



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

Applicant: Ms Donna Page
Agency: Newcastle City Council
Report date: 13 August 2020
IPC reference: IPC20/R000302
Agency reference: GIPA 20-069
Keywords: Government information – decision to refuse access to information – undermine competitive neutrality in connection with any functions of an agency – diminish the competitive value of any information to any person – prejudice any person’s legitimate business, commercial, professional or financial interests – personal factors of the application
Legislation cited: *Government Information (Public Access) Act 2009*
Cases cited: *Murphy v Broken Hill City Council* [2015] NSWCATAD 135; *Media Research Group Pty Ltd v Department of Premier and Cabinet* [2011] NSWADTAP 7; *Neary v State Rail Authority* [1999] NSWADT 107; *AIN v Medical Council (NSW)* [2013] NSWADT 113; *McEwan v Port Stephens Council* [2018] NSWCATAP 211

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

Summary

Ms Donna Page (the Applicant) applied for information from Newcastle City Council (the Agency) under the *Government Information (Public Access) Act 2009* (GIPA Act). The information sought by the Applicant comprised a breakdown of the total project cost of the fit-out for the Agency’s new office space.

The Agency decided to provide access by creating a new document containing some of the information under section 75 of the GIPA Act. The Agency decided to refuse access to other information that it did not include in the new document.

The Applicant applied for external review on 29 April 2020. The reviewer obtained information from the Agency including the notice of decision and the Agency’s GIPA file.

The review of the Agency’s information and decision concluded that its decision is not justified.

The reviewer recommends under section 93 of the GIPA Act that the Agency make a new decision by way of internal review.

The reviewer also recommends under section 92 of the GIPA Act that the Agency consider whether section 31 of the GIPA Act requires the Agency to include a copy of the fit-out contract in the Agency’s contracts register. Where the Agency

decides that one or more of the exceptions in section 32(1) of the GIPA Act applies, the reviewer also recommends that the Agency ensure the requirements under section 32(2) of the GIPA Act are adequately met.

Background

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

... a breakdown of the total project cost of the fit-out of council’s new office space- including authority fees, consultancy fees, total construction cost including preliminaries and fixed and loose furniture fittings and equipment.

To make it clear, I would like the total project cost and a breakdown of the costs of each category listed above and a breakdown of the items and their costs within the categories listed.
2. On 4 March 2020, the Applicant clarified the scope of the request to the following:

Total project costs should also be a category in the table to make sure all expenditure is captured, as below.

Fit-out of council’s new office space	COST
TOTAL project COST BY CATEGORIES	
<ul style="list-style-type: none"> • consultancy fees <ul style="list-style-type: none"> ○ breakdown of the expenditure by individual items 	
<ul style="list-style-type: none"> • authority fees <ul style="list-style-type: none"> ○ breakdown of the expenditure by individual items 	
<ul style="list-style-type: none"> • preliminaries <ul style="list-style-type: none"> ○ breakdown of the expenditure by individual items 	
<ul style="list-style-type: none"> • fixed <ul style="list-style-type: none"> ○ breakdown of the expenditure by individual items 	
<ul style="list-style-type: none"> • loose furniture fittings <ul style="list-style-type: none"> ○ breakdown of the expenditure by individual items 	
<ul style="list-style-type: none"> • equipment <ul style="list-style-type: none"> ○ breakdown of the expenditure by individual items 	
PLUS- Overall TOTAL Project COST <ul style="list-style-type: none"> • breakdown on expenditure by individual items 	

3. In its decision at first instance issued on 24 April 2020, the Agency decided to provide access to some information and refuse access to other information on the basis that there is an overriding public interest against its disclosure. The Agency provided access to information by creating a new record under section 75 of the GIPA Act.

4. In seeking a review of the decision by the Information Commissioner, the Applicant confirmed that she was seeking a review of the Agency's decision to refuse access to information.

Decision under review

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

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. 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

9. In its notice of decision, the Agency listed the following public interest considerations in favour of disclosure of the information at issue:
 - a. enhancing government accountability and contributing to the positive and informed debate on issues of public importance regarding the cost of the fit-out of the [City of Newcastle's (CN)] new office space (the fit-out), and
 - b. ensures effective oversight of the expenditure of public funds.
10. I agree that these are relevant considerations in favour of disclosure of the information at issue. The Agency is reminded that it is not limited in the factors in favour of disclosure that it can consider.

