

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

Applicant: Anonymous  
Agency: City of Sydney Council  
Report date: 13 August 2014  
IPC reference: IPC14/R000304  
Keywords: Government information – decision to provide access to part of the information requested – prejudice a deliberative process of government – diminish competitive commercial value – business interests

## Contents

Contents .....	1
Summary .....	2
Background.....	2
Decisions under review .....	2
The public interest test.....	2
Public interest considerations in favour of disclosure.....	3
Public interest considerations against disclosure.....	4
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. ....	5
Consideration 4(c) – diminish the competitive commercial value of any information to any person.....	5
Consideration 4(d) – business interests. ....	6
Third party consultation .....	6
Balancing the public interest.....	7
Notices of decisions.....	8
Recommendations.....	8
Review rights .....	8
Completion of this review .....	9

## Summary

1. The Applicant applied for information from the City of Sydney Council (the agency) under the *Government Information (Public Access) Act 2009* (GIPA Act).
2. The agency decided to:
  - provide access to some information in full,
  - provide access to some information in part, and
  - refused access to some other information.
3. The Information Commissioner makes the following recommendations in relation to the agency's decision:
  - a. Pursuant to section 93 of the GIPA Act, the Information Commissioner recommends that the agency make a new decision by way of internal review (within 15 working days).
  - b. Pursuant to section 95 of the GIPA Act, the Information Commissioner recommends that the agency adopt the guidance in this report in dealing with future access applications.

## Background

4. The applicant applied under the GIPA Act to the agency for access to the following information:
  - a. Council Report on 5 Bank Street, Pyrmont, submitted to Council Meeting 9/12/13 in a Closed Session under 'Confidential Items'. The Report was submitted by the Manager Urban Renewal, and included a budget range based upon possible concepts.
  - b. Council resolutions made at 9/12/13 meeting, regarding the above report.
  - c. The Environment Management Report on 5 Bank Street provided by RMS to the Manager Urban Renewal.
5. In its decision issued on 17 March 2014, the agency decided to:
  - a. Partially release the Council Report on 5 Bank Street, Pyrmont.
  - b. Not release the Council resolutions made at 9/12/13 meeting, regarding the above report.
  - c. Release the Environment Management Report on 5 Bank Street provided by RMS to the Manager Urban Renewal.
6. In seeking a review of the decision by the Information Commissioner, the applicant confirmed that he disagrees with the decision to refuse access to information.

## Decisions under review

7. The two decisions under review are the agency's decisions to:
  - a. Partially release the Council Report on 5 Bank Street, Pyrmont and
  - b. Not release the Council resolutions made at 9/12/13 meeting, regarding the above report.

## The public interest test

8. 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.
9. 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.
10. 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.
11. Section 13 requires decision makers to:
  - a. identify relevant public interest considerations in favour of disclosure,
  - b. identify relevant public interest considerations against disclosure,
  - c. attribute weight to each consideration for and against disclosure, and
  - d. determine whether the balance of the public interest lies in favour of or against disclosure of the government information.
12. While the notice of decision shows that the agency executed steps (a) and (b) in part, the considerations identified have not been established to the level required by the GIPA Act. In addition the agency has not carried out steps (c) and (d). I am therefore not satisfied that the agency has applied the public interest test as required by the GIPA Act.
13. Steps (a)-(d) are discussed in further detail below.
14. 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**

15. 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. A recent decision of the New South Wales Civil and Administrative Tribunal (“NCAT”) states:

*It is a weighty consideration as it supports the presumption in favour of disclosure and the stated objects of the Act.*<sup>1</sup>
16. The agency may take into account any other considerations in favour of disclosure which may be relevant (s12(2) GIPA Act).
17. In its notice of decision, the agency did not list any other specific public interest considerations in favour of disclosure of the information in issue. I find that the agency overlooked that:
  - a. Disclosure of the information could reasonably be expected to promote open discussion of government affairs, enhance government accountability and contribute to positive and informed debate on the use of public land;

---

<sup>1</sup> Mannix v Department of Education and Communities [2014] NSWCATAD 35 at [64]

- b. Disclosure of the information could reasonably be expected to inform the public about the operations of Council and in particular, its policies and practices for dealing with public land; and
  - c. There is a strong public interest in the community knowing about the use of public land.
18. In reconsidering its decision, the agency should identify the relevant considerations that it has taken into account and explain why the considerations apply to the information sought.

