



Review report under the

Government Information (Public Access) Act 2009

Applicant: The Applicant
Agency: Palerang Council
Report date: 15 July 2015
IPC reference: IPC15/R000253
Keywords: Government information – decision to refuse access –
prejudice supply of confidential information - prejudice the
effective exercise of agency's function

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Summary

1. The Applicant applied for information from the Palerang Council (the Agency) under the *Government Information (Public Access) Act 2009* (GIPA Act).
2. The Agency decided to provide access to some information and decided to refuse access to some other information because of an overriding public interest against its disclosure.
3. The Information Commissioner is satisfied the decision of the Agency is justified and makes no recommendations in relation to the Agency's decision.

Background

4. The Applicant applied under the GIPA Act to the Agency for access to the following information:
 - a. All information pertaining to the Applicant, applicant for Senior Environmental Office (Compliance) including but not limited to references obtained during recruitment processes.
 - b. All information held by Palerang Council regarding the Applicant.
5. On 24 September 2014, the Agency provided its decision made by the Principal Officer, to provide access to some information and to refuse under section 58(1)(e) of the GIPA Act to deal with another part of the application, because of an overriding public interest against disclosure of the information.
6. The Applicant sought internal review by the Agency and on 23 October 2014, the General Manager of the Agency affirmed the initial decision of the Agency.
7. The Applicant requested external review by the Information Commissioner. On 27 March 2015, in review report IPC14/R000694 the Information Commissioner recommended under section 93 of the GIPA Act that the Agency reconsider its decision and make a new decision, as if the decision reviewed had not been made.
8. On 8 May 2015 the Agency decided to provide access to items 1 and 2 in the Schedule of Documents and decided under section 58(1)(d) to refuse access to item 3 (a referee report) because of an overriding public interest against disclosure of the information it contains.
9. In seeking a review of the decision by the Information Commissioner, the Applicant expressed concern that:
 - a. the Agency had failed to release the information requested without providing a satisfactory reason; and
 - b. the decision-maker of the decision under review is the same person who conducted an original determination in response to his GIPA application.
10. The Applicant's concern with respect to the decision-maker is addressed by an explanation with respect to section 93(4) of the GIPA Act, which provides that:

Unlike an internal review, the reconsideration of a decision that is not an internal review:

(a) can be done by the person who made the original decision, and

(b) can be the reconsideration of a decision made by the principal officer of the agency.

Because the Agency's decision of 8 May 2015 is a reconsideration of a decision that is not an internal review, it can be made by the person who made the original decision, who in this instance is the Principal Officer.

Decisions under review

11. The decision under review is the Agency's decision to refuse access to item 3 in the Schedule of Documents, the referee report dated 24 June 2014.

The public interest test

12. 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.
13. 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.
14. 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.
15. 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.
16. 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

17. 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).
18. In its notice of decision, the Agency listed the following public interest considerations in favour of disclosure of the information in issue:
 - a. the information is the Applicant's own personal information;
 - b. disclosure could reasonably be expected to advance the fair treatment of individuals in accordance with the law in their dealings with Council;
 - c. disclosure may contribute to the administration of justice generally, including procedural fairness;

- d. disclosure would be likely to provide background or context for the decision not to appoint the Applicant to the vacant position.

Public interest considerations against disclosure

19. The only public interest considerations against disclosure that can be considered are those in schedule 1 and section 14 of the GIPA Act.
20. 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.
21. 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.
22. 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. prejudice the supply to an agency of confidential information that facilitates the effective exercise of that agency’s functions (clause 1(d) of the table to section 14 of the GIPA Act); and
 - b. prejudice the effective exercise by an agency of the agency's functions (clause 1(f) of the table to section 14 of the GIPA Act).
23. I will discuss each of these considerations in turn.

Consideration 1(d) – prejudice the supply to an agency of confidential information that facilitates the effective exercise of that agency’s functions

24. Clause 1(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 supply to an agency of confidential information that facilitates the effective exercise of that agency’s functions (whether in a particular case or generally).
25. In order for this to be a relevant consideration against disclosure, the Agency must be satisfied that:
 - a. the information was obtained in confidence;
 - b. disclosure of the information could reasonably be expected to prejudice the supply of such information to the Agency in future; and
 - c. the information facilitates the effective exercise of the Agency’s functions.
26. The meaning of the word prejudice is to “cause detriment or disadvantage’.
27. Although the GIPA Act does not use the phrase “future supply”, the nature of the prejudice that this consideration deems to be contrary to the public interest, is implicit. This future effect is one aspect of the abstract nature of the enquiry. The other abstract element is supply in a general sense and whether disclosure will impact supply of similar information by persons to the agency in the future.

