



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

Applicant: ABC
Agency: Newcastle City Council
Report date: 13 February 2015
IPC reference: IPC14/R000520
Keywords: Government information – conclusive presumption against disclosure – legal professional privilege

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Summary

1. The Applicant applied for information from the Newcastle City Council (the Agency) under the *Government Information (Public Access) Act 2009* (GIPA Act).
2. The Agency decided under section 58(1)(d) of the GIPA Act to refuse to provide access to the information sought because of an overriding public interest against its disclosure.
3. The Information Commissioner finds the decision of the Agency is justified under the GIPA Act.

Background

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

Attachment 1 – GIPA request in relation to NCC Council meeting 26/5/14 item – 6 NOM 27/5/14 – Urban Growth/GPT Proposal.

I refer to NCC Council meeting 26/5/14 item – 6 NOM 27/5/14 – Urban Growth/GPT Proposal and Newcastle Herald article 27/5/14 that quoted:

“Green councillor Therese Doyle also moved to have the high-rise issue returned to the Council’s agenda, but her motion was rejected by the Council’s General Manager Ken Gouldthorp...Cr Doyle was seeking to have the submission come before the Council for review before it was passed onto the State Planning department. Mr Gouldthorp said there were legal grounds to prevent it happening.”

Could you please provide full details of the “legal grounds” that the General Manager referred to? Please include the governing law and legal advice/supporting document used by the General Manager to back his statement.
5. In its decision issued on 02 July 2014, the Agency decided to refuse access to the information sought on the basis of a conclusive presumption against its disclosure, legal professional privilege, from clause 5(1) of Schedule 1 to the GIPA Act.
6. In seeking a review of the decision by the Information Commissioner, the Applicant confirmed that she disagrees with the decision of the Agency, stating that she would like the Agency to act:

“...transparently and publicly provide the legal grounds that would prevent the community group NICRA (Newcastle Inner City Residents Alliance” to present their views.”

Schedule 1 – Information for which there is a conclusive presumption of overriding interest against disclosure

7. Section 14(1) of the GIPA Act states that it is to be conclusively presumed that there is an overriding public interest against disclosure of government information if that information is of the kind described in Schedule 1 to the GIPA Act. Because of the conclusive presumption, an agency that successfully

establishes that a Schedule 1 category applies is not required to apply the public interest test found in section 13 of the GIPA Act.

Legal professional privilege – clause 5 of Schedule 1

8. Clause 5(1) of schedule 1 to the GIPA Act states that it is 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.
9. For the 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 client legal privilege and the agency has not waived that privilege, either expressly or impliedly.
10. In order for client legal privilege to attach to the information, each element of client legal privilege must be satisfied. The essential elements of client legal privilege are:
 - the existence of a client and lawyer relationship;
 - the confidential nature of the communication or document, and
 - the communication or document was brought into existence for the dominant purpose of either:
 - enabling the client to obtain, or the lawyer to give legal advice or provide legal services, or
 - for use in existing or anticipated litigation.
11. We have reviewed the information for which legal professional privilege is claimed and confirm that all the elements are met, in circumstances in which the information was either created or requested for the purpose of providing legal advice to the General Manager (on behalf of the Agency) by its lawyer.
12. Under clause 5(2) of schedule 1 to the GIPA Act, an agency must consider whether it is appropriate to waive privilege before it refuses to provide access to the information. On page 2 of the notice of decision the Agency determines that legal professional privilege in relation to the legal advice is not waived.
13. We refer the Applicant to the IPC Fact sheet on Legal Professional Privilege http://www.ipc.nsw.gov.au/sites/default/files/file_manager/KU_LPP_October_2014-ACC_0.pdf

Conclusion

14. The Information Commissioner is therefore satisfied that the Agency's decision not to disclose the information for which legal professional privilege is claimed is justified under the GIPA Act.

Review rights

15. 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.

16. The Applicant has the right to ask the NCAT to review the Agency's decision.
17. 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>

Completion of this review

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

Elizabeth Tydd
Information Commissioner