

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

Applicant: NBN Co.
Agency: Canterbury Bankstown Council
Report date: 21 January 2020
IPC reference: IPC19/R000520
Agency reference: GIPA F-29-872
Keywords: Government information – exempt documents under freedom of information legislation – prejudice relations with another government – diminish competitive commercial value – prejudice any person’s legitimate, business, commercial, professional or financial interests
Legislation cited: *Government Information (Public Access) Act 2009; Freedom of Information Act 1982 (Cth)*
Cases cited: *Smolenski v Commissioner of Police (NSW)* [2015] NSWCATAD 21; *Dezfouli v Justice Health & Forensic Mental Health Network* [2018] NSWCATAD 11

This review has been conducted under delegation by the Information Commissioner pursuant to section 13 of the *Government Information (Information Commissioner) Act 2009*.

Summary

NBN Co. (the Applicant) objected to the proposed release of information by Canterbury Bankstown Council (the Agency) under the *Government Information (Public Access) Act 2009* (GIPA Act).

The Agency decided to provide access to this information despite the Applicant’s objections.

The Applicant, who is a third-party objector in this matter, applied for external review on 19 August 2019. The reviewer obtained information from the Agency including the notice of decision and the Agency’s GIPA file.

The review of the information in issue, the Agency’s notice of decision and the Applicant’s submissions concluded that the Agency’s decision is not justified.

The reviewer recommends under section 93 that the Agency make a new decision. I also recommend under section 92 of the GIPA Act that the Agency in any reconsideration of its decision aligns it with the requirements of the GIPA Act, in particular by having regard to sections 5, 12, 13, 14 and 15 of the GIPA Act.

Background

1. The Agency received an application for access to information, including information that relates to the Applicant.
2. The Agency consulted the Applicant, who objected to disclosure of information relating to them, and in its decision on internal review, issued on 9 July 2019, the Agency decided to provide access to the information.
3. In seeking a review of the decision by the Information Commissioner, the Applicant confirmed:

NBN states that it is of the view that the public interest does not favour the disclosure of the Review Documents on the basis of clause 7, clause 4 and clause 1.

Decision under review

4. The Information Commissioner has jurisdiction to review the decision made by the Agency pursuant to section 89 of the GIPA Act.
5. The decision under review is the Agency's decision to provide access to the information.
6. This is a reviewable decision under section 80(d) of the GIPA Act.

Standing to make an application for external review

7. Under section 89(1) of the GIPA Act a person aggrieved by a reviewable decision of an agency is entitled to have the decision reviewed by the Information Commissioner.
8. The Applicant is an aggrieved party because the Agency decided to provide access to information concerning the Applicant.
9. As the Agency's decision was subject of an internal review, the Applicant is entitled to an external review of the decision by the Information Commissioner.
10. The Applicant applied for an external review within 40 working days of the notice of decision being provided to them in accordance with section 126(1) of the GIPA Act.
11. This is within the time limit for applying for review by the Information Commissioner under section 90 of the GIPA Act.

Onus to justify the decision

12. This external review is of a decision by the Agency to provide access to government information in response to an access application, rather than a decision to refuse to provide access to government information. Section 97(2) of the GIPA Act therefore applies and the burden of establishing that there is an overriding public interest against disclosure of the information rests with the Applicant.
13. Accordingly, the Applicant was invited to make submissions as to why it considers there is an overriding public interest against disclosure.
14. In conducting this review, I have considered the submissions provided by the Applicant, the notice of decision and the information that is subject to release.

The public interest test

15. The access 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. For further information on the public interest test, see the resource sheet at the end of this report.

Public interest considerations in favour of disclosure

16. In its notice of decision at internal review, the Agency raised no public interest considerations in favour of disclosure of the information.
17. In its submissions, the Applicant raised no public interest considerations in favour of disclosure of the information.
18. In circumstances where the onus is on the Applicant to justify that there is an overriding public interest against disclosure of the information and the decision at first instance by the Agency does not identify any public interest considerations in favour of release, it is difficult to be satisfied that the Agency has applied the public interest test in the way envisaged under the GIPA Act.
19. That is by identifying that the public interest factors in favour, and those against and balancing where the public interest lies.
20. For the purposes of the review of this decision, in the absence of the public interest factors identified in favour, by the Agency and the Applicant, I have concluded that no factors in favour have been applied to the release of the information and therefore the only factors that have been considered are those against disclosure.
21. In future, in any reconsideration of its decision the Agency is recommended under section 92 to review its process for application of the GIPA Act to requests for access to information to ensure that it aligns with the requirements of the GIPA Act, in particular by having regard to sections 5, 12, 13, 14 and 15 of the GIPA Act.

