



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

Applicant: Claire Purvis
Agency: Roads and Maritime Services
Report date: 10 April 2015
IPC reference: IPC14/R000627
Keywords: Government information – competitive neutrality

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Summary

1. Claire Purvis (the Applicant) applied for information from the Roads and Maritime Services (the Agency) under the *Government Information (Public Access) Act 2009* (GIPA Act).
2. The Agency refused access to the information it located because it decided there is an overriding public interest against its disclosure.
3. The Information Commissioner recommends under section 93 of the GIPA Act that the Agency make a new decision, by way of internal review. As the Applicant has stated that she does not seek access to information containing a breakdown of costs, this recommendation only extends to withheld information that does not disclose the breakdown of construction costs.

Background

4. The Applicant applied under the GIPA Act to the Agency for access to the following information:

The most recent Cost Benefit Analysis in relation to the “Additional Crossing of the Clarence River at Grafton” project.

This includes any Cost Benefit Analysis in draft form, being the most recent draft. Given that a project supporting objective is to achieve a justifiable benefit-cost ratio at an affordable cost, I assume a document exists to quantify this.
5. In its decision dated 22 September 2014, the Agency identified six pages of information as falling within the scope of the application. The Agency refused access to this information because of an overriding public interest against disclosure. In its reasons for withholding the information the Agency referred to its concerns about releasing information containing a breakdown of the construction costs associated with the project prior to a tender process taking place.
6. In seeking a review of the decision by the Information Commissioner, the Applicant stated that she continues to seek release of the Cost Benefit Analysis, with cost breakdowns redacted. The Applicant further stated:

I acknowledge that releasing the breakdown of project costs may jeopardize the tender process and put the RMS at a competitive disadvantage. My purpose in accessing the information relates to the whole project cost, rather than the component cost. If the RM [sic] had contacted me to discuss the application, I would have suggested that the component dollar values could be redacted. I am interested in seeing the cost benefit analysis of constructing the whole project, based on the total funds to be allocated.

I would appreciate your view of the RMS decision in light of the above, keeping in mind that the breakdown of costs issue was the only public interest consideration against disclosure which was raised in the RMS’s notice of decision. I will be satisfied if the cost breakdown dollar values are redacted.
7. In the course of this review that Applicant also affirmed:

The information I am seeking includes any business case or benefit-cost analysis of the current proposal for a second crossing of the Clarence River. I am not interested in a comparison of various location options earlier proposed. I am interested in the business case for a bridge in the currently proposed location.

8. The scope of this review is limited to the Applicant's access application, which requested the most recent Cost Benefit Analysis. We have not considered any information, including information that may form part of a business case, that goes beyond the scope of the original request.

Decision under review

9. The decision under review is the Agency's decision to refuse to provide access to information in response to an access application. This is a reviewable decision under section 80(d) of the GIPA Act.
10. In this review, pursuant to section 97 of the GIPA Act, the Agency bears the burden of establishing that its decision is justified.
11. In conducting this review we have considered the reasons provided by the Agency in its notice of decision as well as an unredacted copy of the information that was refused.

The public interest test

12. 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.
13. 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.
14. 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.
15. 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.
16. 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

17. 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).

18. In its notice of decision, the Agency identified the general public interest in favour of disclosing information and also listed the following public interest considerations in favour of disclosure of the information in issue:
 - a. disclosure of the information could reasonably be expected to promote open discussion of public affairs, enhance Government accountability or contribute to positive and informed debate on issues of public importance, and
 - b. disclosure of the information could reasonably be expected to ensure effective oversight of the expenditure of public funds.

Public interest consideration 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. 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.
22. In its notice of decision the Agency raised one public interest consideration against disclosure of the information, deciding that its release could reasonably be expected to undermine competitive neutrality in connection with any functions of an agency in respect of which it competes with any person or otherwise place an agency at a competitive advantage or disadvantage in any market (clause 4(a) of the table to section 14 of the GIPA Act).
23. In order to establish that this consideration applies, the Agency needs to demonstrate that:
 - a. the Agency competes with another person in a market, and
 - b. disclosing the information would either
 - i. undermine competitive neutrality in connection with a function of the agency in the market, or
 - ii. place the agency at a competitive advantage or disadvantage in the market.
24. The notice of decision states:

The requested information contains a breakdown of the construction costs associated with this project, which are not in the public domain. RMS intends to go out for a Design and Construct (D & C) contract for the bridge next year.

I am informed that if the construction costs of the project were released it would jeopardise the tender process for this contract and place tenderers at a competitive advantage in the market.

The project will also involve the expenditure of public funds. If this information was released, RMS will not be able to obtain the best value for money as it will be placed at a competitive disadvantage in the market.

I am of the opinion that the release of the commercial information you have requested could reasonably be expected to place the prospective tenderers at an advantage and place RMS at a competitive disadvantage.

I have attributed significant weight to this public interest consideration against disclosure.

25. We are satisfied that this public interest consideration applies to the breakdown of construction costs. However, we are not satisfied that the Agency has demonstrated that this consideration applies to other information contained in the withheld pages.

Was the Agency's decision justified?

26. 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.
27. The notice of decision states:
- I have considered the relevant public interest considerations in favour of and against disclosure of the information you requested.*
- I have found that the public interest considerations against disclosure outweigh those in favour. On that basis, I have decided to refuse to provide access to the information coming within the scope of your application.*
28. The notice of decision does not explain why the Agency found that the public interest consideration against disclosure outweighed those in favour. It also does not explain why information in the withheld pages, other than the breakdown of the construction costs, are subject to a public interest consideration against disclosure.
29. The application of a public interest consideration against disclosure is not on its own sufficient to justify an agency's decision to withhold access to information. The agency must also show that the consideration against disclosure, on balance, outweighs those in favour of disclosure.
30. If an 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. These provisions are found in 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.

Recommendations

31. The Information Commissioner recommends under section 93 of the GIPA Act that the Agency make a new decision, by way of internal review. As the Applicant has stated that she does not seek access to information containing a breakdown of costs, this recommendation only extends to withheld information that does not disclose the breakdown of construction costs.
32. In making a new decision, we recommend that the Agency have regard to the matters raised and guidance given in this report.
33. We ask that the Agency advise the Applicant and us by **17 April 2015** of the actions to be taken in response to our recommendations.

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 NSW Civil and Administrative Tribunal (NCAT) for a review of that decision.
35. The Applicant has the right to ask the NCAT to review the Agency's decision.
36. 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>
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 NCAT.

Completion of this review

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

Elizabeth Tydd
Information Commissioner