



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

Applicant: Mr Norman Cincotta
Agency: Department of Finance, Services and Innovation
Report date: 26 April 2017
IPC reference: IPC17/R000072
Agency reference: IR#8 2016-2017
Keywords: Government information – reveal personal information – prejudice any court proceedings – prejudice a person’s right to procedural fairness – reveal false or unsubstantiated allegations that are defamatory – prejudice business interests.
Legislation cited: *Government Information (Public Access) Act 2009; Building Professionals Act 2005.*
Cases cited: Nil

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

Note:- this report has been edited to address typographical errors only and reissued to the parties on 5 May 2017.

Summary

Mr Norman Cincotta (the Applicant) applied to the Department of Finance, Services and Innovation (the Agency) under the *Government Information (Public Access) Act 2009* (GIPA Act) for access to “missing pages” in a *Statement of Decision on Complaints & Investigations* (the Statement) given to him in accordance with section 32 of the *Building Professionals Act 2005*.

In its original decision the Agency decided to provide access to some further information in the Statement. On internal review the Agency decided to refuse to provide access to the information the Applicant applied for (the withheld pages of the Statement).

The review of the Agency’s information and decision concluded the decision was not justified.

The reviewer recommends, under section 93 of the GIPA Act, the Agency reconsider its decision and make a new decision.

Our reasons are set out in this report.

Background

1. On 30 June 2016 the Building Professionals Board (BPB) wrote to Mr Norman Cincotta (the Applicant) in response to a complaint he made about Mr Stanly Spyrou concerning his professional conduct as a certifying authority for a development at a particular address. Included with this letter was a *Statement of Decision on Complaints & Investigations* (the Statement) which the Board was required to provide the Applicant in accordance with section 32 of the *Building Professionals Act 2005*. The Statement is a 99 page document, however the Applicant was not provided with a complete copy; certain pages were withheld as they related to the complaints made by third parties.
2. On 18 October 2016 the Applicant applied under the GIPA Act for access to information held by the Agency. The Applicant described the information applied for as:

On 7 July 2016, I receive correspondence dated 30 June 2016 from Dr Gabrielle Wallace, Manager for Building Professionals Board. Complaints Reference No. 73/14. I have further application for missing pages to that document. I request missing pages, page numbers:

 - 4 to 57 inclusive and,
 - 67 to 95 inclusive.

The phone number to Building Professional Board written on correspondence to me is 02 8522 7472 – contact Sean Fagan.
3. In making its decision on 5 December 2016 the Agency decided to provide access to some further information and decided to refuse to provide access to some information. In giving reasons for refusing access to some information the Agency considered disclosure of some information would reveal personal information of third parties, would reveal false or unsubstantiated allegations about a person, and is likely to prejudice a person's business affairs.
4. A third party sought an internal review of the Agency's decision. The Agency decided the internal review on 27 January 2017 and in so doing, decided to refuse to provide access to the information the Applicant applied for. That is, all information appearing in pages 4 to 57 inclusive and 67 to 95 inclusive (the withheld pages).

Our review

5. On 13 February 2017 the Information Commissioner received the Applicant's request for external review. This request included a submission, in which the Applicant states "Those findings should not be withheld from me, as my complaint was merged with all the other complaint numbers" and "Mr Spyrou is not prejudiced by the release of the documents ... as I am not party to his NCAT hearing".
6. In conducting this review we have:
 - a. examined the original notice of decision made on 5 December 2016;
 - b. considered the notice of decision on Internal Review dated 27 January 2017;

- c. examined the Applicant's submission received by the IPC on 13 February 2017, which included the letter from BPB dated 30 June 2016 and the attached Statement of Decision dated 16 June 2016 that was enclosed with the letter;
 - d. considered the information provided by the Agency for the purpose of this review. This information includes pages 4 to 57 and 67 to 95 of the Statement.
7. On external review the burden of establishing that the decision is justified lies on the agency (section 97 of the GIPA Act).

Decisions under review

8. A decision to provide or refuse to provide access to information in response to an access application is a reviewable decision under section 80(d) of the GIPA Act.
9. The decision on internal review is the focus of the external review by the Information Commissioner. However, the Information Commissioner's view about the internal review decision has also been informed by examination of the original decision.