Public interest considerations against disclosure

11. In its notice of decision, the Agency raised the following public interest considerations against disclosure of the information, deciding that its release could reasonably be expected to:
 - a. undermine competitive neutrality in connection with any functions of an agency (clause 4(a) 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), and
 - 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).
12. I will discuss each of these considerations in turn.

Consideration 4(a) – 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

13. For guidance on the application of clause 4(a) of the table at section 14 as a public interest consideration against disclosure, see the Public Interest Consideration (PIC) Resource attached to this report.
14. In order for the consideration in clause 4(a) to apply, the Agency must establish that:
 - a. it is providing a function in a marketplace where there are other persons also in that marketplace (that is, the Agency is not a monopoly provider of a particular function); and
 - b. that the release of the information could have one or more of the following outcomes:
 - i. to place an agency at a competitive advantage or disadvantage against others, or
 - ii. to undermine the agency's competitive neutrality in relation to the function.
15. In its notice of decision, the Agency explained:

In order to fit-out the new premises, CN has been required to go to the market to determine whether there are suppliers willing and able to provide these services and goods needed. While I accept that CN is a major client with ongoing needs to engage suppliers, it also competes with others in that market and is subjected to the same pressures of "offer and demand".

I am of the view that disclosing further detailed cost as requested in your application would result in placing CN at a disadvantage in the market by discouraging supplier (sic) from entering into contractual arrangements due to the fear that this commercial information, which may sometimes be confidential, would be publicly available (consideration against disclosure).

I believe that CN's accountability is already achieved through legislative obligations where certain expenses must go before the elected council for decision, compliance with CN's procurement policy, or publication of information where the value of a contract is above \$150,00 (sic).
16. Although the Agency submits that it competes with others in the market, it is unclear who the Agency contends it is competing with, particularly in the context where the Agency is a Council. Relevantly, in the decision of *Murphy v Broken Hill City Council* [2015] NSWCATAD 135, the Tribunal explained at [35]-[37] that the term 'competitive neutrality' means:

... the elimination of resource allocation distortions arising out of public ownership of entities engaged in significant business activities: Government businesses should not enjoy any net significant competitive advantage simply as a result of their public sector ownership.
17. It is also unclear what significant business activities are being undertaken by the Agency with respect to the information at issue. Notwithstanding this, the Agency also contends that disclosure of the information at issue would discourage suppliers of services from engaging with the Agency in the future, due to the fear that commercial information provided by the supplier would be made publicly

available. However, the Agency has not provided any credible evidence in support of its contention that such an effect could reasonably be expected to occur. Similarly, the Agency has not undertaken any consultations with the third parties to ascertain whether they objected to the disclosure of the information. While such consultation would not of itself be determinative, it would be a factor considered in the application of the public interest test.

18. Further, based on my examination of the information at issue, it is apparent that the information the Agency withheld under clause 4(a) largely comprises details of the costings and fees charged by the suppliers. It is unclear how or why disclosure of this information would undermine the Agency's competitive neutrality in connection with any of its functions in respect of which it competes with any person, or otherwise place the Agency at a competitive advantage or disadvantage in any market.
19. Accordingly, for the reasons above, I cannot be satisfied that the Agency's reliance on the consideration in clause 4(a) is justified.

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

20. 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.
21. For this consideration to apply, the Agency needs to establish why the information has a competitive commercial value, and how that value would be diminished following the disclosure of the information.
22. In the decision of *Media Research Group Pty Ltd v Department of Premier and Cabinet* [2011] NSWADTAP 7, the Tribunal explained at [48]:

... information of "commercial value" would ordinarily be information with a proprietary character, information of an internal character (such as specialised statistics) or information the product of some unique or special intellectual processes of a high order that might fall below the level of a "trade secret". There should, as we see it, be some uniqueness attaching to the information that justifies treating it as exclusive, secret or confidential.
23. I have examined the information to which the Agency has applied the consideration in clause 4(c), which comprises the hourly rates charged by the suppliers to the Agency.
24. In its notice of decision, the Agency said:

