



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

Applicant: The Applicant Pty Ltd
Agency: Department of Trade and Investment Regional Infrastructure
and Services
Report date: 30 March 2015
IPC reference: IPC14/R000640
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objections – onus to establish public interest against disclosure
– undermine competitive neutrality – diminish competitive
commercial value of information - prejudice legitimate business
interests – prejudice conduct of research

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Summary

1. The Applicant Pty Ltd (the Applicant) requested that the Information Commissioner review a decision to release information made by the Department of Trade and Investment (Agency).
2. The Agency decided to release the information in response to a *Government Information (Public Access) Act 2009* (GIPA Act) information access application, despite the Applicant's objection.
3. The Information Commissioner is not satisfied that the Applicant has established there is an overriding public interest against disclosure of the information, pursuant to section 97(2) of the GIPA Act.
4. The Information Commissioner makes no recommendations against the Agency's decision.

Background

5. The Agency received an information access application under the GIPA Act (reference GIPA 14-138) for access to information relating to the XYZ Coal Area.
6. On 16 May 2014, the Agency consulted with the Applicant, who is the owner of the XYZ Coal Area, as the information concerned its business affairs and related information.
7. On 28 May 2014 the Applicant provided its objections to release of all the information subject to the GIPA application, including information concerning:
 - a. EL1111;
 - b. ML2222; and
 - c. ML3333

on the basis of some overriding public interests against disclosure listed in item 4 of the table at section 14 of the GIPA Act, regarding the business interests of agencies and other persons.

8. In a letter dated 16 June 2014, the Agency noted the objections received on behalf of the Applicant and decided that information concerning the original Expression of Interest (EOI) and performance in meeting the undertakings given and conditions imposed should be released, but that information concerning the results, analysis and predictions based upon those results should be withheld. The Agency considered that this is because such information is achieved at a cost and informs subsequent analysis, predictions and commercial decisions, the disclosure of which is likely to be prejudicial to a company's commercial and financial interests. A schedule of documents provided a summary of the information as it was proposed to be disclosed and withheld respectively.
9. On 9 July 2014, the Applicant sought internal review of the Agency's decision to release the information either in full or in part, maintaining its objections to the release of all parts of the documents as stated in its letter of 28 May 2014.
10. On 4 September 2014, the Agency provided its internal review decision (reference GIPA 14-138 IR – Applicant), in which it decided to provide access to information either in full or in the same redacted form as it had determined should be released in the first instance decision.

11. On 29 October 2014, the Information Commissioner received the Applicant's request for review of the Agency's decision, in which the Applicant maintains its objections to disclosure of "both documents in their entirety" upon the grounds outlined and maintained in its objection letter and request for internal review.
12. On 27 February 2015 the Applicant was advised that pursuant to section 97(2) of the GIPA Act, the burden of establishing that there is an overriding public interest against disclosure of the information lies on the Applicant for review. Accordingly, the Applicant was invited to provide submissions in support of its arguments. The Applicant confirmed its intention to rely on its external review application.

Decision under review

13. The decision under review is the Agency's internal review decision of 4 September 2014, (reference GIPA 14-138 IR – Applicant) in which it decided that information concerning the original EOI and performance in meeting the undertakings given and conditions imposed should be released, but that information concerning the results, analysis and predictions based upon those results should be withheld.
14. The information is numbered consistent with the description in the schedule of documents appended to the Agency's first instance decision of 16 June 2014: 1, 2, 2a, 3, 3h, 3i, 4g, 5, 5a, 5c, 5d, 6h, 7a, 7b, 7c, 7e, 8a, 8b, 9, 10, 10a, 11, 12, 12e, 12f, 13, 13c, 14 and 14a.

The public interest test

15. A person who makes an access application for government information 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.
16. 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.
17. 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.
18. 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.
19. 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

20. 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).
21. In its internal review notice of decision, the Agency noted the general public interest in favour of disclosing government information under section 12(1) of the GIPA Act and the presumption in favour of disclosure, unless there is an overriding public interest against disclosure, at section 5 of the GIPA Act.
22. The Applicant submitted no public interest considerations in favour of disclosure.

Public interest considerations against disclosure

23. The only public interest considerations against disclosure that can be considered are those in schedule 1 and section 14 of the GIPA Act.
24. 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 Applicant must establish that the disclosure of the information could reasonably be expected to have the effect outlined in the table.
25. 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.
26. Therefore before applying a consideration against disclosure to the information, the Applicant must:
 - identify the information;
 - characterise it as information to which a public interest consideration against disclosure set out in the table to section 14 of the GIPA Act applies, and
 - demonstrate that disclosure of the information could have the effect deemed not to be in the public interest.
27. In its objection letter to the Agency dated 28 May 2014, the Applicant states that it “*strongly objects to the release of ALL information subject to GIPA 14-138*” and cites the public interest considerations against disclosure from clauses 4(a), 4(c), 4(d) and 4(e) of the table to section 14 of the GIPA Act. It submits:

Due to the highly sensitive, detailed and confidential nature of the information in all of the documents concerning EL1111, ML2222 and ML3333, it could reasonably be expected that the release of this information would:

- a. *undermine the competitive neutrality of the Applicant, placing it at an unfair disadvantage in the coal mining market;*
- b. *diminish the competitive commercial value of the Applicant to numerous people and entities;*
- c. *prejudice the Applicant’s legitimate business, commercial, professional and financial interests; and*

- d. *prejudice the conduct, effectiveness and integrity of research conducted by the Applicant revealing its purpose, conduct and/or results.*
28. The Applicant's objections to proposed release of information by the Agency made in its application for internal review dated 9 July 2014 are articulated in the same terms as its earlier objections. It also expresses the view that all the information contained in the documents (1, 2, 2a, 3, 3h, 3i, 4g, 5, 5a, 5c, 5d, 6h, 7a, 7b, 7c, 7e, 8a, 8b, 9, 10, 10a, 11, 12, 12e, 12f, 13, 13c, 14 and 14a,) including "*information concerning the original EOI and performance in meeting the undertakings given and conditions imposed*" is highly sensitive and confidential and disclosure is likely to be prejudicial to the Applicant's commercial and financial interests.
29. I will discuss the considerations against disclosure from clauses 4(a), 4(c), 4(d) and 4(e) of the table to section 14 of the GIPA Act, in turn.