The public interest test

10. 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. For further information on the public interest test, see the Public Interest Test (PIT) Sheet provided with this report.

Public interest considerations in favour of disclosure

11. In its notice of decision on internal review, the Agency noted the general public interest in favour of disclosing government information (section 12(1) of the GIPA Act) and that it is not limited to the examples of other public interest considerations in favour of disclosure set out in section 12(2) of the GIPA Act.
12. According to its notice of decision the Agency considered the following factors to be relevant public interest considerations in favour of disclosure:
 - a. disclosure of the information could reasonably be expected to promote open and informed discussion of issues of public importance;
 - b. disclosure of the information could reasonably be expected to inform the public about the BPB's operations and, in particular its policies and practices for dealing with complaints lodged by members of the public
 - c. your complaint is part of the BPB's investigation
 - d. the matters investigated in the BPN's report have adversely affected a number of people.
13. The Agency's notice of decision also explains why it considers these factors in favour of disclosure and the extent of their application. It is my view that these considerations are relevant.

14. In addition to the considerations in favour of disclosure identified by the Agency I am of the view that there is a public interest in understanding the extent of a certifying authority's non-compliant activities.

Personal factors of the application

15. Section 55 of the GIPA Act provides for the following personal factors of the application that can be taken into account:
 - a. the Applicant's identity and relationship with any other person;
 - b. the Applicant's motive for making the access application; and
 - c. any other factors particular to the Applicant.
16. Section 55(2) of the GIPA Act provides that the personal factors of the application can also be taken into account as factors in favour of providing the applicant with access to the information.
17. However, under section 55(3) of the GIPA Act, the personal factors of the application may be relevant considerations against disclosure if (and only to the extent that) those factors are relevant to the agency's consideration of whether the disclosure of the information could reasonably be expected to have any of the effects referred to in clauses 2–5 (but not clauses 1, 6 or 7) of the table to section 14.
18. It is not immediately clear from the notice of decision on internal review, to what extent whether the Agency turned its mind to the personal factors of the application.
19. In his submission made to the Information Commissioner the Applicant states that "BPB combined all the complaints into one, and so merged all the complaints into one" and that "At no time in my telephone conversation with John Kim, did I state that I required access to the documents to assist me or others to gain restitution." The Applicant submits that his request was as stated in the original notice of decision, that is the Applicant "... found it difficult to understand how BPB reached their decision to take disciplinary actions against Mr Spyrou."
20. It is my view that the personal factors relevant to this access application include:
 - a. the fact the Applicant made a complaint to the BPB;
 - b. the fact that of the findings 1 matter was not proven, 1 matter was proven, 3 allegations were proven and 5 allegations were not proven;
 - c. that the Applicant contends his motive for making the access application is to understand how BPB reached its decision to take disciplinary action against the certifier.
21. Some of these factors may attribute weight for or against disclosure of the investigation report and vary in the weight to be attributed. The Agency might consider these factors and any others it identifies as relevant, in its considerations of whether there is an overriding public interest against disclosure of the information.

Public interest considerations against disclosure

22. In its notice of decision on Internal Review the Agency relied on five public interest considerations against disclosure of the information appearing in the withheld pages of the Statement, deciding that its release could reasonably be expected to:
 - a. reveal an individual's personal information (clause 3(a) of the table to section 14 of the GIPA Act);
 - b. prejudice any court proceedings by revealing matter prepared for the purposes of or in relation to current or future proceedings (clause 3(c) of the table to section 14 of the GIPA Act);
 - c. prejudice the fair trial of any person, the impartial adjudication of any case or a person's right to procedural fairness (clause 3(d) of the table to section 14 of the GIPA Act);
 - d. reveal false or unsubstantiated allegations about a person that are defamatory (clause 3(e) of the table to section 14 of the GIPA Act);
 - e. prejudice business interests (clause 4(d) of the table to section 14 of the GIPA Act).
23. I will discuss each of these considerations in turn.

