information and privacy commission
new south wales

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

Applicant:	The Honourable Keith Mason AC KC
Agency:	Department of Communities and Justice
Report date:	5 May 2023
IPC reference:	IPC23/R000071
Agency reference	GIPA22/4474
Keywords:	Government information – overriding public interest against disclosure – collective Ministerial responsibility – prejudice a deliberative process
Legislation cited:	*Government Information (Public Access) Act 2009*
Cases cited:	*Re Waterford and Department of the Treasury (No 2)* (1984) 5 ALD 588; *Fitzpatrick v Office of Liquor and Gaming (NSW)* [2010] NSWADT 72; *Department of Community Services v Latham* [2000] NSWADTAP 21; *Dawson v Ministry of Transport* [2007] NSWADT 236; *Fire Brigade Employees' Union v Fire and Rescue (NSW)* [2014] NSWCATAD 113; *Fitzpatrick v Office of Liquor and Gaming (NSW)* [2010] NSWADT 72*; Leech v Sydney Water Corporation* [2010] NSWADT 298; *Hurst v Wagga City Council* [2011] NSWADT 307; *McKay v Transport for NSW* [2017] NSWCATAD 212; *Transport for NSW v Searle* [2018] NSWCATAP 93; *Lipscombe v Blue Mountains City Council* [2018] NSWCATAD 182; *Taylor v Office of Destination NSW* [2018] NSWCATAD 195

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 Hon Keith Mason AC KC (the Applicant) applied for information from the Department of Communities and Justice (the Agency) under the *Government Information (Public Access) Act 2009* (GIPA Act). The information sought by the Applicant was in relation to correspondence concerning the establishment of the Judicial Commission.

The Agency decided to refuse to provide access to the requested information based on an overriding public interest against disclosure.

The Applicant applied for external review on 8 February 2022. 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.

Background

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

   "*Correspondence to and from the Attorney General in relation to the establishment of the Judicial Commission, especially letters from judges of NSW Courts*."

2. In its decision issued on 23 December 2022, the Agency decided to refuse to provide access to the requested information due to an overriding public interest against disclosure in accordance with section 58(1)(d) of the GIPA Act.

Decision under review

3. The Information Commissioner has jurisdiction to review the decision made by the Agency pursuant to section 89 of the GIPA Act.
4. The decision under review is the Agency's decision to refuse to provide access due to an overriding public interest against disclosure.
5. This is a reviewable decision under section 80(d) of the GIPA Act.

Materials considered

6. During this external review, I have examined information provided by both the Applicant and the Agency including:
   a. submissions provided by the Applicant to the Information Commissioner which detail the Applicant's objections to the Agency's decision;
   b. documents provided by the Applicant that shed light on the historical context surrounding the information and the personal factors of the application, consistent with section 55(4) of the GIPA Act; and
   c. further submissions provided by the Agency, which offer additional insight into its decision to deny access.

The Applicant's submissions

7. When requesting a review by the Information Commissioner, the Applicant raised several concerns with the Agency's decision. In summary, the Applicant submitted the following:
   a. The decision-maker failed to fulfil the obligations set out in sections 61(b) and (c) of the GIPA Act, which require an agency's decision to include information regarding the underlying facts, sources of information and the general nature of the records that fall within the scope of a GIPA request.
   b. The decision-maker neglected to consider the potential public benefit of the Applicant's purpose for seeking the requested information, which is to prepare a history of the Supreme Court for publication in advance of its bicentenary on 17 May 2024.
   c. The decision-maker ought to have afforded greater weight in favour of disclosure due to the significant passage of time between the creation

of the records in 1986 and the Applicant's submission of the GIPA request in 2022.

d. With respect to clause 1(a), the Applicant emphasised, "*To the extent, which I challenge, that any of the judges' letters were placed before Cabinet in the Attorney-General's submission to Cabinet, this would not make them evidence of the internal deliberations of Cabinet*."

e. Concerning clause 1(e), the Applicant asserted that the Agency applied this consideration in a mechanical manner, without properly acknowledging the specific context surrounding the information in question.

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 in issue:

   a. *There is a general public interest in favour of the disclosure of government information.*

   b. *The general right of the public to have access to government information held by agencies.*

   c. *Disclosure of the information could reasonably be expected to promote open discussion of public affairs or inform the public about the history and establishment of the Judicial Commission.*

10. I agree that these are relevant considerations in favour of disclosure of the information in question.

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. prejudice collective Ministerial responsibility (clause 1(a) of the table to section 14 of the GIPA Act); and

    b. 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).

12. For guidance on the application of clauses 1(a) and 1(e) as a public interest considerations against disclosure, see the Public Interest Consideration (PIC) Resource on the IPC website.

