information and privacy commission new south wales

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

Applicant:	The Applicant
Agency:	Department of Industry
Report date:	22 November 2016
IPC reference:	IPC16/R000581
Keywords:	Government information – parliamentary privilege – contempt – deliberative process – competitive commercial value

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Summary

1. The Applicant applied for information from the Department of Industry (the Agency) under the *Government Information (Public Access) Act 2009* (GIPA Act).
2. The Agency decided to provide access to some information and to not provide access to some information.
3. The Information Commissioner recommends under section 93 of the GIPA Act, that the Agency reconsider the decision and make a new decision by way of internal review. This reconsideration is limited only to documents 2, 3, 6 and 7.

Background

4. The Applicant applied under the GIPA Act to the Agency for access to the following information:
    a. "All briefing notes, documents and emails relating to the answers received on 27 July 2016 and printed in Questions and Answer paper no. 66 to Questions 1027 asked on 22 June 2016"
5. In its decision issued on 5 October 2016, the Agency decided to provide access to some information and to not provide access to some information.
6. In seeking a review of the decision by the Information Commissioner, the Applicant confirmed that access to the information was sought and that the Agency's refusal to provide the information was curtailing the ability for scrutiny of answers provided to Parliament.

Decisions under review

7. The decision under review is the Agency's decision to refuse to provide access to information in response to an access application.
8. This decision is a reviewable decision under section 80(d) of the GIPA Act.

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 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 contribute to positive and informed debate on important issues or matters of serious interest."

16. These are relevant public interest considerations in favour of disclosure.

Public interest considerations against disclosure

17. The only public interest considerations against disclosure that can be considered are those in schedule 1 and section 14 of 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 two public interest considerations against disclosure of the information, deciding that its release could reasonably be expected to:

    a. clause 1(e) of the table to section 14 of the GIPA Act – 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; and

    b. clause 4(c) of the table to section 14 of the GIPA Act – diminish the competitive commercial value of any information to any person.

21. The notice of decision also decided that there is a conclusive presumption that the public interest does not favour disclosure of information on the basis of contempt (clause 4 of Schedule 1of the GIPA Act).

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

Clause 4 of Schedule 1 – parliamentary privilege

23. Clause 4(c) of Schedule 1 to the GIPA Act states:

> *It is to be conclusively presumed that there is an overriding public interest against disclosure of information the public disclosure of which would, but for any immunity of the Crown:*
> *(c) infringe the privilege of Parliament.*

24. An agency is not required to balance the public interest considerations for and against disclosure before refusing access to information that is prohibited from disclosure by parliamentary privileged contained in clause 4(c) of Schedule 1 of the GIPA Act.

25. The information that is subject to this consideration is documents 1 and 8. These documents were inspected as part of our external review.

26. The Applicant has expressed views that "the refusal to release information undermines the ability of [redacted] to review the veracity of answers provided to Parliament".

27. We draw the Applicant's attention to a passage from *Stewart v Ronalds* (2009) 76 NSWLR 99, which was cited with approval in *Prebble v Television New Zealand* [1994] 3 All ER 407 and consistent with *OPEL Networks* and *Tebutt*:

> *The need to ensure so far as possible that a member of the legislature and witnesses before committees of the House can speak freely without fear that what they say will later be held against them in the courts*

28. This passage shows the importance of parliamentary privilege in protecting Ministers' right to free speech in a parliamentary democracy.

29. In order to establish that parliamentary privilege applies to the information, the information must relate to a "debate or proceeding in Parliament" in accordance with section 9 of the *Bill of Rights 1688* (applied in Australia through the *Imperial Acts Application Act 1969*).

30. The case of *In the matter of OPEL Networks Pty Ltd (in liq)* [2010] NSWSC 142, Austin J decided that briefing notes and draft briefing notes should be privileged from production. The principle expounded by Austin J at [118]:

> *It seems to me necessarily true, and not dependent upon the evidence of the particular case, that if briefings and draft briefings to Parliamentarians for Question Time and other Parliamentary debate are amenable to subpoenas and other orders for production, the Commonwealth officers whose task it is to prepare those documents will be impeded in their preparation, by the knowledge that the documents may be used in legal proceedings and for investigatory purposes that might well affect the quality of information available to Parliament.*

31. This principles of parliamentary privilege outlined by Austin J was considered "relevant to the scope and application of clause 4(c) of schedule 1 of the GIPA Act" by Isenberg JM in the case of *Tziolas v NSW Department of Education and Communities* [2012] NSWADT 69 and applied in *Tebutt v Minister for Lands and Water* [2015] NSWCATAD 95.