However, I also believe it is unreasonable for CN to disclose the detailed itemised cost as requested in your application where it would be expected to diminish the commercial value of that information to the suppliers. This is because there is sufficient information available in the public domain (such as through tendering, matters decided by the elected council, or required to be published) to enable competitors to gain a commercial advantage in this market, who, as a result can charge less to be more competitive, effectively undercutting these suppliers. Accordingly, I have afforded much weight to this consideration against disclosure where it would be expected to have this result. Accordingly, I have afforded much weight to this consideration against disclosure where it would be expected to have this result.
25. Essentially, the Agency contends that disclosure of the information would diminish the commercial value of the information by allowing competitors to undercut the pricing set by the suppliers. However, the Agency has not identified any character

of uniqueness that would justify the treatment of the information as exclusive, secret or confidential.

26. Relevantly, in the decision of *Neary v State Rail Authority* [1999] NSWADT 107 (*Neary*), the Tribunal considered invoices for professional fees and disbursements issued by the Crown Solicitor's Office in respect of services provided to the State Rail Authority. The Tribunal found at [42] that information relating to fees and hourly rates could not reasonably be regarded as information with 'commercial value'.
27. Accordingly, in light of the reasons provided by the Agency in its notice of decision, my consideration of the information at issue and the authority in *Neary*, I cannot be satisfied that the Agency has justified its decision that the information to which the Agency refused under clause 4(c) has the requisite intrinsic commercial value for the consideration in clause 4(c) to apply.
28. For these reasons, I cannot be satisfied that the Agency's reliance on the consideration in clause 4(c) is justified.

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

29. 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.
30. In order to establish the relevance of this consideration, the Agency must identify the relevant legitimate interest and explain how the interest would be prejudiced if the information was disclosed. The meaning of the word 'prejudice' is to 'cause detriment or disadvantage'.
31. In its notice of decision, the Agency explained:

It is apparent to me that providing a detailed breakdown to the extent requested in your application would prejudice both CN and suppliers. This is because it would affect the parties' ability to negotiate terms if it was publicly known what each party was willing to accept cost wise, putting parties at a commercial disadvantage. Further, this would give a commercial advantage to other suppliers in the market and create an expectation by prospective clients of what suppliers should be giving them for their money.
32. With respect to the information that the Agency refused access under clause 4(c), the Agency has also applied the consideration in clause 4(d) to the same information. As I discussed above at [23], this information comprises the hourly rates charged by the suppliers for its services to the Agency. The Agency contends that disclosure of this information would enable competitors to the suppliers to gain a commercial advantage by charging less to be more competitive, and therefore undercutting the suppliers.
33. Having considered the Agency's reasons and the information comprising the hourly rates charged by the suppliers, I am satisfied that the Agency has identified the party whose interests would be prejudiced. Similarly, it appears that the Agency has adequately explained how disclosure of this information could reasonably be expected to put the supplier at a commercial disadvantage by allowing its competitors to price their services at a lower cost.
34. A similar approach was taken in the decision of *AIN v Medical Council (NSW)* [2013] NSWADT 113 (*AIN*), where the Tribunal accepted at [118]-[120] that the disclosure of the hourly rates of counsel engaged by the agency would prejudice the legitimate business and commercial affairs of counsel by allowing other legal

service providers to unfairly compete with them, or would allow their other clients to attempt to negotiate a more competitive rate on the basis of rates charged to the agency. In considering the public interest test, the Tribunal found that although there is public interest in the amount spent by the agency on legal services, there is an overriding public interest against disclosing the information, as ‘there is little in favour of release of counsel’s hourly rates, while the economic harm to those counsel may be significant’ (at [127]).

35. In light of the authority in *A/N*, I am satisfied that the Agency’s reliance on the consideration in clause 4(d) as a public interest consideration against disclosure is justified with respect to the information comprising the hourly rates charged by the suppliers for its services to the Agency.
36. With respect to the remaining information that the Agency withheld under clause 4(d), it is apparent that some of this information comprises preliminary costings and pricing details relating to the work to be completed by the suppliers as part of the fit-out.
37. However, it is unclear how or why disclosure of this information could reasonably be expected to give a commercial advantage to the suppliers’ competitors or put the suppliers at a commercial disadvantage. In particular, it does not appear that the remaining information comprises any details as to the extent of the work required relative to the costs being charged by the suppliers. Accordingly, it is unclear how the suppliers’ competitors would be able to use this limited information to gain a commercial advantage over the suppliers.
38. With the exception of the information comprising the hourly rates charged by the suppliers, I cannot be satisfied that the Agency’s reliance on the consideration in clause 4(d) is justified, as it does not appear that the Agency has adequately explained how the supplier’s legitimate business, commercial, professional or financial interests would be prejudiced if the information was disclosed.