Public interest considerations against disclosure

22. In its notice of decision at internal review, the Agency found that no public interest considerations against disclosure applied.
23. The Applicant raises the following public interest considerations against disclosure of the information, submitting that its release could reasonably be expected to:
 - a. Prejudice relations with, or the obtaining of confidential information from, another government (clause 1(c) of the table to section 14 of the GIPA Act)
 - b. Diminish the competitive commercial value of any information to any person (clause 4(c) of the table to section 14 of the GIPA Act)
 - c. Prejudice any person's legitimate business, commercial professional or financial interests (clause 4(d) of the table to section 14 of the GIPA Act)
24. In addition to these considerations, the Applicant also raised clause 7 of the section 14 table of the GIPA Act which states that there is a public interest consideration against disclosure of information communicated to the Government of New South Wales by the Government of the Commonwealth or of another State if notice has been received from that Government that the information is exempt matter within the meaning of a corresponding law of the Commonwealth or that other State.
25. In its submissions, the Applicant raised additional public interest considerations against disclosure however, the considerations examined below are the Applicant's objections on which the recommendation in this report primarily relies.
26. I will discuss each of these considerations in turn.

Consideration 7 – Exempt documents under interstate Freedom of Information legislation

27. For guidance on the application of clause 7 of the table at section 14 as a public interest consideration against disclosure, see the Public Interest Consideration (PIC) Resource attached to this report.
28. Clause 7 provides:
- There is a public interest consideration against disclosure of information communicated to the Government of New South Wales by the Government of the Commonwealth or of another State if notice has been received from that Government that the information is exempt matter within the meaning of a corresponding law of the Commonwealth or that other State.*
29. This clause has the effect that, if another Government notifies an agency that the information is exempt under the Freedom of Information law of another State or the Commonwealth, then that is a public interest against disclosing the information pursuant to an application for access made in NSW.
30. In the matter of *Smolenski v Commissioner of Police (NSW)* [2015] NSWCATAD 21 at [48] (*Smolenski*), clause 7 was found to apply to information that is:
- Communicated to the Government of New South Wales;
 - By the Government of the Commonwealth or of another State; and
 - A notice has been received from the Government of the Commonwealth or State that the information is ‘exempt matter’ within the meaning of a corresponding law of the Commonwealth of that State.
31. It is noted that clause 7(2) of the table at Section 14 provides that the public interest consideration under this clause extends to consideration of the policy that underlies the exemption.
32. In its submissions to the Agency, the Applicant provided the following:
- Information relating to NBN’s commercial activities is exempt or carved out from the application of the FOI Act, under section 7(3A) and Part II of Schedule 2 of the FOI Act.*
- ...
- The documents relate to NBN’s commercial activities and, had the documents been sought under the FOI Act, would be exempt from release under CAE.*
33. Part II of Schedule 2 of the *Freedom of Information Act 1982 (Cth)* (FOI Act) specifies agencies exempt in respect of particular documents and states the following:
- NBN Co, in relation to documents in respect of its commercial activities*
34. Further, section 7(3A) of the FOI Act, provides:
- (3A) In part II of Schedule 2, commercial activities, when used in relation to NBN Co, means
- activities carried on by NBN Co on a commercial basis; or
 - activities, carried on by NBN Co, they may reasonably be expected in the foreseeable future to be carried on by NBN Co on a commercial basis.
35. In the matter of *Smolenski* the Tribunal held that clause 7 is a consideration against disclosure and that the Tribunal was required to apply the public interest test under

section 13 of the GIPA Act to determine whether there is an overriding public interest against disclosure. This was affirmed in the matter of *Dezfouli v Justice Health & Forensic Mental Health Network* [2018] NSWCATAD 11 (*Dezfouli*).

36. In its decision, the Agency argues:

In the current case the document is a standard letter to Council indicating the NBN was intending to lay cable between three properties

...

This type of letter, given the roll out of the NBN, must have been issued tens of thousands of times to Councils and private individuals all over Australia. Apart from the mud map of the proposed work, it contains standard information about how the work will be conducted

...

