



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

Applicant:
Agency: Waverley Council
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searches

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Summary

1. The Applicant applied for information from Waverley Council (the Agency) under the *Government Information (Public Access) Act 2009* (GIPA Act).
2. The Agency provided access to some information with redactions and withheld some information because it attracted legal professional privilege. The Agency identified and released further information at a later time.
3. The Information Commissioner recommends the Agency make a new decision in relation to the review with the exception of the section pertaining to legal professional privilege.

Background

4. On 19 April 2013, the Applicant applied under the GIPA Act to the Agency for access to information relating to the development at XXXX Street Bondi. Specifically the following information was requested:
 - a. 'Documents/correspondence from 27 December 2011 to present between staff members including Nada Mardini, Mark Featherstone and Dan Joannides and the staff that they supervise (including Council Rangers). This could also include correspondence from the General Manager, the Director, Planning and Environmental Services, and Planning Staff.
 - b. Documents/correspondence from 27 December 2011 to present between Council departments including, but not limited to, Compliance, Planning and Technical Staff.
 - c. Documents/correspondence from 27 December 2011 to present between Council/ Council staff and external staff including, but not limited to, the PCA. Please exclude correspondence between Council and neighbouring residents, and submissions from residents objecting to the development.'
5. In its decision issued on 24 May 2013, the Agency decided to release approximately 300 pages of information with some redactions to personal information. One document was withheld because it attracted legal professional privilege.
6. In correspondence with the Information and Privacy Commission (IPC) the Applicant advised that there is no issue with the removal of personal information from any of the documentation provided in response to the access application.
7. In seeking a review of the decision by the Information Commissioner, the Applicant alleged that the Agency holds more information than it released in response to the access application.

Decisions under review

8. Under review are the Agency's decisions:
 - a. To refuse to release information that attracts legal professional privilege; and
 - b. That it conducted reasonable and appropriate searches regarding the access application.

The public interest test

9. 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.
10. The general public interest consideration in favour of access to government information set out in section 12 of the GIPA Act means that this balance is always weighted in favour of disclosure. Section 5 of the GIPA Act establishes a presumption in favour of disclosure of government information.
11. Before deciding whether to release or withhold information, the Agency must apply the public interest test and decide whether or not an overriding public interest against disclosure exists for the information.
12. Section 13 requires decision makers to:
 - a. identify relevant public interest considerations in favour of disclosure,
 - b. identify relevant public interest considerations against disclosure,
 - c. attribute weight to each consideration for and against disclosure, and
 - d. determine whether the balance of the public interest lies in favour of or against disclosure of the government information.
13. The Agency must apply the public interest test in accordance with the principles set out in section 15 of the GIPA Act.

Public interest considerations in favour of disclosure

14. Section 12(1) of the GIPA Act sets out a general public interest in favour of disclosing government information, which must always be weighed in the application of the public interest test. The Agency may take into account any other considerations in favour of disclosure which may be relevant (s12(2) GIPA Act).
15. In its notice of decision, the Agency did not list any public interest considerations in favour of disclosure of the information in dispute.
16. In our view relevant considerations in favour of disclosure include:
 - a. Disclosure of the information could reasonably be expected to promote open discussion of public affairs, enhance Government accountability or contribute to positive and informed debate on issues of public importance, and
 - b. Disclosure of the information could reasonably be expected to inform the public about the operations of agencies and in particular, their policies and practices for dealing with members of the public, and
 - c. The information requested is regarding an adjacent property to that of the Applicant.

Public interest considerations against disclosure

17. Public interest considerations against disclosure are set out in section 14 and schedule 1 to the GIPA Act.
18. In order for the considerations against disclosure set out in the table to section 14 of the GIPA Act to be raised as relevant, the Agency must establish that the disclosure of the information *could reasonably be expected to have the effect* outlined in the table.
19. The words “could reasonably be expected to” should be given their ordinary meaning. This requires a judgment to be made by the decision-maker as to whether it is reasonable, as distinct from irrational, absurd or ridiculous, to expect the effect outlined.
20. In its notice of decision the Agency raised a public interest consideration against disclosure of the information, deciding that its release could reasonably be expected to reveal an individual’s personal information.
21. The Agency decided to release the information with redactions made to the personal information found in the records.
22. The Applicant advised that he has no concerns regarding the redaction of the personal information from the records identified in relation to the application.