13. I will discuss each of these considerations in turn.

Consideration 1(a) – prejudice collective Ministerial responsibility

Principles

14. For clause 1(a) to be a relevant consideration against disclosure, the Agency is required to:
    a. describe the collective Ministerial responsibility in question; and
    b. demonstrate that a prejudice to that collective Ministerial responsibility could reasonably be expected if the information was disclosed.
15. The Tribunal noted in *McKay v Transport for NSW* [2017] NSWCATAD 212 ('*McKay*') that clause 1(a) can be applicable where information may not meet the definition of "Cabinet information" in Schedule 1 clause 2(1), but still raises concerns about undermining the deliberative processes of Cabinet (at [77]).

The Agency's case

16. The Agency acknowledged that the scope of the Applicant's GIPA request encompasses correspondence from members of the judiciary which contain opinions provided in response to the Attorney General's invitation for feedback on provisions of the draft Judicial Officer's Bill.
17. The Agency claimed that disclosure of the information could reasonably be expected to prejudice Ministerial responsibility based on the following:

    …disclosing information of this nature will undermine collective Ministerial responsibility by revealing the AG's position with respect to a matter that went to Cabinet, as well as advice considered by the Attorney General and Cabinet with respect to the Bill. These communications occurred under strict conditions of confidentiality, consistent with established convention. While acknowledging the historical nature of the information, the AG is concerned that the prospect of the release of information of this nature would have the effect of prejudicing future consultation between the judiciary, other stakeholders and the AG on matters of law reform.

Consideration

18. Although the Agency's decision briefly mentions the information captured by the access application and explains its reliance on consideration 1(a), I agree with the Applicant's argument that the Agency did not adequately address the requirements of sections 61(b) and (c) of the GIPA Act. These sections require an agency, when deciding to refuse access on the basis of an overriding public interest against disclosure, to incorporate in its decision

    (b) the findings on any material questions of fact underlying those reasons, together with a reference to the sources of information on which those findings are based,

    (c) the general nature and the format of the records held by the agency that contain the information concerned.
19. The Agency appears to have treated the records within the scope of the Applicant's GIPA request as a collective group of documents, consisting of judiciary correspondence, and applied its reasons for relying on consideration 1(a) to the entire category without considering the specific information contained in each individual record that would result in the anticipated prejudice if the information were to be disclosed.
20. I refer the Agency to the case of *Taylor v Office of Destination NSW* [2018] NSWCATAD 195, where the Tribunal was critical of an approach which applies

the public interest test to categories of documents. As the Tribunal stated at [20]:

It is the Respondent's obligation to identify the information contained in each document which it says should be withheld from the Applicant because the public interest considerations against disclosure of the information contained in the document outweigh those in favour.

21. Upon my review of the information at issue, it is not clear what specifically within the correspondence would, as the Agency claimed, "*undermine collective Ministerial responsibility*". Additionally, the factual circumstances described by the Agency in reliance upon this provision do not adequately address the information in issue.

22. The Agency's decision would have benefitted from elaborating on the nature of the specific information within each of the identified documents which demonstrates a prejudice to collective Ministerial responsibility for the purpose of satisfying section 61(b). As a result, the Agency does not draw a clear nexus between the information at issue and its conclusion that release of the information "*would have the effect of prejudicing future consultation between the judiciary, other stakeholders and the AG on matters of law reform.*"

23. The Agency may wish to also note that it is best practice for a decision to include, when appropriate, a schedule of documents that lists the records that fall under the scope of the access application. The schedule should include a description of each record, its location of the record within the agency, its format, any public interest considerations in favour of, or against disclosure, the corresponding GIPA Act sections for any such considerations, and whether the information was released. Including a schedule of documents would have assisted the Agency in fulfilling the obligation set out in section 61(c) of the GIPA Act.

24. I note the Applicant's submission that the information in question does not serve as evidence of the internal deliberations of Cabinet. However, consideration 1(a) does not necessarily apply to information that discloses the actual deliberations of Cabinet as such information is captured by clause 2 of Schedule 1 to the GIPA Act, which prescribes a conclusive presumption of an overriding public interest against disclosure of information of this nature. Consideration 1(a) on the other hand would be relevant to, as noted at paragraph 15 of this report, information which is not necessarily Cabinet information, but still poses a risk to undermining Cabinet's deliberative processes. In *McKay*, information of this kind included reports about a proposed light rail route which were prepared for the purpose of assisting Cabinet in its deliberations but did not meet the criteria of 'Cabinet Information' per clause 2 of Schedule 1.

25. That said, I am of the view that this matter is distinguishable from the case of *McKay,* as the Tribunal found that consideration 1(a) was applicable to the information on the basis that the information concerned matters that were currently the subject of deliberation by Cabinet, and there was evidence that premature disclosure of the information would prejudice those deliberations. The Agency failed to consider the fact that the historical information within the requested records does not concern matters that are presently being deliberated on by Cabinet. The Agency's decision would have benefitted from contemplating the fact that there has been a substantial time gap between the documents' creation in 1986 and the Applicant's access request in 2022, which tends to diminish the relevance of consideration 1(a). As a consequence, it appears that the Agency's argument for prejudice lacks a basis in 'real and

substantial grounds' (see *Leech v Sydney Water Corporation* [2010] NSWADT 298 at [25]).

