



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

Applicant:

Agency: Department of Planning, Industry and Environment

Report date: 30 July 2020

IPC reference: IPC20/R000413

Agency reference:

Keywords: Government information – refuse access to information – 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 - the effective exercise by an agency of the agency's functions

Legislation cited: *Government Information (Public Access) Act 2009*;

Cases cited: *Fire Brigade Employees' Union v Fire and Rescue (NSW)* [2014] NSWCATAD 113; *Fitzpatrick v Office of Liquor and Gaming (NSW)* [2010] NSWADT 72; *Taylor v Destination NSW* [2017] NSWCATAD 272 at; *Taylor v Destination* [2018] NSWCATAD 195; *McKinnon v Blacktown City Council* [2012] NSWADT 44; *Thomas v Auburn City Council* [2015] NSWCATAD 18; *Watt v Department of Planning and Environment* [2016] NSWCATAD 42

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

Summary

The Applicants applied for information from the Department of Planning, Industry and Environment (the Agency) under the *Government Information (Public Access) Act 2009* (GIPA Act). The Applicant sought access to information pertaining to planning and urban design studies relating to the Westmead Precinct Project.

The Agency decided to provide access to some information and refuse access to other information.

The Applicant applied for external review on 9 June 2020. The reviewer obtained information from the Agency including the notice of decision and information at issue.

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.

Background

1. The Applicant applied under the GIPA Act to the Agency for access to the following information:
 1. *All documents since December 2015 relating to the proposed rezoning of 3-11 Hassall Street, Westmead.*
 2. *All documents since December 2015 pertaining to planning and urban design studies, including drafts, for the Westmead Precinct in the Greater Parramatta & Olympic Park urban investigation and revitalisation area.*
2. On 6 February 2020, following consultation, the Applicant revised the scope of their request to the following:

“All documents since June 2017 pertaining to planning and urban design studies, including drafts, relating to:
(a) 3-11 Hassall Street Westmead;
(b) Westmead Innovation District Master Plan (led by Westmead Alliance);
and
(c) Westmead South (led by DPIE).”
3. On 2 March 2020, the Agency advised the Applicant that there would be an estimated cost of \$1,200 to process the access request. In order to reduce the processing charges, the Agency provided the Applicant with a schedule of documents to assist the Applicant with identifying the specific information sought.
4. The Applicant reduced the number of documents it sought access to and the estimated processing cost was revised to \$855. On 11 March 2020, the Agency requested an advance deposit of \$427.50 and payment was made by the Applicant.
5. In its decision at first instance issued on 20 April 2020, the Agency decided to refuse access to some of the information.
6. In seeking a review of the decision by the Information Commissioner, the Applicant confirmed that they sought an external review of the Agency’s decision to refuse access to documents identified as documents 8, 14, 25, 27, 63a, 78, 78c and 86 in the decision.

Decision under review

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

The public interest test

10. 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

11. In its notice of decision, the Agency 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 and enhance the Government's accountability;
 - b. Disclosure of the information could reasonably be expected to inform the community of the Government's operations, including, in particular, the policies, guidelines and codes of conduct followed by the Government in its dealings with members of the community; and
 - c. Disclosure of the information could reasonably be expected to reveal the reason for a government and any background or contextual information that informed the decision.
12. 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

13. 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. 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 (clause 1(e) of the table to section 14 of the GIPA Act); and
 - b. prejudice the effective exercise by an agency of the agency's functions (clause 1(f) of the table to section 14 of the GIPA Act).
14. I will discuss each of these considerations in turn.