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

24. For guidance on the application of clause 3(a) of the table at section 14 as a public interest consideration against disclosure, see the Public Interest Consideration (PIC) Resource attached to this report: [Consideration 3\(a\)](#).
25. According to its notice of decision on internal review the Agency states that the information appearing in the withheld pages of the Statement "... includes names of individuals and businesses, complaint reference numbers, property addresses and development approval reference numbers. This type of information could be used to discover the other complainants' identities" who "... were not advised ... their personal information ... could be made publicly available."
26. We examined the information appearing in the withheld pages of the Statement and we are satisfied that the names of individuals, property addresses and development approval reference numbers appearing in these records can be characterised as personal information because it is information about an individual whose identity is apparent or can reasonably be ascertained from the information. Nonetheless, we are not persuaded that the Agency has established that this consideration applies to the information identified because while it may have characterised the information as personal, the test requires the Applicant also explain how the information would be publicly revealed if it were disclosed.
27. Some of this information (residential addresses and complaint reference number of the complainants) has already been disclosed to the Applicant by BPB in its *Statement of Decision on Complaints & Investigations*. With this in mind it is worth noting that a person's identity may be apparent where neither the name nor photograph is involved, but the information about the person is such that it could not be referring to anyone else. This is known as constructive identification.

28. Nevertheless as stated at paragraph 1.3 of the Information Commissioners *Guideline 4 – Personal Information as a public interest consideration under the GIPA Act*, personal information includes opinions. There are opinions about third parties appearing in the withheld pages, however the Agency did not characterise this information as personal information or explain how it would be ‘publicly revealed’.
29. On this basis, I am not satisfied that the Agency has established that clause 3(a) of the table at section 14 is a relevant public interest consideration against disclosure of information appearing in the withheld pages of the Statement.

Consideration 3(c) – prejudice any court proceedings

30. For guidance on the application of clause 3(c) of the table at section 14 as a public interest consideration against disclosure, see the Public Interest Consideration (PIC) Resource attached to this report: [Consideration 3\(c\)](#).
31. The Agency’s notice of decision the Agency states that the certifier has “... appealed the BPB’s decision at NCAT”, that “NCAT ordered that some of the BPB’s disciplinary orders be stayed until it has handed down its decision” and finally that “NCAT already holds the information being considered for release”. It also states that it does not consider disclosure of the withheld pages of the Statement would have the effects outlined in clause 3(c) (and 3(d)) of the table at section 14 of the GIPA Act.
32. The test set out in the attached PIC Resource (Consideration 3(c)) has three requirements all of which must be satisfied in order to establish that clause 3(c) is a relevant consideration against disclosure. One requirement that must be satisfied is that the information in question was prepared for the purposes of or in relation to current or future proceedings.
33. The Applicant’s (and the other complainant’s) *Statement of Decision on Complain’s & Investigations* was prepared in accordance with section 32 of the *Building Professionals Act 2005* (the BPA). Section 32(1) of BPA Act provides:

The Board is to provide a written statement of a decision made under section 31 to the complainant and the accreditation holder concerned, and must do so as soon as practicable after the decision is made (bearing in mind the public welfare and seriousness of the matter).
34. The 99 page Statement was prepared for the purpose of informing complainants of the outcome of their complaint. It was not prepared for the purpose of NCAT proceedings.
35. For this reason I am of the view that this consideration against disclosure is not relevant.

Consideration 3(d) – prejudice a person’s right to procedural fairness

36. For guidance on the application of clause 3(d) of the table at section 14 as a public interest consideration against disclosure, see the Public Interest Consideration (PIC) Resource attached to this report: [Consideration 3\(d\)](#).
37. In its notice of decision the Agency states that it considered whether disclosing the withheld pages of the Statement would prejudice an individual’s right to procedural fairness. It also states that “Although BPB had made its decision and notified you and other complainants in writing ... It is possible ... NCAT could overturn part or all of BPB’s decision, meaning that information contained in the report about [the certifier’s] professional conduct would be superseded and therefore false and unsubstantiated”.