Outcome

26. On the information before me, I am **not satisfied** that the Agency's reliance on clause 1(a) as a public interest consideration against disclosure is justified.

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

Principles

27. For clause 1(e) to be a relevant consideration against disclosure, 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 government or an agency.

28. The meaning of the term 'deliberative process' was considered by the Administrative Appeals Tribunal, in *Re Waterford and Department of the Treasury (No 2)* (1984) 5 ALD 588 at [58] to [61]. The AAT held that the deliberative processes involved in the functions of an agency are its thinking processes – the processes of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action (at [58]). The Tribunal adopted this analysis within the GIPA Act context in *Fire Brigade Employees' Union v Fire and Rescue (NSW)* [2014] NSWCATAD 113, considering whether documents in issue formed part of the agency's "internal thinking".

The Agency's case

29. The Agency provided the following rationale for relying on clause 1(e):

    Some of the correspondence contains advice and feedback regarding the drafting of the Bill.

    …

    There are concerns that release of this information could reasonably be expected to result in stakeholders feeling inhibited or limiting their representations in the future, with the expectation that their views may be publicly disclosed. This will impact on the AG's ability to properly assess and make decisions with respect to law reform and legislative implementation by removing a robust process that enables the identification of flaws or unintended consequences in draft bills before legislation is passed.

Consideration

30. I consider my observation on the Agency's application of section 61(b) of the GIPA Act (see paragraphs 18 to 22 of this report) to be relevant in the context of its reliance on clause 1(e).

31. During the course of this review, I examined the withheld information. While I am satisfied that the information contains 'deliberations, consultations, opinions

or recommendations', I am not satisfied that the Agency has demonstrated how disclosure of this information could reasonably be expected to prejudice a deliberative process of the Attorney General (AG).

32. While the Agency has put forward a claim of prejudice based on an inhibition of frankness and candour, the Tribunal has stated that a claim of this kind needs to be supported by clear and credible evidence, which goes beyond the suggestion that public officers may simply be more considered in their advice: see *Fitzpatrick v Office of Liquor and Gaming (NSW)* [2010] NSWADT 72 at [173]-[175].

33. In my view, the Agency's decision lacks clarity on what it is about the information within the requested documents that would result in a reluctance of the AG's stakeholders to provide feedback and observations during the deliberative process of legislative reform and drafting, beyond the Agency's identification of the fact that some of the documents contain "*advice and feedback regarding the drafting of the Bill"*.

34. I agree with the Applicant's assertion that the Agency seems to have applied clause 1(e) in a mechanical manner, without considering the contextual factors related to the information in question. While I am not satisfied that the Agency has met the criteria for justifying reliance on clause 1(e), I am also of the view the Agency should have taken into account the fact that the deliberative process for which the correspondence was prepared has long been finalised. This undermines the relevance of clause 1(e) and the weight, if any, that should be given to it, and is a relevant factor in the balancing of the public interest: *Department of Community Services v Latham* [2000] NSWADTAP 21 at [34]; *Dawson v Ministry of Transport* [2007] NSWADT 236; *Fitzpatrick v Office of Liquor and Gaming (NSW)* [2010] NSWADT 72*; Lipscombe v Blue Mountains City Council* [2018] NSWCATAD 182.

Outcome

35. For the above reasons, I am **not satisfied** with the Agency's reliance on clause 1(e) as a public interest consideration against disclosure is justified.

Balancing the Public Interest Test

36. 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 under the GIPA Act.

37. Balancing the competing public interest considerations under s 13 of GIPA Act, is "a question of fact and degree, requiring the weighing of competing matters, and a task that is not amenable to mathematical calculation" (*Hurst v Wagga City Council* [2011] NSWADT 307 at [70]). The Appeal Panel stated in *Transport for NSW v Searle* [2018] NSWCATAP 93 at [104], that while the process in section 13 of the GIPA Act requires a broad value judgment to be made, it is not made in a vacuum, but having regard to the objects of the legislation, the general presumption in favour of disclosure of government information, and the principles set out in section 15 of the GIPA Act.

38. In any reconsideration of its decision, it may be beneficial for the Agency to give further consideration to the public benefit associated with the purpose

behind the Applicant's access request when attributing weight to the considerations in favour of and against disclosure of the information at issue.

Conclusion

39. On the information available, I am **not satisfied** that the Agency's decision to refuse to provide access due to an overriding public interest against disclosure is justified.
40. I make this finding as:
    a. I am **not satisfied** with the Agency's reliance on clause 1(a) as a public interest consideration against disclosure, and
    b. I am **not satisfied** with the Agency's reliance on clause 1(e) as a public interest consideration against disclosure.

Recommendation

41. I recommend under section 93 of the GIPA Act that the Agency make a new decision, by way of internal review.
42. 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

43. 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.
44. The Applicant has the right to ask the NCAT to review the Agency's decision.
45. 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
46. 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

47. This review is now complete.

48. If you have any questions about this report please contact the Information and Privacy Commission on 1800 472 679.

Andrew Tudehope

Senior Regulatory Officer