32. Based on the principles outlined in *OPEL Networks*, which was confirmed in *Tziolas* and applied in *Tebutt*, we are satisfied that the briefing note, which was created for the purpose of a Minister conducting business in Parliament to

respond to a question on notice asked on 22 June 2016, is subject to parliamentary privilege.

33. Similarly, the email thread is also subject to parliamentary privilege. This is because the thread relates to discussions concerning the briefing note and response to be provided regarding the question on notice.

34. The disclosure of the briefing note and email thread would create the situation described by Austin J above in *OPEL Networks*.

35. Accordingly, we are satisfied that the Agency has established a conclusive presumption of an overriding public interest against disclosure in relation to the information over which it has been claimed.

Consideration 1(e) – prejudice a deliberative process

36. Clause 1(e) of the table at section 14 states:

> *There is a public interest consideration against disclosure if disclosure of the information could reasonably be expected to 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 (whether in a particular case or generally).*

37. In order for this consideration to apply, 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 the agency.

38. The information that is subject to this consideration is documents 2, 3, 6 and 7.

39. The notice of decision states that "Documents 2, 3, 6 and 7 contain discussions regarding options and valuations for the proposed Regional & Performing Arts Conference Centre in Gosford".

40. These documents contain information relating to valuation (consultation) conducted in relation to a deliberative process concerning the Regional & Performing Arts Conference Centre.

41. The notice of decision further states that "the public release of documents… could allow external factors to influence the decision making process hindering the ability of both Government and Council to undertake a frank assessment of all options before them and make a robust decision" and that the release of the information would be prejudicial to the final decision.

42. In the matter of *Watts v Department of Planning and Environment* [2016] NSWCATAD 42, Senior Member McAteer expressed the need for evidence to be provided to support the consideration at [71]:

> *Whilst the respondent's view that the release of the material (currently withheld under clause 1 (e) and (f)), would prejudice future deliberations and consultations within the Department(s), it is not borne out by any evidence provided in these proceedings. Whilst there is an opinion provided by the respondent, no specific material has been advanced as to how and why that would be the case.*

43. The notice of decision gave an opinion that the final decision would be prejudiced because external factors would hinder the ability for the Government

and Council to make a robust decision, but it did not provide any specific material that would evidence how and why the expected prejudice would occur.

44. We are not satisfied that the Agency has demonstrated how the prejudice described is one that would reasonably be expected to occur upon disclosure of the information.

45. On that basis, we are not satisfied that the Agency has justified that this consideration applies to the information.

Consideration 4(c) – diminishing competitive commercial value

46. Clause 4(c) of the table to section 14 of the GIPA Act provides:

> *There is a public interest consideration against disclosure of information if disclosure of the information could reasonably be expected to diminish the competitive commercial value of any information to any person*

47. In order for this consideration to apply, the Agency must establish that:

    a. the information has a competitive commercial value; and

    b. the value could reasonably be expected to diminish if the information was disclosed.

48. The Agency must show the commercial context in which it operates, the significance of the information in that context and that there is a reasonable basis for the expectation that disclosure would diminish the competitive commercial value. The use of the descriptor "competitive" implies that the information would need to provide the person with a competitive edge

49. The information that is subject to this consideration is documents 2, 3, 6 and 7.

50. The notice of decision states that “documents 2, 3, 6 and 7 contain land valuations that if released would inhibit the future ability of Government & Council to subject the land to competitive tender as the commercial value is already publicly known”.

51. We have reviewed the documents and are satisfied that information about land valuation is contained only in documents 2, 3 and 7. Document 6 does not appear to contain information about land valuation that this consideration relates.

52. We are satisfied that land valuation is information of a competitive commercial value.

53. However, we are not satisfied how release of this information would diminish its competitive commercial value. This is because it is not apparent from the context how disclosure of this information would reasonably result in diminished competitive commercial value.

54. On that basis, we are not satisfied that the Agency has justified that this consideration applies to the information.

Recommendations

55. The Information Commissioner recommends under section 93 of the GIPA Act, that the Agency reconsider the decision and make a new decision by way of internal review. This reconsideration is limited only to documents 2, 3, 6 and 7.

56. In making a new decision, have regard to the matters raised and guidance given in this report.

57. We ask that the Agency advise the Applicant and us **within 10 working days** of the actions to be taken in response to our recommendations.

Review rights

58. 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.

59. The Applicant has the right to ask the NCAT to review the Agency's decision.

60. 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

61. 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

62. This review is now complete.

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

Elizabeth Tydd
Information Commissioner