information and privacy commission new south wales

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

Applicant:	Mr Simon Bryce
Agency:	Sydney Opera House
Report date:	07 March 2014
IPC reference:	IPC13/R000132
Keywords:	Government Information – decision to refuse access – reveal deliberation, consultation, opinion, recommendation, prejudice deliberative process, legal professional privilege

Contents

Summary

1. Mr Simon Bryce (the Applicant) applied for information from Sydney Opera House (the Agency) under the *Government Information (Public Access) Act 2009* (GIPA Act).
2. The Agency decided to refuse access to the information contained in records referred to as 'document 1' and 'document 2'. The Agency decided to release the remainder of the requested information in full.
3. The Information Commissioner makes the following recommendations in relation to the Agency's decision:
   - in respect of the decision to refuse access to information contained in 'document 1' it is recommended that the Agency makes a new decision.
   - In respect of the decision to refuse access to information contained in 'document 2' no recommendation is made.

Background

4. On 15 January 2013, the Applicant applied under the GIPA Act to the Agency for access to the following information:
   - 'all records held by the Sydney Opera House in relation to me, my company, Theatre Tours Australia Pty Ltd and the theatre show Busting Out!'
5. In its decision issued on 12 February 2013, the Agency decided to refuse access to information contained in 'document 1' and 'document 2' and to provide access to all other information captured by the application.

Decisions under review

6. The two decisions under review are the Agency's decisions to:
   - Refuse access to information contained in 'document 1'
   - Refuse access to information contained in 'document 2'

The public interest test

7. The Applicant has a legally enforceable right to access the information requested, unless there is an overriding public interest against disclosing the information (section 9(1) of the GIPA Act). The public interest balancing test for determining whether there is an overriding public interest against disclosure is set out in section 13 of the GIPA Act.
8. The general public interest consideration in favour of access to government information set out in section 12 of the GIPA Act means that this balance is always weighted in favour of disclosure. Section 5 of the GIPA Act establishes a presumption in favour of disclosure of government information.
9. Before deciding whether to release or withhold information, the Agency must apply the public interest test and decide whether or not an overriding public interest against disclosure exists for the information.
10. Section 13 requires decision makers to:

- identify relevant public interest considerations in favour of disclosure,
- identify relevant public interest considerations against disclosure,
- attribute weight to each consideration for and against disclosure, and
- determine whether the balance of the public interest lies in favour of or against disclosure of the government information.

11. The Agency must apply the public interest test in accordance with the principles set out in section 15 of the GIPA Act.

Public interest considerations in favour of disclosure

12. Section 12(1) of the GIPA Act sets out a general public interest in favour of disclosing government information, which must always be weighed in the application of the public interest test. The Agency may take into account any other considerations in favour of disclosure which may be relevant (s12(2) GIPA Act).

13. In its notice of decision, the Agency did not list any considerations in favour of disclosure.

Public interest considerations against disclosure

14. In order for the considerations against disclosure set out in the table to section 14 of the GIPA Act to be raised as relevant, the Agency must establish that the disclosure of the information *could reasonably be expected to have the effect* outlined in the table.

15. The words "could reasonably be expected to" should be given their ordinary meaning. This requires a judgment to be made by the decision-maker as to whether it is reasonable, as distinct from irrational, absurd or ridiculous, to expect the effect outlined.

16. In its notice of decision the Agency raised one public interest consideration against disclosure of the information in 'document 1', deciding that its release could reasonably be expected to:

- Reveal a deliberation or consultation conducted or an opinion, advice given, in such a way as to prejudice a deliberative process of government or an agency (clause 1(e) of the table to section 14 of the GIPA Act).

Consideration 1(e) – reveal a deliberation or consultation conducted, or an opinion or recommendation given, in such a way as to prejudice a deliberative process of government or an agency.

17. Clause 1(e) of the table at section 14 of the GIPA Act states:

> *There is a public interest consideration against disclosure if disclosure of the information could reasonably be expected to reveal a deliberation or consultation conducted, or an opinion, advice or recommendation given, in such a way as to prejudice a deliberative process of government or an agency (whether in a particular case or generally).*

18. In order for clause 1(e) to apply, the Agency must establish that disclosing the information contained in 'document 1' could reasonably be expected to 'reveal':

    (a) a deliberation or consultation conducted; or

(b) an opinion or recommendation;

(c) in such a way as to prejudice a deliberative process of the agency.