Consideration 1(e) – 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

15. For guidance on the application of clause 1(e) of the table at section 14 as a public interest consideration against disclosure, see the Public Interest Consideration (PIC) Resource attached to this report.
16. The issue the Agency needs to address is whether there is more than a mere possibility that releasing the information would reveal any deliberation, opinion, advice or recommendations that would be detrimental to, or disadvantage the Agency's decision making process.
17. In *Fire Brigade Employees' Union v Fire and Rescue (NSW)* [2014] NSWCATAD 113, the Tribunal adopted the view that the deliberative processes involved in the functions of an agency are its thinking processes – the processes of reflection and “internal thinking”. In particular, the Tribunal accepted at [58]-[61] that the definition of ‘deliberative process’ involves the weighing up or evaluation of the competing arguments or considerations that may have a bearing upon a course of action, and that documents disclosing a deliberative process must be distinguishable from documents dealing with the

purely procedural or administrative processes involved in the functions of an agency. Further to this point, the Tribunal found that any claim that consideration 1(e) applies needs to be supported by clear and credible evidence, which goes beyond the suggestion that the public officers may simply be more considered and less spontaneous in their advice: *Fitzpatrick v Office of Liquor and Gaming (NSW)* [2010] NSWADT 72 (at [173]-[176]).

18. In its notice of decision, the Agency found that the information at issue contains the “*opinions, advice and recommendations that will be used to inform the strategic framework for the Westmead Precinct project*” and that the disclosure of the information:

... will impact the current work for the strategic framework... because the identified documents contain analysis and recommendations which may be used to inform the current work for the Strategic Framework.

Disclosing the information at this time could expose unfair advantage or disadvantage for some landowners or developers in the precinct and pre-empt certain decisions which may raise expectations with the community.

...

Release of the identified information at this time can reasonably be expected to prejudice the decision making processes because they would introduce information to the public arena and by extension the decision making processes, that which is still being deliberated.”

19. The Applicant submits that the Agency has not made an objective assessment of whether the effect of disclosure which are of concern could be expected to arise. Specifically, the Applicant has raised that the Agency has not explained how disclosure of the information could expose the unfair advantage or disadvantage for some landowners or developers in the precinct or pre-empt certain decisions.
20. The Applicant further submits that the Agency did not address whether there is more than a mere possibility that the release of the information would reveal any deliberation, advice or recommendation that would be detrimental to, or disadvantage the Agency’s decision making process.
21. Having examined the information at issue, I agree with the Applicant that, other than a general assertion that disclosure of the information “could expose unfair advantage or disadvantage for some landowners or developers in the precinct and pre-empt certain decisions”, the Agency has not adequately explained how or why this could reasonably be expected to occur. In particular, the consideration in cl 1(e) requires the Agency to demonstrate that disclosure of the deliberation or consultation conducted, or opinion, advice or recommendation given would prejudice a deliberative process of government or an agency. It is my view that the Agency has not adequately articulated the deliberative process that would be adversely affected.
22. I remind the Agency that under section 97(1) of the GIPA Act, the burden of establishing that a decision is justified lies on the Agency. In *Taylor v Destination NSW* [2017] NSWCATAD 272 at [83] the Tribunal stated that the Agency must examine the relevant information in each document and apply the public interest considerations against disclosure to the actual information. The Tribunal further held in *Taylor v Destination NSW* [2018] NSWCATAD 195 at [86] that an agency is required to consider the public interest consideration against disclosure in relation to the relevant information and not make generalised assertions.

23. Furthermore, an Agency must “*demonstrate, with respect to each public interest consideration against disclosure upon which it relies, that disclosure could reasonably be expected to have the nominated effect*” (*McKinnon v Blacktown City Council* [2012] NSWADT 44 at [44]).
24. As part of this review, I obtained the information at issue and information from the Agency in relation to its application of the public interest test. The information at issue contains project reports, presentations and Council Meeting minutes. It appears that the Agency’s decision is to refuse access to the documents in full, except for documents 27 and 63a that were refused in part.
25. It is unclear how the Agency has applied this consideration to the actual information at issue. For example, documents 78 and 78c appear to be the same document being minutes of a meeting dated 15 November 2019. It is unclear how the information contained is deliberative, as it does not appear to contain a consultation, recommendation or opinion. Further, it is not apparent from the information that there is a weighing up or evaluation of competing arguments or considerations that may have a bearing on a course of action. Rather, the information in documents 78 and 78c appears to relate to updates on particular parts of the Westmead Precinct Project. These updates include discussions in relation to reports that were subsequently released by the Agency in response to the access application. The decision by the Agency to refuse access to documents 78 and 78c appears to be at odds with its decision to release the relevant reports to which the meeting minutes refer.
26. Relevantly, in *Thomas v Auburn City Council* [2015] NSWCATAD 18, the Tribunal found at [45] that where the information at issue “*[does] not reveal or otherwise disclose any particular process, other than seeking information to inform an individual as to how they should best decide a particular matter*” clause 1(e) would not apply.
27. Based on the information before me, I am not satisfied that the Agency has justified its reliance on this clause with respect to all of the information that the Agency refused access to. The notice of decision does not make clear that the Agency considered the public interest test in relation to the actual information contained in each document.
28. Furthermore, I note that in *Watt v Department of Planning and Environment* [2016] NSWCATAD 42, the Tribunal considered that no prejudice could arise where the relevant deliberations had already concluded. In any reconsideration of the decision, the Agency may wish to consider the passage of time and whether any deliberations in the information at issue have now concluded.
29. I further note that the notice of decision would benefit from the Agency addressing whether there is more than a mere possibility that releasing the information would reveal any deliberation, opinion, advice, or recommendations that would be detrimental to, or disadvantage the Agency’s decision making process with respect to the particular information contained in each document.