Legal professional privilege

23. Clause 5(1) of schedule 1 states that it is to be conclusively presumed that there is an overriding public interest against disclosure of information:

That would be privileged from production in legal proceedings on the ground of client legal privilege (legal professional privilege), unless the person in whose favour the privilege exists has waived the privilege.
24. This means that in order for an agency to rely on clause 5 of schedule 1 to the GIPA Act, the information must be of a kind that would not be required to be disclosed in legal proceedings in NSW because it is information that attracts legal professional privilege and the agency has not waived, either expressly or impliedly that privilege.

What is legal professional privilege?

25. Legal professional privilege protects confidential communications and confidential documents between a lawyer and a client made for the dominant purpose of the lawyer providing legal advice or professional legal services to the client or for use in current or anticipated litigation.
26. The existence and maintenance of privilege must always be considered in light of all the facts and circumstances that apply to the information.
27. In order for legal professional privilege to apply, each element of legal professional privilege must be satisfied. The essential elements of legal professional privilege which derive from sections 118 and 119 of the *Evidence Act 1995* (NSW) are:
 - a. The existence of a client and lawyer relationship;
 - b. The confidential nature of the communication or document, and

- c. The communication or document was brought into existence for the dominant purpose of either:
 - i. enabling the client to obtain, or the lawyer to give legal advice or provide legal services, or
 - ii. for use in existing or anticipated litigation.
- 28. The Agency has provided a copy of the one document it says attracts legal professional privilege.
- 29. Having reviewed the information and having considered the tests for legal professional privilege, we are satisfied that the information regarding this part of the review is subject to a claim of legal professional privilege. This is because we can see the existence of a client and lawyer relationship, the confidential nature of the information in the report and that the report was brought into existence for the dominant purpose of providing legal advice to the Agency.

Waiver of privilege

- 30. Clause 5(2) of schedule 1 to the GIPA Act provides that an agency must consider whether or not it is appropriate to waive privilege. The Agency's decision not to waive privilege is not a reviewable decision under the GIPA Act.
- 31. There is no evidence in the documentation provided by the Agency that the waiver of privilege was considered as required pursuant to clause 5(2) of the schedule to the GIPA Act.
- 32. On 8 July 2014 the IPC contacted the Agency requesting information regarding the requirement to consider the waiver of privilege of the document concerned.
- 33. On 23 July 2014 the Agency advised that it did not waive its right regarding legal professional privilege of the document.
- 34. The decision by the Agency not to waive legal professional privilege is not a reviewable decision under the GIPA Act.

Searches for information

- 35. Section 53 of the GIPA Act sets out the requirement to conduct searches:
 - 53 Searches for information held by agency*
 - (1) The obligation of an agency to provide access to government information in response to an access application is limited to information held by the agency when the application is received.*
 - (2) An agency must undertake such reasonable searches as may be necessary to find any of the government information applied for that was held by the agency when the application was received. The agency's searches must be conducted using the most efficient means reasonably available to the agency.*
 - (3) The obligation of an agency to undertake reasonable searches extends to searches using any resources reasonably available to the agency including resources that facilitate the retrieval of information stored electronically.*
 - (4) An agency is not required to search for information in records held by the agency in an electronic backup system unless a record containing the*

information has been lost to the agency as a result of having been destroyed, transferred, or otherwise dealt with, in contravention of the State Records Act 1998 or contrary to the agency's established record management procedures.
(5) *An agency is not required to undertake any search for information that would require an unreasonable and substantial diversion of the agency's resources.*

36. The expression 'government information' is defined in section 4 of the GIPA Act as 'information contained in a record held by an agency.'
37. Before deciding that it does not hold information, an agency must comply with the requirements of section 53(2) of the Act. The requirements are:
 - undertake such reasonable searches as necessary to locate the information requested; and
 - use the most efficient means reasonably available to the agency.
38. In *Smith v Commissioner of Police [2012] NSWADT 85*, Judicial Member Isenberg said at paragraph 27:

*In making a decision as to the sufficiency of an agency's search for documents which an applicant claims to exist, there are two questions:
(a) are there reasonable grounds to believe that the requested documents exist and are the documents of the agency; and if so,
(b) have the search efforts made by the agency to locate such documents been reasonable in all the circumstances of a particular case.*
39. When considering whether there are reasonable grounds to believe that information exists and whether searches to locate information were reasonable, the facts, circumstances and context of the application is relevant. Key factors in making an assessment about reasonable searches include "the clarity of the request, the way the agency's recordkeeping system is organised and the ability to retrieve any documents that are the subject of the request, by reference to the identifiers supplied by the applicant or those that can be inferred reasonably by the agency from any other information supplied by the applicant" (*Miriani v Commissioner of Police, NSW Police Force [2005] NSWADT 187* at [30]).
40. The GIPA Act does not require an agency to include details of its searches in a notice of decision. However, it is good practice for written decisions to clearly explain what the search processes were, what was found, an explanation if no records were found, what was released and what was held back. Details of searches should include where and how the agency searched, a list of any records found – and if appropriate a reference to the business centre holding the records, the key words used to search digital records (including alternative spellings used) and a description of the paper records that were searched.
41. In the notice of decision the Agency decided to release all of the documents captured by the searches it conducted in relation to the access application with the exception of one document it says attracted legal professional privilege excluded by schedule 1 to the GIPA Act. The Agency also redacted personal information contained in the documents.

42. On 11 September 2013 the Agency contacted the Applicant releasing more information it identified as falling within the scope of the access application.
43. On 31 January 2014 the Agency advised the IPC that there was an issue identifying some information in relation to the review because of an information technology issue. Specifically the Agency stated that the file that containing information regarding the access application was unable to be opened due to its large file size (82 Mb) and that the file crashed every time it was attempted to be opened. The Agency advised also that there may be more information available and this would be furnished once the technological issue was remedied.
44. In correspondence to the IPC the Applicant has advised and produced documentation that indicates that there may be additional information that was not identified or released in response to this access application. The Applicant holds the view that further information exists including minutes of meetings, diary and journal entries, records from the data management system TRIM and attachments to emails provided.
45. Furthermore, the Applicant advises that documents were not provided by some staff and that some but not all emails regarding particular staff were not identified and/or released. According to the Applicant these documents include Councillor's submissions and site visit records including photographs by Council Rangers.
46. We have reviewed the material presented to the IPC by the Applicant and the information provided by the Agency in response to the access application and enquiries made by the IPC.
47. It is reasonable when considering the material provided by the Applicant and the Agency to the IPC during the course of the review that there are other documents falling within the scope of the access application held by the Agency that have not been released to the Applicant.
48. In future access applications it may assist the applicant if the Agency created a schedule of documents in response to access applications with such a substantial scope.
49. We recommend the Agency make a new decision pursuant to section 93 of the GIPA Act.

Recommendations

50. The Information Commissioner recommends under section 93 of the GIPA Act that the Agency make a new decision regarding the searches completed and information identified in relation to the access application by way of internal review within 15 working days.
51. In making a new decision, the Information Commissioner recommend the Agency has regard to the matters raised and guidance given in this report.
52. We ask that the Agency advise the Applicant and the IPC by **1 August 2014** of the actions to be taken in response to our recommendations.

Review rights

53. Our reviews are not binding and are not reviewable under the GIPA Act. However, a person who is dissatisfied with a reviewable decision of an agency may apply to the NSW Civil and Administrative Tribunal (NCAT) for a review of that decision.
54. An application for a NCAT review 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
Level 10, 86 Goulburn Street,
Sydney, NSW, 2000

Phone: 1300 006 228

Website: <http://www.ncat.nsw.gov.au>

55. 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 the NCAT.

Completion of the review

56. This review is now complete.
57. If you have any questions in relation to this report please contact the IPC on 1800 472 679 or via email at ipcinfo@ipc.nsw.gov.au.

Elizabeth Tydd
Information Commissioner