

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

Applicant: The Hon. Sophie Cotsis, MLC
Agency: Office of Local Government
Report date: 14 July 2015
IPC reference: IPC14/R000735
Keywords: Government information – cabinet information – excluded
information – conclusive presumption against disclosure

Contents

Contents	1
Summary	2
Background.....	2
Decisions under review	2
The public interest test.....	2
Clause 2 of Schedule 1 – cabinet information.....	3
Clause 6 of Schedule 1 – excluded information	4
Recommendations.....	4
Review rights	4
Completion of this review	5

Summary

1. The Hon. Sophie Cotsis, MLC (the Applicant) applied for information from the Office of Local Government (the Agency) under the *Government Information (Public Access) Act 2009* (GIPA Act).
2. The Agency decided to provide access to some of the information, that some information is not held by the Agency and to refuse to provide access to some information because there is an overriding public interest against disclosure of the information.
3. We do not make any recommendations in relation to the Agency's decision.

Background

4. On 18 September 2014, the Applicant applied under the GIPA Act to the Agency for access to information relating to the "Fit for the Future" package.
5. In its decision issued on 26 November 2014, the Agency decided to provide access to some of the information, that some information is not held by the Agency and to refuse to provide access to some information because there is an overriding public interest against disclosure of the information.
6. In seeking a review of the decision by the Information Commissioner, the Applicant confirmed that she pressed for the release of the information.

Decisions under review

7. The decision under review is the Agency's decision to:
 - a. Refuse to provide access to government information in response to an access application on the basis of two conclusive presumptions of overriding public interest against disclosure:
 - i. clause 2 of Schedule 1 of the GIPA Act – cabinet information; and
 - ii. clause 6 of Schedule 1 of the GIPA Act – excluded information.
8. For the purpose of conducting this review, the Agency provided the Information Commissioner with a copy of the information to which access was refused.

The public interest test

9. According to section 9(1) of the GIPA Act, an access applicant has a legally enforceable right to access the information requested, unless 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.
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. In its notice of decision, the Agency listed the following public interest considerations in favour of disclosure of the information in issue:

- a. general presumption in favour of the disclosure of government information under section 5 of the GIPA Act.
- 12. 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.

Clause 2 of Schedule 1 – cabinet information

- 13. Clause 2(1) 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 (referred to in this Act as **Cabinet information**) contained in any of the following documents...*

 - (a) 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)*
 - (d) a document prepared after Cabinet's deliberation or decision on a matter that would reveal or tend to reveal information concerning any of those deliberations or decisions*
- 14. An agency is not required to balance the public interest considerations for and against disclosure before refusing access to information that is prepared for the dominant purpose of being submitted to Cabinet for consideration or reveals, or tends to reveal, cabinet deliberations.
- 15. The information subject to this conclusive presumption against disclosure is documents 5 and 24 of the schedule of documents.
- 16. In relation to document 5, the notice of decision states that the document was prepared for the dominant purpose of being submitted to Cabinet.
- 17. According to *D'Adam v New South Wales Treasury [2014] NSWCATAD 68*, agencies must meet three conditions in order to rely on clause 2(1)(a):
 - a. there is information;
 - b. the information must be contained in a document; and
 - c. the document is prepared for the dominant purpose of being submitted to Cabinet for Cabinet's consideration.
- 18. The document contains information as defined by the GIPA Act. The first two conditions are met.
- 19. In relation to the third condition, we note that the document is marked as "Cabinet in Confidence". Although this classification is not decisive, it provides an indication of the nature and purpose of the document. The information contained in the document also serves this function.
- 20. Upon review, we are satisfied that the document was prepared for the dominant purpose of being submitted to Cabinet. The three conditions have been met and the Agency is able to rely on the conclusive presumption against disclosure under clause 2(1)(a) of Schedule 1 of the GIPA Act.
- 21. In relation to document 24, the notice of decision states that the document would reveal or tend to reveal information concerning Cabinet deliberations or decisions.
- 22. Upon review, the document contains information that if disclosed would reveal information concerning a cabinet decision. Therefore, the Agency is able to rely

on the conclusive presumption against disclosure under clause 2(1)(d) of Schedule 1 of the GIPA Act.

23. We are satisfied that the Agency has established a conclusive presumption of an overriding public interest against disclosure in relation to these documents.

Clause 6 of Schedule 1 – excluded information

24. Clause 6(1) 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 that is excluded information of an agency, other than information that the agency has consented to the disclosure of

25. An agency is not required to balance the public interest considerations for and against disclosure before refusing access to information that is excluded information.
26. The information subject to this conclusive presumption against disclosure is document 4.
27. A list of excluded information is contained in Schedule 2 of the GIPA Act.
28. The notice of decision cites clause 3 of Schedule 2 of the GIPA Act. This clause describes the type of information held by the Agency that is excluded information. Specifically, it cites:

The Treasury Corporation—borrowing, investment and liability and asset management functions.
29. We have reviewed the information and are satisfied that the Agency's classification of the information falls within this clause.
30. If excluded information is information of another agency, the agency must consult with that agency to determine whether it consents to the disclosure of that information.
31. The Agency's notice of decision states that it consulted with Treasury Corporation and it did not consent to the disclosure. On that basis, the Agency did not disclose the information.

Recommendations

32. We are satisfied that the Agency's decision to refuse access to the information is justified.
33. Therefore, we do not make any recommendations regarding the Agency's decision.

Review rights

34. 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.
35. The Applicant has the right to ask the NCAT to review the Agency's decision.

36. 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

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

Elizabeth Tydd
Information Commissioner