Consideration 1(f) – prejudice the effective exercise by an agency of the agency’s functions

30. For guidance on the application of clause 1(f) of the table at section 14 as a public interest consideration against disclosure, see the PIC Resource attached to this report.

31. Once the relevant function of the Agency has been identified, the Agency needs to establish a substantial adverse effect to the exercise of that function. This requires a demonstration of the detriment or disadvantage that would occur by the disclosure of the information on the agency's function.
32. In its notice of decision, the Agency identified the relevant function to be the Planning, Industry and Environment Cluster's function to integrate efficiency across key areas of the Department including long-term planning, precincts, infrastructure priorities, open space, environment, natural resources and growing industries. The Place, Design and Public Spaces division creates plans for the future of regions and local services, revitalises urban areas, provides land for new homes, services and public space and develops policies that guide planning activity for government and local government across NSW.
33. Based on the information before me, I am satisfied that the Agency has identified the relevant function that could be prejudiced by the disclosure of the information.
34. In its notice of decision, the Agency relies on its reasons provided with respect to the application of clause 1(e) and identified that the functions of the Agency could reasonably be expected to be prejudiced as the disclosure of the information may prevent the Agency from achieving its goals.
35. The Applicant submits that the Agency has not explained how it would be prevented from achieving its goals, and that the Agency has not established the substantial adverse effect to the functions of the Place, Design and Public Spaces division.
36. As discussed at paragraphs [22]-[23], the Agency is required to consider the actual information at issue when applying the public interest test. It is not clear from the notice of decision that the Agency has considered the actual information contained in each document and applied the public interest test to the actual information. Accordingly, I am not satisfied that the Agency is justified in its reliance on this clause.
37. In any reconsideration of the decision, I encourage the Agency to consider and explain how the information in the particular document would prejudice the Agency's functions if it were disclosed and how such prejudice could reasonably be expected to occur.

Third party consultation

38. Under section 54 of the GIPA Act, the Agency may 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](#). Pursuant to section 15(b) of the GIPA Act, the Agency must have regard to this guideline.
39. For further information on consultation, please refer to the IPC's Fact Sheets [Third party consultation](#) and [Why consult third parties](#).
40. In processing the access request, the Agency consulted with third parties under section 54 of the GIPA Act.
41. In its notice of decision, the Agency stated that in applying and balancing the public interest test, it took into consideration, any objections that it received.
42. Accordingly, I am satisfied that the Agency has met its obligations under section 54 of the GIPA Act.

Conclusion

43. On the information available, I am satisfied that the Agency's decision under review is not justified in relation to clauses 1(e) and 1(f).

Recommendations

44. I recommend under section 93 of the GIPA Act that the Agency make a new decision, by way of internal review.
45. I ask that the Agency advise the Applicant and the IPC within 10 working days of the actions to be taken in response to our recommendations.

Applicant review rights

46. 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.
47. The Applicant has the right to ask the NCAT to review the Agency's decision.
48. 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>

49. 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

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

Yoko Morimoto

Regulatory Officer