19. The term 'reveal' is defined in schedule 4, clause 1 of the GIPA Act to mean:

> *To disclose information that has not already been publicly disclosed (otherwise than by lawful means).*

20. In the notice of decision the Agency states:

> *The documents consist of internal communications between staff and management which reveal a deliberation or consultation or advice given in a way which would prejudice the deliberative process undertaken by Sydney Opera House. Disclosure could reasonably be expected to contravene s. 14 of GIPAA in that it would "reveal a deliberation or consultation conducted, or an opinion, advice or recommendation given, in such a way as to prejudice a deliberative process of government or an agency". I have decided that to publicly reveal internal correspondence which reveals the deliberative process of Sydney Opera House management would be prejudicial to Sydney Opera House's deliberative process and as such that there is an overriding public interest against disclosure of government information in this instance because the public interest considerations against disclosed information identified above (ie prejudice to Sydney Opera House) outweigh the general public interest in favour of disclosure set out in s. 13 of GIPAA.*

21. In our view the information in issue does not contain a deliberation, consultation, opinion or recommendation. Further, in terms of prejudicing a deliberative process it appears that the decision regarding the play's performance had already been determined. We are not satisfied that the deliberative process would be changed by the release of 'document 1'

22. Deliberative processes are the thinking processes of an Agency. In our view 'document 1' is an account of a conversation and events leading up to a decision that had already occurred.

23. The Agency has not explained sufficiently what deliberation or consultation was conducted, what recommendation or opinion is contained within, or what prejudice would occur as a result of the releasing the information.

24. We recommend that the Agency makes a new decision regarding the information contained in 'document 1'.

Legal professional privilege

25. The Agency decided that a conclusive overriding public interest against disclosure of the information contained in 'document 2' existed because the information is subject to legal professional privilege. It relies on clause 5(1) of schedule 1 of the GIPA Act.

26. Clause 5 of schedule 1 of the GIPA Act says:

> (*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.*

27. This means that in order for an agency to rely on clause 5 of schedule 1 to the GIPA Act, the information must be of a kind that would not be required to be disclosed in legal proceedings in New South Wales because it is information that attracts client legal privilege and the agency has not waived, either expressly of impliedly, that privilege.

28. Under clause 5(2) of schedule 1 to the GIPA Act, an agency must consider whether it is appropriate to waive privilege. An agency's decision not to waive privilege is not a reviewable decision under the GIPA Act. However, if privilege has previously been waived, either expressly or impliedly, by an agency, then clause 5 of schedule 1 to the GIPA Act will not apply.

29. In order for client legal privilege to attach to the information, each element of client legal privilege must be satisfied. The essential elements of client legal privilege are set out below:

    - The existence of a client lawyer relationship;
    - The confidential nature of the communication or document, and
    - The communication or document was brought into existence for the purpose of either:
        - Enabling the client to obtain, or the lawyer to give legal advice or provide legal services, or
        - For use in existing or anticipated litigation.

30. We are satisfied that the information contained in 'document 2' is subject to legal professional privilege.

31. The Agency considered and decided against waiving its legal professional privilege.

32. We make no recommendations against the Agency regarding this decision.

Recommendations

33. The Information Commissioner recommends the Agency makes a new decision with respect to the information contained in 'document 1' pursuant to section 93 of the GIPA Act.

34. In making a new decision, have regard to the matters raised and guidance given in this report.

35. We ask that the Agency advise the Applicant and us by **10 February 2014** of the actions to be taken in response to our recommendations.

Review rights

36. 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 NSW Civil and Administrative Tribunal (NCAT) for a review of that decision.

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

38. An application for a review by the NCAT can be made up to 20 working days from the date of this report. After this date, the NCAT can only review the decision if it agrees to extend this deadline. The NCAT's contact details are:

    NSW Civil and Administrative Tribunal
    Level 10, 86 Goulburn Street,
    Sydney, NSW, 2000

    Phone: 1300 006 228
    Website: http://www.ncat.nsw.gov.au/ncat/contact_ncat

39. 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 Information and Privacy Commission or the NCAT.

Closing our file

40. This file is now closed. Please call 1800 472 679 if you have any questions.