

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

Applicant: Thomas Lockley
Agency: Infrastructure NSW
Report date: 3 August 2020
IPC reference: IPC20/R000419
Agency reference: 68
Keywords: Government information – information not held – searches – information already available to the applicant – overriding public interest against disclosure – personal information – breach of confidence
Legislation cited: *Government Information (Public Access) Act 2009*
Cases cited: *Smith v Commissioner of Police* [2012] NSWADT 85 (*Smith*); *Miriani v Commissioner of Police, New South Wales Police* [2005] NSWADT 187; *Davison v NSW Department of Education and Training* [2013] NSW ADT 25;

This review has been conducted under delegation by the Information Commissioner pursuant to section 13 of the *Government Information (Information Commissioner) Act 2009*.

Summary

Thomas Lockley (the Applicant) applied for information from Infrastructure NSW (the Agency) under the *Government Information (Public Access) Act 2009* (GIPA Act). The information sought by the Applicant relates to reviews of the new museum in Western Sydney project.

The Agency decided that there was an overriding public interest against disclosure of the information.

The Applicant applied for external review of that decision on 14 June 2020. The reviewer obtained information from the Agency including the notice of decision, the and details of its searches.

The review of the Agency's information and decision concluded that its decision is justified.

The reviewer makes no recommendations.

Background

1. On 6 May 2020, the Applicant applied under the GIPA Act to the Agency for access to the following information:

I refer to the Government's response to the report titled 'Museums and Galleries in New South Wales – Final Report by portfolio committee No. 4 – Legal Affairs' submitted to Mr David Blunt, Clerk of the Parliaments, Parliament House, Macquarie St Sydney on 17 July 2019, online at the Inquiry website.

In his response to the Inquiry Finding 1, page 2 of the document, the then Minister for the Arts stated: 'Since February 2016, Infrastructure NSW has undertaken six independent reviews of the New Museum in Western Sydney Project, conducted by more than 30 independent reviewers'.

I seek copies of the ensuing documents. If copies are not to be made available, I seek details of the establishment of the authorship groups, names of participants, dates of meetings and subjects of the reviews.

2. In its decision dated 2 June 2020, the Agency decided to refuse access to the information because there is an overriding public interest against its disclosure.
3. On 14 June 2020, the Applicant applied to the IPC for external review of that decision.
4. In seeking a review of the decision by the Information Commissioner, the Applicant contests the Agency's decision that there is an overriding public interest against disclosure of the information and that the Agency did not conduct reasonable searches in determining that the information is not held.

Decision under review

5. The Information Commissioner has jurisdiction to review the decision made by the Agency pursuant to section 89 of the GIPA Act.
6. The decision under review is the Agency's decision that government information is not held under section 58(1)(b) of the GIPA Act and the decision to refuse to provide access to the information because there is an overriding public interest against disclosure of the information under section 58(1)(d) of the GIPA Act.
7. These are reviewable decisions under section 80(e) and 80(d) of the GIPA Act.

Information not held – searches

8. Under section 53 of the GIPA Act, an agency must undertake reasonable searches for the information applied for.
9. In the external review application, the Applicant contends that the Agency did not conduct reasonable searches. In reference to the schedule of documents provided to the Applicant, the Applicant states:

None of these documents were referred to in the release of the Business Case papers, April 2017. We cannot find any more information about them. We urgently need to confirm that no discussion of alternative projects was made (as is a prime requirement for NSW Business Cases) and that no, or few museum experts have

ever been involved in the planning process. We need to be assured that the reviews were independent, and that they were not just 'box ticking' exercises. In short, if this ill begotten project ever comes to fruition, we need to know who to blame.

10. I have interpreted this statement as a purported request for external review of the Agency's searches.
11. For the purposes of this external review, I requested further information from the Agency on the searches that they carried out for the information sought by the Applicant.
12. The Agency advised that the independent reviews are assurance reviews undertaken by the Agency as part of its assurance function. They are known in the Agency as "Gateway Reviews" and "Gateway Review Reports". Such assurance reviews and reports are only held by the Assurance team in the Agency, and in e-Cabinet.
13. All Gateway Review Reports are saved in the Agency's records management system, which is called "Objective". The Assurance team also keeps a schedule of assurance reviews (an excel spreadsheet from the Infrastructure NSW Reporting and Assurance Portal) which summarises the status of the reviews - reviews completed, in progress and planned, when reported to Cabinet, as well other dates etc.
14. Objective was searched for assurance review reports that were listed in the relevant schedule. The records are arranged per Cluster/Agency/Project. The keywords would be "Powerhouse" or "Museum".
15. The Agency advised that it did not search for any hardcopy information as it does not keep hard copies as the reports are 'Sensitive NSW Cabinet'.
16. The search was undertaken by the Director of Assurance.
17. I have taken the above information into account when considering the following two questions derived from *Smith v Commissioner of Police* [2012] NSWADT 85 (*Smith*) at [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.
18. As to the first question in *Smith*, the Applicant has made a request for information about reviews of the New Museum in Western Sydney Project. This project is within the Agency's jurisdiction. I therefore accept that there are reasonable grounds to believe that information within the scope of the Applicant's request exist, and they would be documents of the Agency.
19. As to the second question in *Smith*, I note that the Agency made searches in accordance with the details in paragraphs [12] to [16].
20. What constitutes a 'reasonable search' will vary with the circumstances. Key factors in making an assessment 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, New South Wales Police* [2005] NSWADT 187 at [30]).