Council is of the opinion that the information does not relate to any of NBN's commercial operations. It does not contain any details of any financial arrangements; it does not provide any information regarding how the work will be carried out or any other information that would constitute a commercial value to NBN.

Therefore, Council does not believe the information falls within the exemption provisions set out in either Part II of Schedule 2 or Section 7(3A) of the FOI Act.

As such, Council is of the opinion that Section 7(1) and (3) of the Table in Section 14 of the GIPA Act does not apply.

37. It appears that the Agency has not considered clause 7 as a public interest consideration against disclosure but rather reached its own determination regarding whether it considers the information in question falls within the exemption under the FOI Act. This is inconsistent with clause 7 which provides that **there is a public interest consideration against disclosure** of information if a **notice has been received from the Government of the Commonwealth or State that the information is 'exempt matter'** within the meaning of a corresponding law of the Commonwealth or that other State [emphasis added]. The application of clause 7 is distinguishable from the application of those conclusive presumption of an overriding public interest against disclosure that is provided for in Schedule 1 to the GIPA Act.
38. The fact that NBN provided a notice to the Agency in accord with clause 7(1) is not disputed by the parties. Upon review of the information, the notice provided by NBN has identified the exemptions to which applies under the FOI Act. Therefore, in line with the matters of *Smolenski* and *Dezfouli*, the Agency was required to consider this notice as a public interest consideration against disclosure to which it then under the GIPA Act is required to apply the public interest test and balance where the interest lies.
39. Accordingly, in the absence of the demonstrated application of the public interest test as required by the GIPA Act, I am satisfied that the Applicant has justified its reliance on clause 7 and I cannot be satisfied that the Agency's decision took into consideration clause 7 as a relevant public interest consideration against disclosure.

Consideration 1(c) – prejudice relations with, or the obtaining of confidential information from another Government

40. For guidance on the application of clause 1(c) of the table at section 14 as a public interest consideration against disclosure, see the Public Interest Consideration (PIC) Resource attached to this report.
41. In order to establish that this consideration against disclosure is relevant, the Applicant must demonstrate that:
- Disclosure of the information could reasonably be expected to prejudice relations with another government in future; or
 - Disclosure could reasonably be expected to have a prejudicial effect on obtaining confidential information from another government in future.
42. In its submissions to the IPC, NBN stated the following:
- If GIPA applicants were able to obtain the Review Documents (or similar documents) by the operation of the GIPA Act (or State RTI legislation), this could prejudice relations between NSW (or other States) and the Commonwealth as it would:*
- Allow Applicants to forum shop between State RTI and Commonwealth FOI legislation, so as to potentially achieve a different outcome in respect of an identical or a similar application;*
 - Undermine the purpose of nbn’s CAC and the Australian Parliament’s legislative intentions and policy objectives in carving out nbn’s commercial activities from CFI Act;*
 - Give rise to less positive relations between Council (or other NSW Government entities) and nbn, which is instrumentality of the Commonwealth Government; and*
 - Potentially and adversely impact State and Commonwealth relations due to the consequential prejudice to nbn’s business, commercial and financial affairs, as noted in this submission.*
- ... nbn provides the Review Documents and similar documents to LGAs, like Council, pursuant to a confidentiality regime. Disclosure of the Review Documents could cause nbn to limit the transfer of confidential materials to more than 500 LGAs across Australia, as well as, NSW and other State Government entities.*
43. NBN further stated:
- nbn provided Council with the Review Documents in confidence and pursuant to an NDA.*
44. I have considered the Applicant’s submissions regarding the notice provided to the Agency objecting to the release of the information. In order for the Applicant to demonstrate the application of this consideration they must be able to link the release of the information to the prejudice it would cause to the relations with another government in future or in obtaining the confidential information from another government in future.
45. While the Applicant describes the impact that could arise from the release of the information, I cannot be satisfied that it has demonstrated how that impact would have the effect on relations with another government or the obtaining of confidential information.
46. On this basis, I am not satisfied that the Applicant’s reliance on clause 1(c) is justified.