38. If the Agency is to rely of this consideration against disclosure they need to demonstrate that the certifier in this matter's right to procedural fairness would be prejudiced by the disclosure of the withheld pages of the Statement. While it is possible that the 'NCAT could overturn part or all of the BPB's decision' and that if this occurred some of the information in the 99 page Statement would be superseded, I do not see the relevance of these reasons in so far as its application toward demonstrating how the certifier's right to procedural fairness would be prejudiced.
39. A person's right to procedural fairness may be prejudiced if information which is critical of that person is disclosed to a third party before the person who has been criticized has had an opportunity to comment on the claims.
40. It is apparent from the Statement itself that the certifier was afforded the opportunity to comment on the claims against him before the Statement was issued to the complainants. If the Agency is of the view that disclosure of the withheld pages of the Statement would prejudice the certifier's procedural fairness in so far as proceedings before the NCAT it would need to explain that the disclosure of the 99 page Statement (which has already been disclosed) occurred without or before the certifier had an opportunity to comment on the allegations in the NCAT, and how this caused detriment to the procedural fairness associated with those proceedings.
41. The words "could reasonably be expected to" means more than a mere possibility, risk or chance and must be based on real and substantial grounds and not be purely speculative, fanciful, imaginary or contrived.
42. Therefore I am not persuaded that the Agency has established that this consideration against disclosure is a relevant consideration against the disclosure of the withheld pages of the Statement.

Consideration 3(e) – reveal false or unsubstantiated allegations that are defamatory

43. For guidance on the application of clause 3(e) of the table at section 14 as a public interest consideration against disclosure, see the Public Interest Consideration (PIC) Resource attached to this report: [Consideration 3\(e\)](#).
44. The Agency's notice of decision states that if the NCAT overturned part or all of the BPB's decision the information appearing in the Statements given to the complainants "... would be superseded and therefore false and unsubstantiated".
45. I have examined the information appearing in the 99 page Statement and note that some allegations were not proven. On this basis I am satisfied that some allegations maybe false or unsubstantiated. Nonetheless, the Agency has not articulated how disclosure of information that could be characterised as false or unsubstantiated allegations about the certifier, are defamatory.
46. For these reasons I am not persuaded that the Agency has established that clause 3(e) is a relevant consideration against the disclosure of the withheld pages of the Statement.

Consideration 4(d) – prejudice business interests

47. For guidance on the application of clause 4(d) of the table at section 14 as a public interest consideration against disclosure, see the Public Interest Consideration (PIC) Resource attached to this report: [Consideration 4\(d\)](#).

48. It is not immediately apparent from the notice of decision which of the interests would be prejudiced. However what it does state that the amount of information published allows members of the public to make an informed decision while still permitting the certifier to engage in their profession, which is their livelihood. Therefore it would appear that the interest the Agency considered would be prejudiced is the certifier's profession.
49. The Agency also acknowledges in its notice of decision that "Members of the public can view the information on the register when deciding whether to engage a building certifier" and that "... the certifier's interest are also adversely affected when information about misconduct is published on the register, as this could deter members of the public from engaging them." Further the Agency considers, that disclosing "The level of detail contained in the documents... when they are not publicly available... would be unfair and could *potentially* create a perception that the BPB's findings against [the certifier] were even more serious."
50. What is not clear is how disclosure of the withheld pages of the Statement, could reasonably be expected to damage or cause further damage to the professional reputation. The words "could reasonably be expected" means more than a mere possibility, risk or chance and must be based on real and substantial grounds and not be purely speculative, fanciful, imaginary or contrived." This could be demonstrated by explaining that has he lost clients due to the information already published on the register and/or that he has suffered financial loss for example. It would also require an explanation as to how disclosure of further information would exacerbate that loss if such a loss were to exist.
51. While I can see that this consideration against disclosure may apply, based on the Agency's reasons, I am not satisfied that it has not already been negated by the publication of the disciplinary action on the BPB's website or to what extent this consideration applies.

Conclusion/s

52. On the information before me, I am not satisfied that the Agency's decision to refuse to provide access to the investigation report is justified for the reasons set out in this review report.