21. I am satisfied that the search terms used, and the locations of the search used by the Agency are reasonable to search for the information sought by the applicant. I am also satisfied that the person who conducted the search is of a position to have relevant knowledge of the locations and search terms to locate the information within the Applicant's request.
22. For these reasons, in relation to the second question in *Smith*, I am satisfied that the Agency's searches for the information requested by the Applicant have been reasonable in the circumstances of this case.
23. On the information available, I am satisfied that no further records within the scope of the Applicant's request are held by the Agency. Therefore, I am satisfied that the Agency's decision that government information is not held is justified.

The public interest test

24. The Applicant has a legally enforceable right to access the information requested and there is a presumption in favour of disclosure of information that is only displaced if there is an overriding public interest against disclosing the information. 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.

Public interest considerations in favour of disclosure

25. In its notice of decision, the Agency listed the following public interest considerations in favour of disclosure of the information in issue:
 - there is a statutory presumption in favour of disclosure under section 12 of the GIPA Act,
 - The information could reasonably be expected to provide evidence of the decision-making process with respect to decisions on issues of public importance.
 - The information may promote discussion of public affairs, enhance Government accountability and contribute to positive and informed debate about an issue of public importance.
26. I agree with the Agency that these are relevant public interest considerations in favour of disclosure in this matter.

Public interest considerations against disclosure

27. The Agency decided that there is a conclusive presumption of overriding public interest against the disclosure of the information sought by the applicant because that information was prepared before or after Cabinet's deliberation or decision on a matter that reveals or tends to reveal the position that a particular Minister has taken, is taking, will take, is considering taking, or has been recommended to take, on the matter in Cabinet.

28. The Agency also raised the following public interest consideration/s against disclosure of the information, deciding that its release could reasonably be expected to:
 - found an action against an agency for breach of confidence or otherwise result in the disclosure of information provided to an agency in confidence (clause 1(g) of the table to section 14 of the GIPA Act), and
 - reveal an individual's personal information (clause 3(a) of the table to section 14 of the GIPA Act).
29. I will discuss each of these considerations in turn.

Conclusive presumptions of an overriding public interest consideration against disclosure

30. If information falls within the scope of one of the clauses of schedule 1 to the GIPA Act, then it is conclusively presumed that it is not in the public interest to release this information. This means that when an agency demonstrates that information is of a kind listed under any of the clauses of Schedule 1 to the GIPA Act, the agency is not required to balance the public interest considerations for and against disclosure before refusing access to the information.

Schedule 1 Clause 2 - Cabinet Information

31. Clause 2 of schedule 1 to the GIPA Act states:
 - 1) *It is to be conclusively presumed that there is an overriding public interest against disclosure of information (referred to in this Act as Cabinet Information) contained in any of the following documents:*It then lists six categories of information that would fall under Cabinet information.
32. The Agency's notice of decision identified all six documents identified in the Schedule of Documents and the details of the establishment of the authorship groups, names of participants, dates of meetings and subjects of the reviews, as being Cabinet information.
33. Under section 30(1) of the *Government Information (Information Commissioner) Act* (GIIC Act) the Information Commissioner is unable to require a person or Agency to produce records or information (among other types of information) if compliance with the requirement would disclose information that is Cabinet information. Section 30(2) of the GIIC Act provides that a certificate of the Secretary or General Counsel of the Department of Premier and Cabinet that any information, record or thing or the answer to any question comprises, contains or would reveal Cabinet information is conclusive of that fact for the purposes of this section.
34. Due to the unique circumstances arising from the COVID-19 pandemic, the IPC wrote to the Agency requesting that they certify the reasons under Schedule 1 Clause 2 of the GIPA Act for the items in the notice of decision where a conclusive presumption of overriding public interest against disclosure is claimed by reason of Cabinet information.