Personal factors of the application

39. When applying the public interest test and deciding if information can be released to an Applicant, section 55 of the GIPA Act provides that a decision maker is entitled to take into account the personal factors of the application, including:
 - a. the Applicant’s identity and relationship with any other person
 - b. the Applicant’s motives for making the access application, and
 - c. any other factors particular to the Applicant.
40. In particular, section 55(2) of the GIPA Act explains that an Agency can take into account the personal factors of the Applicant as factors in favour of providing access to the Applicant.
41. In its notice of decision, the Agency explained:

The information is sought by the Newcastle Herald for the purpose of reporting on this matter. I therefore consider this to be a strong consideration in favour of disclosure of that information to you.
42. On this basis, I am satisfied that the Agency has adequately considered the Applicant’s personal factors as a factor in favour of disclosure.

Third party consultation

43. 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. The Information Commissioner has issued a guideline about consultation under section 54 of the GIPA Act, which is available on our website at www.ipc.nsw.gov.au (see *GIPA Guideline 5 – Consultation on public interest considerations under section 54 and section 54A of the GIPA Act April 2019*).
44. In its notice of decision, the Agency explained:
- While consultation would ordinarily be required with third parties regarding the release of their business, financial or commercial information, it was not practical to do so here. Accordingly, consultation was not undertaken.*
45. Although the Agency states that it was not practical to undertake consultations with the third parties, it has not explained why this is the case.
46. I draw the Agency's attention to Part 3.1 of GIPA Guideline 5, which provides:
- It is important that an agency does not presume an outcome of consultation without seeking the views of the third party. The outcome of a consultation may be that the third party does not object to the disclosure of the information. If an agency is concerned that the consultation with the third party may result in distress to the third party, the agency may wish to put strategies in place to mitigate or address the possible effect of the consultation.*
47. Accordingly, in any reconsideration of its decision, I encourage the Agency to consider undertaking consultations with the third parties which may provide an important input into the public interest test and may inform the Agency's determination as to where the balance lies.

Open access information

48. The GIPA Act requires Agencies to disclose certain information as part of open access requirements under the GIPA Act. Part 3 Division 5 of the GIPA Act prescribes the requirements for the publication of contracts by an agency in a government contracts register.
49. Section 6(1) of the GIPA Act further provides:
- An agency must make the government information that is its open access information publicly available unless there is an overriding public interest against disclosure of the information.*
50. Relevantly, Parliament's second reading of the GIPA Bill 2009 states the following:
- The new legislation shifts the focus toward proactive disclosure. The legislation requires that certain "open access information" must be published. This includes details of an agency's structure and functions, its policy documents and its register of significant private sector contracts. In addition, agencies are authorised to release other information unless it is sensitive personal information or there is some other overriding public interest reason why it cannot be disclosed. There is a significant amount of information that can and should be released without the need for a formal application.*
51. During the course of this external review, enquiries were made with the Agency as to whether the information at issue was contained in any government contracts to which the Agency was a party. The Agency advised that some of the details were contained in government contracts and that the total awarded values of these

contracts were displayed publicly on the Agency's online contracts register. The Agency further explained that the contract relating to the fit-out had a value of \$9,055,626 (the fit-out contract).

52. Section 31 of the GIPA Act prescribes:

If a class 2 contract has (or is likely to have) a value of \$5 million or more (a class 3 contract), the register must include a copy of the class 3 contract.

53. However, section 32(1) of the GIPA Act also provides the following exceptions to the requirement that agencies must include information or a copy of the contract in the contracts register:

(1) A requirement of this Division to include information or a copy of a contract in the government contracts register does not require the inclusion of:

(a) the commercial-in-confidence provisions of a contract, or

(b) details of any unsuccessful tender, or

(c) any matter that could reasonably be expected to affect public safety or security, or

(d) a copy of a contract, a provision of a contract or any other information in relation to a contract that is of such a nature that its inclusion in a record would result in there being an overriding public interest against disclosure of the record.