Recommendation/s

53. I recommend under section 93 of the GIPA Act, the Agency reconsider its decision to refuse to provide access to the withheld pages of the Statement and make a new decision.
54. In making a new decision, have regard to the matters raised and guidance set out in this report.
55. I ask that the Agency advise the Applicant and the IPC by 10 May 2017 of the actions to be taken in response to our 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>
59. 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

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

Simone Newton
Investigation & Review Officer

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

Clause 3(a) 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 reveal an individual’s personal information.

Personal information is defined in the GIPA Act as:

...information or an opinion (including information or an opinion forming part of a database and whether or not recorded in a material form) about an individual (whether living or dead) whose identity is apparent or can reasonably be ascertained from the information or opinion. [Schedule 4(4)(1) GIPA Act]

The term ‘reveal’ is defined in schedule 4, clause 1 of the GIPA Act to mean:

To disclose information that has not already been publicly disclosed (otherwise than by lawful means).

Section 15(b) of the GIPA Act provides that agencies must have regard to any relevant guidelines issued by the Information Commissioner when determining whether there is an overriding public interest against disclosure.

The Information Commissioner has published *Guideline 4 – Personal information as a public interest consideration under the GIPA Act*. This Guideline sets out what is meant by ‘personal information’ in the GIPA Act and includes (in paragraph 1.2) examples of what should be considered personal information.

In order to establish that this consideration applies, the Agency has to:

- a. identify whether the information is personal information,
- b. consider whether the information would be revealed by disclosing it under the GIPA Act.

Consideration 3(c) – prejudice any court proceedings

Clause 3(c) of the table at 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 prejudice any court proceedings by revealing matter prepared for the purposes of or in relation to current or future proceedings

To show this is a relevant consideration against disclosure, the Agency may need to consider such questions as:

- a. which court proceedings would be prejudiced?
- b. how would the court proceedings be prejudiced?
- c. what event was the information prepared in response to?

The Agency needs to provide sufficient detail with respect to the anticipated prejudicial effect, and base this on relevant facts.

It must give reasons, including the findings on any material questions of fact underlying those reasons, together with a reference to the sources of information on which those findings are based (section 61(a) and (b) of the GIPA Act).

Consideration 3(d) – prejudice the fair trial of any person

Clause 3(d) 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 prejudice the fair trial of any person, the impartial adjudication of any case or a person's right to procedural fairness.

The meaning of the word prejudice is to “cause detriment or disadvantage”. To establish that this consideration applies, the Agency must show that there is a reasonable expectation of prejudice occurring to a case or trial which is pending or current.

The Agency needs to provide sufficient detail with respect to the anticipated prejudicial effect, and base this on relevant facts. It must give reasons, including the findings on any material questions of fact underlying those reasons, together with a reference to the sources of information on which those findings are based (section 61(a) and (b) of the GIPA Act).

Consideration 3(e) – reveal false or unsubstantiated allegations that are defamatory

Clause 3(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 false or unsubstantiated allegations about a person that are defamatory.

To demonstrate that this is a relevant consideration, the Agency must show that the information contains:

- a. false and unsubstantiated allegations against a person; and
- b. that those allegations are defamatory.

In order to satisfy the second element of this consideration, the Agency must consider and reach a conclusion about whether the allegations are defamatory according to the general principles of defamation law.

A general statement of the elements of defamation from Halsbury's Laws of Australia (chapter written by Dr David Rolph) states (with notes removed):

A publication is defamatory of a person if it tends, in the minds of ordinary reasonable people, to injure his or her reputation either by:

- (1) disparaging him or her;*
- (2) causing others to shun or avoid him or her; or*
- (3) subjecting him or her to hatred, ridicule or contempt.*

The cause of action in defamation is complete upon the publication of a defamatory imputation and damage may be inferred without proof of actual loss or injury to the plaintiff.

Consideration 4(d) – prejudice business interests

Clause 4(d) 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 prejudice any person's legitimate business, commercial, professional or financial interests

In order to establish the relevance of this consideration, the agency must:

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

The meaning of the word prejudice is to “cause detriment or disadvantage”.

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

In particular, an agency must identify the party whose interests would be prejudiced, and the relevant interest/s. In order to justify the application of the consideration, an agency must demonstrate the causal nexus between the disclosure of the information and the prejudice to that interest.

¹ Macquarie Dictionary, 6th edition, October 2013