35. The Head of Assurance in Infrastructure NSW responded by certifying that the documents identified in the notice of decision fall within the meaning of Cabinet information under Schedule 1 Clause 2 of the GIPA Act.
36. Relevantly, the Agency answered “Yes” to the following questions:
 1. *Is there information contained in a document listed in clause 2(1) of Schedule 1?*
 3. *a document prepared for the dominant purpose of its being submitted to Cabinet for Cabinet’s consideration (whether or not the document is actually submitted to Cabinet)?*
 6. *a document prepared before or after Cabinet’s deliberation or decision on a matter that reveals or tends to reveal the position that a particular Minister has taken, is taking, will take, is considering taking, or has been recommended to take, on the matter in Cabinet?*
37. The Agency answered “No” to the following question
 8. *Does the information consist solely of factual material?*
38. I have considered and assessed the information provided by the Agency and I am satisfied that the identification and certification of the information by the Head of Assurance at the Agency to be persuasive of that the fact that the information is a kind that attracts the claim of cabinet information.
39. I am satisfied that the Agency’s decision relating to this conclusive presumption of overriding public interest against disclosure is justified.
40. As I am satisfied that the Agency’s decision relating to the conclusive presumption of overriding public interest against disclosure is justified, it is unnecessary for the Agency to balance the public interest considerations in favour of disclosure and against disclosure before refusing access to the information. However, for completeness I have addressed the Agency’s reasons under clauses 1(g) and 3(a).
41. For guidance on the application of clause 1(g) and 3(a) of the table at section 14 as a public interest consideration against disclosure, see the [Public Interest Consideration \(PIC\) Resource](#) on the IPC website.

Consideration 1(g) – found an action against an agency for breach of confidence or otherwise result in the disclosure of information provided to an agency in confidence

42. For clause 1(g) to be found, the Agency needs to establish:
 - a. the information was obtained in confidence; and
 - b. disclosure of the information could reasonably be expected to found an action against an agency for breach of confidence; or
 - c. otherwise result in the disclosure of information provided in confidence
43. The Agency relied upon the Infrastructure Investment Assurance Framework (IIAF), which is available on the Agency’s website, which sets out in section 2.6 how review reports are treated, and restrictions on their disclosure. The Agency also states that it has implemented strict confidentiality protocols for the conduct of reviews and the provision of information to the Agency and review teams for the purposes of assurance reviews under the IIAF. The Agency considers there could be grounds for delivery agencies to claim that the Agency

has breached its obligations of confidence to those agencies, if this information were to be released.

44. I have read the IIAF and I am satisfied that the information sought by the Applicant was obtained in confidence and its disclosure would result in the disclosure of information provided in confidence.
45. I am satisfied that the Agency has justified that clause 1(g) is a relevant public interest consideration against disclosure.

Consideration 3(a) – reveal an individual’s personal information

46. I note that the Agency has conflated clauses 3(a) and 3(b) into its assessment of clause 3(a). Clause 3(a) does not concern the contravention of an information protection principle under *the Privacy and Personal Information Protection Act 1998* (PIIP Act). This is a consideration under clause 3(b).
47. Regarding its reasons, the Agency found that it holds information concerning the authors and participants of the reviews, and such information was obtained and used by the Agency in accordance with strict privacy and confidentiality requirements. It found that disclosure by Agency of such personal information without the consent of the relevant persons would constitute a breach of information protection principles 10 and 11.
48. The Agency decided that it was not able to identify a permissible use to release of personal information of review authors and participants to the public at large. It found that personal information collected and used by the Agency for the purposes of undertaking its assurance role in respect of Government projects may not be released without the persons’ consent.
49. Given the information’s status as Cabinet information, I was not able to inspect the information in issue. However, I am satisfied that the names of the review authors would constitute personal information for the purposes of clause 3(a).
50. I am satisfied that the Agency has justified that clause 3(a) is a relevant consideration against disclosure.
51. Although the Agency did not expressly address clause 3(b), it appears that the Agency also considered this public interest consideration against disclosure.
52. It is unclear from the Agency’s reasons why it considers disclosure of the information could reasonably be expected to be a breach of the PIIP Act. Generally, disclosure under the GIPA Act will not be a breach of the PIIP Act. Section 25 of the PIIP Act provides for exemptions where non-compliance is lawfully authorised or required. Section 5 of the PIIP Act provides that nothing in the PIIP Act affects the operation of the *Government Information (Public Access) Act 2009*.
53. As the Agency has not provided sufficient reasons to explain why it considers disclosure of the information to be a breach of the PIIP Act, I am not satisfied that the Agency has justified that clause 3(b) is a relevant consideration against disclosure.

Conclusion

54. I am satisfied that the Agency’s decision that there is a conclusive presumption of overriding public interest against disclosure of the information as it is Cabinet information under Schedule 1 clause 2 of the GIPA Act is justified.

Recommendations

55. I make no recommendations.

Applicant review rights

56. 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.
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.

Philip Tran

Senior Regulatory Officer