54. Section 32(2) of the GIPA Act further provides:

(2) If an agency does not include a copy of a contract in the register, or includes only some of the provisions of a contract in the register, because of this section, the agency must include in the register:

(a) the reasons why the contract or those provisions have not been included in the register, and

(b) a statement as to whether it is intended that the contract or those provisions will be included in the register at a later date and, if so, when it is likely that they will be included, and

(c) if some but not all of the provisions of the contract have been included in the register, a general description of the types of provisions that have not been included.

55. As the fit-out contract has a value of more than \$5 million, section 31 of the GIPA Act is relevant. In circumstances where section 31 has application, the Agency's contracts register must include a copy of the contract in accordance with section 31. However, for the purposes of this external review, a search of the Agency's contracts register did not locate the full copy of the fit-out contract, and only yielded an extract containing limited information with respect to the contract, including a brief description of the contract, the contractor's details, the relevant process and the assessment criteria. Further, it does not appear that the Agency has provided in its contracts register any reasons as to why the contract had not been included in the register, or any statement as to whether it intended that the contract will be included in the register at a later date.

56. In light of the information above, I recommend under section 92 of the GIPA Act that the Agency consider whether the GIPA Act requires the Agency to include a copy of the fit-out contract in the Agency's contracts register. Where the Agency decides that one or more of the exceptions in section 32(1) applies, it is also recommended that the Agency ensure the requirements under section 32(2) are

adequately met. The Agency may also wish to examine its other contracts in its contracts register to ensure compliance with the requirements in Part 3 Division 5.

57. Notwithstanding the above, the issue of open access information and the public interest test was also considered in *McEwan v Port Stephens Council* [2018] NSWCATAP 211, where the Appeal Panel explained at [41]-[42]:

We agree that the mandatory release requirement in s 6 of the GIPA Act is substantially qualified such that it does not apply when the balancing exercise required by the overriding public interest against disclosure test set out in s 13 of the GIPA Act is against disclosure. This is apparent from the terms of s 6(1) of the GIPA Act.

However, we think that because the information in issue was open access information, the Tribunal needed to start with the position that this was an important factor in favour of disclosure which was additional to other relevant factors in favour of disclosure, including the general public interest in favour of disclosure provided for in s 12(1) of the GIPA Act. In our view such an approach is necessary in order to give meaningful effect to the mandatory release requirement expressed in s 6.

58. It is not apparent from the Agency's notice of decision that the Agency has considered whether the information at issue comprises open access information in accordance with Part 3 of the GIPA Act. Accordingly, where it is found that the information at issue comprises open access information, in any reconsideration of its decision, I encourage the Agency to consider whether this would also be a strong factor in favour of disclosure of the information.
59. For more information on open access information, please see the [IPC's Open access information fact sheet](#) and [Agency Contract Register Self-Assessment Checklist](#).

Conclusion

60. On the information available, I am satisfied that the Agency's decision under review:
- is justified in relation to clause 4(d) of the table in section 14 of the GIPA Act with respect to the information comprising the hourly rates charged by the suppliers
 - is not justified in relation to clause 4(d) with respect to the remaining information withheld under this clause
 - is not justified in relation to clauses 4(a) and 4(c) of the table in section 14 of the GIPA Act.

Recommendation

61. I recommend under section 93 of the GIPA Act that Agency make a new decision, by way of internal review.
62. I also recommend under section 92 of the GIPA Act that the Agency consider whether section 31 of the GIPA Act requires the Agency to include a copy of the fit-out contract in the Agency's contracts register. Where the Agency decides that one or more of the exceptions in section 32(1) of the GIPA Act applies, it is also recommended that the Agency ensure the requirements under section 32(2) of the GIPA Act are adequately met.

63. I ask that the Agency advise the Applicant and the IPC by **21 July 2020** of the actions to be taken in response to our recommendations.

Applicant review rights

64. 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.
65. The Applicant has the right to ask the NCAT to review the Agency's decision.
66. 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>

67. 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

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

Kevin Cheng

Senior Regulatory Officer