28. It is commonly understood that information will have a confidential quality if the person was not bound to disclose the information but did so on the basis of an express or inferred understanding that the information would be kept confidential.
29. The notice of decision states that the referee report was obtained as part of the Agency's recruitment process, which included making contact with referees who have actually worked with a shortlisted job applicant, and obtaining a candid assessment of the applicant against the position's selection criteria.
30. The Agency submits that:
 - a. it cannot compel a referee to provide information about an applicant;
 - b. it relies on the ability of referees to provide information voluntarily and candidly;
 - c. it takes steps to ensure the information is obtained at a convenient time for the referee to avoid rushed or superficial content and to ensure confidentiality;
 - d. it treats the information provided as being confidential to be used only for the purpose of assessing the suitability of the applicant for the position.
31. The Agency concludes that if it is unable to ensure the confidentiality of information provided during a referee check, the referee is likely to be guarded and selective in what they say about an applicant, which is likely to prejudice the supply of information necessary to enable the Agency to select the most suitable candidate.
32. We are satisfied that the Agency has established the elements of this consideration against disclosure with respect to the information in question.

Consideration 1(f) – prejudice the effective exercise by an agency of the agency's functions

33. Clause 1(f) 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 effective exercise by an agency of the agency's functions.
34. To show that this is a relevant consideration against disclosure, the Agency must establish:
 - a. the relevant function of the Agency;
 - b. that is or would be prejudiced by release of the information.
35. The notice of decision relies upon the same reasons as set out in relation to consideration 1(d) before concluding that disclosure of the information in the referee report could reasonably be expected to prejudice the Agency's ability to obtain frank and candid information about job applicants and that this will prejudice the effective exercise of the Council's function of selecting the most suitable candidate for a position.
36. We are satisfied that the Agency has established the relevance of this consideration against disclosure with respect to the information in question. It has clearly identified the relevant Agency function of recruitment and the reasonable expectability of prejudice to that function should the information be released.

Consultation on public interest considerations

37. In accordance with section 54 of the GIPA Act, the Agency consulted with the relevant third party, who may reasonably be concerned about the disclosure of their personal information contained in the referee report. The third party raised an objection to release.
38. While the objection is not determinative in itself, section 54(5) of the GIPA Act requires an Agency to take into account any objection to disclosure of information received in the course of consultation when determining whether there is an overriding public interest against disclosure.
39. The Agency has considered the relevance of the third party's objections in its determination of the public interest test.

Balancing the public interest

40. The GIPA Act does not provide a set formula for weighing individual public interest considerations or assessing their comparative weight. Whatever approach is taken, these questions may be characterised as questions of fact and degree to which different answers may be given without being wrong, provided that the decision-maker acts in good faith and makes a decision available under the GIPA Act.
41. A 2014 NCAT decision helpfully stated that:
*It is really a matter of placing identified considerations in order of priority or importance.*¹
42. The notice of decision acknowledges that the most significant of the considerations in favour of disclosure is that the information comprises personal information about the Applicant. It balances this against the need to ensure that the Agency is able to obtain frank and candid information about job applicants from referees and the importance of the understanding that, in providing such information, it will be treated confidentiality.
43. The Agency concludes that disclosure in this instance could reasonably be expected to prejudice the Agency's ability in future to recruit the most suitable candidates for vacant positions and that this outweighs the public interest considerations in favour of disclosing the information.

Recommendations

44. The Information Commissioner is satisfied that the Agency's decision is justified under section 97 of the GIPA Act and makes no recommendations in relation to the Agency's decision.

Review rights

45. 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.
46. The Applicant has the right to ask the NCAT to review the Agency's decision.

¹ Mannix v Department of Education and Communities [2014] NSWCATAD 35 at [63]

47. 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

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

Elizabeth Tydd
Information Commissioner