notice of decision the Agency does not explain why the disclosure could reasonably be expected to enable the existence or identity of any confidential source of information, in relation to the enforcement or administration of the law to be ascertained. Nor is there an explanation of why the disclosure could reasonably be expected to prejudice the effectiveness of any lawful method or procedure for preventing, detecting, investigating or dealing with any contravention or possible contravention of the law (including revenue law).
25. Providing such explanations would go towards satisfying the requirements of section 61 of the GIPA Act which, relevantly, says:

61 Notice of decision to refuse to provide access

Notice of an agency's decision to refuse to provide access to information because there is an overriding public interest against disclosure of the information must state the following:

- (a) the agency's reasons for its decision,
 - (b) the findings on any material questions of fact underlying those reasons, together with a reference to the sources of information on which those findings are based,
26. The Agency also relies on subsection 17(8)(b)(ii) of the GLA Act to refuse to disclose the information. This subsection prevents access to information that

would disclose information obtained in the course of an investigation of an application for a casino licence under the CC Act or a licence under Part 4 of that Act. Both the Applicant and the Agency acknowledge that the application was for a special employee licence under Part 4 of the CC Act. It appears that the information only came into the possession of the Agency because it was conducting an investigation into the Applicant's application for a licence under Part 4 of the CC Act.

Specified qualification and exceptions

27. In his application to the Information Commissioner the Applicant raised the issue of subsection 17(2)(c) of the GLA Act and the exception it creates that allows the disclosure of information in certain circumstances.
28. Although subsection 17(2)(c) creates an exception that might be applicable to the Applicant's general circumstances, the exception is not applicable to his application made under the GIPA Act.
29. Clause 1 of Schedule 1 to the GIPA Act states that there is a conclusive presumption of an overriding public interest against disclosure of information which is prohibited by the GLA Act's secrecy provisions whether or not the prohibition is subject to specified qualifications or exceptions.
30. Having established that the information the Applicant seeks access to is subject to section 17 of the GLA Act the exception in subsection 17(2)(c) is not applicable for the purposes of a GIPA Act application.

Findings

31. The Agency has not satisfied the burden of establishing that the decision is justified in relation to subsections 17(8)(a)(ii) and (iii) of the GLA Act pursuant to section 97 of the GIPA Act. Specifically the Agency did not demonstrate how disclosure of the information could reasonably be expected to have the effects described in subsections 17(8)(a)(ii) and (iii) of the GLA Act.
32. The Agency has properly relied on subsection 17(8)(b)(ii) of the GLA Act to refuse the Applicant access to the information he requested pursuant to section 58(1)(d) of the GIPA Act.

Recommendations

33. Pursuant to section 95 of the GIPA Act, the Information Commissioner recommends that the Agency revise its procedures for information access requests so that future notices of decision comply with the requirements of section 61 of the GIPA Act.

Review rights

34. 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.
35. If the Applicant is dissatisfied with our recommendations or the Agency's response to our recommendations, the Applicant may ask the ADT to review the Agency's decision

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

Phone: (02) 9377 5711

Facsimile: (02) 9377 5723

Website: <http://www.lawlink.nsw.gov.au/adt>

37. If the Agency makes a new reviewable decision as a result of our review, the Applicant 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 IPC or ADT.

Closing our file

38. This file is now closed.
39. If you have any questions in relation to this report please contact the IPC on 1800 472 679.