### **Public interest considerations against disclosure**

19. The only public interest considerations against disclosure that can be considered are those in schedule 1 and section 14 of the GIPA Act.
20. 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.
21. The words “could reasonably be expected to” should be given their ordinary meaning. Courts have stated that the words
- ...require a judgment to be made by the decision-maker as to whether it is reasonable, as distinct from something that is irrational, absurd or ridiculous<sup>2</sup>*
- to expect the effect outlined.
22. Therefore before applying a consideration against disclosure to the information, the agency must
- identify the information;
  - 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
  - demonstrate that disclosure of the information could have the effect deemed not to be in the public interest.
23. In its notice of decision the agency listed three public interest considerations against disclosure from the table at section 14 of the GIPA Act, that is clauses 1(3), 4(c) and 4(d).
24. Listing public interest considerations alone does not meet the requirements of the public interest test. It is also not enough to meet the requirements for notices of decisions set out in section 61 of the GIPA Act. If the agency raises a public interest consideration against disclosure, it needs to show the elements of the consideration apply to the particular information.
25. If any of the elements of a public interest consideration against disclosure are not met, the consideration does not apply.
26. Below is some guidance as to the elements which need to be satisfied for the considerations cited in the notice of decision.

---

<sup>2</sup> Attorney General's Department v Cockcroft (1986) 10 FCR 180. Cited with approval in Hurst v Wagga Wagga City Council [2011] NSWADT 307

**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.**

27. Clause 1(e) of the table at section 14 states:

*There is a public interest consideration against disclosure of the information 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).*

28. In order for clause 1(e) to apply, the agency must establish that disclosing the information 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.

29. 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).*

30. The meaning of the word prejudice is to ‘cause detriment or disadvantage’.<sup>3</sup>

31. The agency needs to demonstrate what particular prejudice or harm would befall which particular deliberative or ‘decision-making process’ of the agency, by providing access to the information sought.

**Consideration 4(c) – diminish the competitive commercial value of any information to any person.**

32. Clause 4(c) of the table at section 14 states:

*There is a public interest consideration against disclosure if disclosure of the information could reasonably be expected to diminish the competitive commercial value of any information to any person.*

33. To show that this is a relevant consideration against disclosure, the agency must establish:

- a. there is competitive commercial value attached to the information in question, and
- b. how disclosing the information could reasonably be expected to disadvantage any person.

34. In the context of the access to information regime, ‘commercial value’ may be defined in several ways, including:

- a. information may have ‘commercial value’ to an agency or person if it was valuable for the purposes of carrying on the commercial activity in which that agency or other person was engaged;
- b. a genuine buyer is prepared to pay to obtain that information;
- c. the information is capable of being described as commercial in character.

---

<sup>3</sup> Hurst v Wagga Wagga City Council [2011] NSWADT 307 at [60]

35. The term 'person' is defined in schedule 4, clause 1 of the GIPA Act to include:

*An agency, the government of another jurisdiction (including a jurisdiction outside Australia) and an agency of the government of another jurisdiction.*

36. Note, this definition does not limit the definition of person in the *Interpretation Act 1987*, which includes an individual, a corporation and a body corporate or politic.

#### **Consideration 4(d) – business interests.**

37. Clause 4(d) of the table at section 14 states:

*There is a public interest consideration against disclosure if disclosure of the information could reasonably be expected to prejudice any person's legitimate business, commercial, professional or financial interests.*

38. For this consideration to apply, the agency must:

- a. identify the relevant legitimate interest; and
- b. explain how the interest would be prejudiced if the information was disclosed.