Consideration 4(a) – undermine competitive neutrality

30. Clause 4(a) of the table at section 14 provides:
- There is a public interest consideration against disclosure if disclosure of the information could reasonably be expected to 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.*
31. For this consideration against disclosure to be relevant, it requires establishing that *an agency* is providing a function in a marketplace and that the release of the information could have one or more of the following outcomes:
- a. to place *an agency* at a competitive advantage or disadvantage against others; or
 - b. to undermine *the agency's* competitive neutrality in relation to the function.
32. The Applicant submits that it is reasonably expectable that disclosure would "*undermine the competitive neutrality of the Applicant, placing it at an unfair disadvantage in the coal mining market.*"
33. The undermining of competitive neutrality needs to be in connection with any functions of an agency, not, as argued by the Applicant, in connection with a commercial enterprise.
34. Our assessment is that the Applicant has failed to establish the relevance of clause 4(a) as a consideration against disclosure of the information in question.

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

35. Clause 4(c) of the table at section 14 provides:
- There is a public interest consideration against disclosure if disclosure of the information could reasonably be expected to diminish the competitive commercial value of any information to any person.*
36. To show that this is a relevant consideration against disclosure the Applicant must show that releasing the information could reasonably be expected to have the effect outlined and base this on substantial grounds.

37. The Applicant submits that it is reasonably expectable that disclosure would “*diminish the competitive commercial value of the Applicant to numerous people and entities.*”
38. Clause 4(c) is to do with the diminishing commercial value of information held by government, not the diminishing value of a commercial entity, such as the Applicant.
39. The Applicant has failed to demonstrate the relevance of the consideration at clause 4(c) to the information in question.

Consideration 4(d) – prejudice any person’s legitimate business interests

40. Clause 4(d) of the table at section 14 provides:

There is a public interest consideration against disclosure if disclosure of the information could reasonably be expected to prejudice any person’s legitimate business, commercial, professional or financial interests.

41. The term ‘person’ is defined in schedule 4, clause 1 of the GIPA Act to include:

An agency, the government of another jurisdiction (including a jurisdiction outside Australia) and an agency of the government of another jurisdiction.

42. Note, this definition does not limit the definition of person in the *Interpretation Act 1987*, which includes an individual, a corporation and a body corporate or politic.

43. To show that this is a relevant consideration against disclosure, the Applicant must:

- a. identify the relevant legitimate interest; and
- b. explain how the interest would be prejudiced if the information was disclosed.

44. Our view is that the relevant meaning of ‘legitimate’ for the purposes of this consideration is its ordinary meaning, that is genuine and not spurious.¹

45. The Applicant is a listed public company with a business focus on the Australian coal industry, and is one of the largest export coal miners in Australia.²

46. As such, it has a legitimate interest in operating for profit and therefore it satisfies the first element of the consideration.

47. Regarding the second element, the Applicant submits that disclosure will “*prejudice its legitimate business, commercial, professional and financial interests*” as the information is sensitive and confidential.

48. The Applicant has not explained how its interest would be prejudiced if the information was disclosed and we are therefore not persuaded that the Applicant has made a valid case as to the reasonably expectable consequences with respect to clause 4(d).

¹ Macquarie Dictionary 6th ed, October 2013

² <http://www.theapplicant.com.au/page/about-theapplicant/> accessed 5 March 2015

49. We are therefore not satisfied this is a relevant consideration against disclosure of the information in question.

Consideration 4(e) – prejudice the conduct, effectiveness or integrity of any research by revealing its purpose, conduct or results

50. Clause 4(e) of the table at section 14 states:

There is a public interest consideration against disclosure of information if disclosure of the information could reasonably be expected to prejudice the conduct, effectiveness or integrity of any research by revealing its purpose, conduct or results (whether or not commenced and whether or not completed).

51. The Applicant submits that disclosure of the information could reasonably be expected to “*prejudice the conduct, effectiveness and integrity of research conducted by the Applicant by revealing its purpose, conduct and/or results.*”
52. To establish the relevance of this consideration against disclosure, the Applicant needs to do more than re-state the words of the clause; it must show how all the elements are satisfied, to demonstrate the reasonably expectable effect of the consideration, as outlined in paragraph 26 above.
53. We are therefore not satisfied that this is a relevant consideration against disclosure.

Conclusion

54. The Information Commissioner is not satisfied that the Applicant has established that there is an overriding public interest against disclosure of the information, pursuant to section 97(2) of the GIPA Act.
55. The Information Commissioner therefore makes no recommendation against the decision of the Agency.

Review rights

56. 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.
57. The Applicant has the right to ask the NCAT to review the Agency’s decision.
58. 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

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

Elizabeth Tydd
Information Commissioner