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

47. For guidance on the application of clause 4(c) of the table at section 14 as a public interest consideration against disclosure, see the PIC Resource attached to this report.
48. In order to rely on this clause as a consideration against disclosure, the Applicant must show that releasing the information could reasonably be expected to have the effect outlined in clause 4(c) and base this on substantial grounds (PIC Resource).
49. In particular, the Applicant must identify why the information has a competitive commercial value, and how that value would be adversely affected if the information was disclosed.
50. That approach requires consideration of individual circumstances including: the nature of the commercial relationship for example under monopoly arrangements or an exclusive licence; the age of the information in question and therefore its commercial value.
51. In its submissions to the IPC, the Applicant raises a number of points including:
 - a. The Land Access & Activity Notices (LAAN) provided to Council are fundamentally different to those provided to private residences or business. The LAANs provided to Council contained Detailed Design Drawings (DDD) which are supplied to LGAs only under the confidentiality regime.
 - b. The LAANs and DDDs are supplied to LGAs to determine optimal locations for the rollout of NBN network infrastructure, to minimise adverse impacts upon LGAs and their residents and to expedite the migration and connection of end-users to NBN services, among other objectives.
52. The Applicant provided further submissions regarding the commercial value in DDDs. NBN submits the following:
 - c. NBN's DDDs have an inherent commercial value in that NBN has expended time, resources and person-hours in developing these (and similar documents) for the NBN network across the country.
 - a. The DDDs also assist in any negotiations regarding the placement of NBN network infrastructure with LGAs, delivery partners and other affected parties, thereby serving a clear commercial purpose.
 - b. DDDs serve an operational purpose in that they are used by NBN's business and delivery partners to assist in the design, construction and rollout the NBN network in the field.
 - c. NBN's competitors could use GIPA to obtain DDDs thereby minimising their own costs in developing similar designs or commercial data. In effect, NBN would be providing competitors with a valuable resource, for which they have not paid.
 - d. NBN does not publish nor release DDDs to the public and does not make location of its network infrastructure generally accessible to the public.
53. Based upon the information before me I cannot be satisfied of the relevant facts including competitors, age of the information, the terms under which it was supplied and therefore its commercial value.
54. In accordance with the Public Interest Test under the GIPA Act, if this consideration is established then the decision maker must weigh that consideration against the considerations in favour of disclosure and arrive at a determination.

55. In the interests of finality and having determined that this matter should be reconsidered because it fails to identify public interest factors in favour of disclosure, I make no specific finding in relation to consideration at clause 4(c) of the Table to section 14.
56. The factual circumstances to be examined under clause 4(c) are also relevant to the operation of clause 4(d) of the Table to section 14 - prejudice any person's legitimate business, commercial, professional or financial interests.

Consideration 4(d) – prejudice any person's legitimate business, commercial, professional or financial interests.

57. For guidance on the application of clause 4(d) of the table at section 14 as a public interest consideration against disclosure, see the PIC Resource attached to this report.
58. In order to establish this consideration against disclosure is relevant, the Applicant must:
 - a. Identify the relevant legitimate interest; and
 - b. Explain how the interest would be prejudiced if the information was disclosed.
59. In particular, the Applicant must identify the party whose interests would be prejudiced and demonstrate the causal nexus between the disclosure of the information and the prejudice to that interest.
60. Relevant factors include those outlined above together with the impact of the passage of time and therefore the value to any identified competitors operating in the market with the NBN to properly consider the second limb, that is the prejudice to those commercial operations from disclosure. Accordingly, this requires an examination of both the nature of the information and how commercial interests would be prejudiced by the release of the information.

Balancing the public interest test

61. I note that the Agency did not find any considerations against disclosure to have been made out and so did not undertake a balancing of the public interest test in accordance with section 13 of the GIPA Act. Additionally, it did not identify any public interest considerations in favour of the release of the information.

Conclusion

62. On the evidence available at review, I am satisfied that the Agency's decision is not justified.

Recommendations

63. I recommend under section 93 of the GIPA Act that the Agency make a new decision.
64. I also recommend under section 92 of the GIPA Act that the Agency in any reconsideration of its decision it aligns with the requirements of the GIPA Act, in particular by having regard to sections 5, 12, 13, 14 and 15 of the GIPA Act
65. I ask that the Agency advise the Applicant and the IPC by **4 February 2020** of the actions to be taken in response to our recommendations.

Applicant review rights

66. This review is not binding and is 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.
67. The Applicant has the right to ask the NCAT to review the Agency's decision.
68. 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: [/www.ncat.nsw.gov.au](http://www.ncat.nsw.gov.au)

69. 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

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

Cassandra Vizza

Acting Regulatory Officer