39. Our view is that the relevant meaning of 'legitimate' for the purposes of this consideration is its ordinary meaning, that is genuine and not spurious.<sup>4</sup>

#### **Third party consultation**

40. In some circumstances, under section 54 of the GIPA Act, the agency may also be required to consult third parties if the information is of a kind requiring consultation. For example, consultation may be required if:

- the information concerns a person (or entity)'s business, commercial, professional or financial interests, and
- the person (or entity) may reasonably be expected to have concerns about the disclosure of the information, and
- those concerns may reasonably be expected to be relevant to the question of whether there is a public interest consideration against disclosure.

41. The agency must take any third party objection into account in making its decision, however an objection is not in itself determinative of an overriding public interest consideration against disclosure. Similarly, the agency may decide to release information despite receiving an objection from a third party. However under section 54(6) and (7) the agency must notify the third party of its decision, and not release the information until the third party's review rights have expired.

42. In its notice of decision, the agency states it was required to consult with relevant third parties before releasing the information and that there were no objections to the release of The Environment Management Report on 5 Bank Street.

---

<sup>4</sup> Macquarie Dictionary 6<sup>th</sup> ed, October 2013

43. We recommend that in future when the agency consults with any relevant third parties, it include the details of the consultation and any reliance upon the outcome of such consultation in its decision as required by section 61 of the GIPA Act.
44. The Information Commissioner has issued *Guideline 5 – Consultation on public interest considerations under section 54 of the GIPA Act* which is available on our website at [www.ipc.nsw.gov.au](http://www.ipc.nsw.gov.au). I refer the agency to this publication for further guidance.

### **Balancing the public interest**

45. 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.

46. A recent NCAT decision helpfully stated that:

*It is really a matter of placing identified considerations in order of priority or importance.<sup>5</sup>*

47. In reconsidering the decision, the agency should:

- 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;
- 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;
- make a decision about which way the balance lies, in light of the weight in favour and against.

48. If at this stage the agency 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).

49. 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.

---

<sup>5</sup> Mannix v Department of Education and Communities [2014] NSWCATAD 35 at [63]

50. Once all of the above steps have been finalised, the agency should explain its reasons for the decision to the applicant. If the agency decides that there is an overriding public interest against disclosing the information its notice of decision must meet the notice requirements in section 61 of the GIPA Act. To assist the agency in drafting notices of decisions, I have included some additional guidance, below.

### **Notices of decisions**

51. When making a decision about an access application, an agency must issue a notice of decision that meets the requirements prescribed by section 126 of the GIPA Act.
52. The agency, having applied the public interest test under section 13 of the GIPA Act, must include detailed reasons if it decides not to release information in response to a formal access application
53. Section 61 of the GIPA Act provides that when an agency refuses to provide access to information because there is an overriding public interest against disclosure, its notice of decision must include the following:
  - the reasons for its decision to refuse access;
  - the findings on any key questions of fact, and the source of the information on which the findings are based; and
  - the general nature and format of the records that contain the information sought.
54. In failing to apply the public interest test correctly, the agency's notice of decision does not meet the requirements of section 61 of the GIPA Act in that it does not contain reasons for the decision to refuse access or the findings of material questions of fact underlying those reasons..

### **Recommendations**

55. The Information Commissioner recommends under section 93 of the GIPA Act that the agency make a new decision, by way of internal review within 15 working days.
56. The Information Commissioner recommends pursuant to section 95 of the GIPA Act that in making a new decision, the agency have regard to the matters raised and guidance given in this report.
57. We ask that the agency advise the applicant and us by **22 July 2014** of the actions to be taken in response to our recommendations.

### **Review rights**

58. 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 NSW Civil and Administrative Tribunal (NCAT) for a review of that decision.
59. The applicant has the right to ask the NCAT to review the agency's decision



60. 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  
Administrative and Equal Opportunity Division  
Level 10, John Maddison Tower  
86-90 Goulburn Street,  
Sydney NSW 2000

Phone: 1300 006 228

Website: <http://www.ncat.nsw.gov.au>

61. 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 NCAT.

### **Completion of this review**

62. This review is now complete.
63. If you have any questions about this report please contact the Information and Privacy Commission on 1800 472 679.