



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

Applicant: The Applicant
Agency: Landcom trading as UrbanGrowth NSW
Report date: 23 March 2016
IPC reference: IPC15/R000558
Keywords: Government information – decision to refuse access – Cabinet information

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Summary

1. The Applicant applied for information from Landcom trading as UrbanGrowth NSW (the Agency) under the *Government Information (Public Access) Act 2009* (GIPA Act).
2. The Agency decided to refuse access to the information under section 58(1)(d) of the GIPA Act, on the basis that there is a conclusive presumption against disclosure of the information because it is Cabinet information.
3. The Information Commissioner is satisfied that the information is Cabinet information pursuant to clause 2(1)(c) of Schedule 1 to the GIPA Act and that the Agency has justified its decision in accordance with section 97 of the GIPA Act.
4. The Information Commissioner makes no recommendations in relation to the Agency's decision.
5. The Information Commissioner recommends pursuant to section 95 of the GIPA Act, that the Agency note the guidance in this report with respect to dealing with future GIPA applications in which a claim of conclusive presumption against disclosure of Cabinet information is made.

Background

6. On 2 October 2015 the Applicant applied under the GIPA Act to the Agency for access to the three-dimensional montages of the Parramatta North Urban Renewal project that were presented by Urban Growth NSW at the Heritage Council of NSW meeting on 4 March 2015.
7. The Applicant requested access be provided to the information in the following ways:
 - a. a copy of the model; and/or
 - b. high resolution images of the model; and/or
 - c. for the model to be made available during the Applicant's Symposium on 12 October 2015 at the Parramatta Leagues Club.
8. In its decision issued on 03 November 2015, the Agency decided to refuse access to the information because of the conclusive presumption against disclosure in clause 2(1)(c) of Schedule 1 to the GIPA Act, Cabinet information. This is the decision under review, pursuant to section 80(d) of the GIPA Act.
9. In seeking a review of the decision by the Information Commissioner, the Applicant confirmed that it disagrees with the Agency's decision.
10. During the course of this review the Agency provided us with an electronic copy of the information for inspection, which in accordance with section 91 of the GIPA Act, we will not disclose.

Conclusive presumption against disclosure of Cabinet information

11. Under section 14(1) and clause 2 of Schedule 1 to the GIPA Act, it is to be conclusively presumed that there is an overriding public interest against disclosure of Cabinet information.

12. In circumstances in which a conclusive presumption against disclosure is established, there is no requirement to apply the public interest test.

Cabinet information generally

13. Clause 2 of Schedule 1 to the GIPA Act sets out the type of documents that contain Cabinet information. If information falls within one of those categories, then it may be that there is a conclusive presumption against its disclosure.
14. However, before deciding that a conclusive presumption applies, an agency must first consider the exceptions at clauses 2(2) and 2(4) of Schedule 1 to the GIPA Act.
 - a. Whether the information contained in such documents is solely factual in nature. Clause 2(4) of Schedule 1 to the GIPA Act provides:

Information is not Cabinet information to the extent that it consists solely of factual material unless the information would:

(a) reveal or tend to reveal information concerning any Cabinet decision or determination, or

(b) reveal or tend to reveal the position that a particular Minister has taken, is taking or will take on a matter in Cabinet.
 - b. Whether public disclosure of the document has been approved by the Premier or Cabinet, or 10 years have passed since the end of the calendar year in which the document came into existence, pursuant to clause 2(2)(a) and 2(2)(b) of Schedule 1 to the GIPA Act.
15. An agency must also consider the contents of any attachments to Cabinet information. Information is not Cabinet information merely because it is contained in a document attached to a document referred to in clause 2(1) of schedule 1 to the GIPA Act (clause 2(3) of schedule 1 to the GIPA Act).
16. For the purposes of the GIPA Act, Cabinet includes a committee of Cabinet and a subcommittee of a committee of Cabinet (clause 2(5) of Schedule 1 to the GIPA Act).
17. Under section 97 of the GIPA Act, it is an agency's responsibility to justify a decision that information is Cabinet information. Before we can be satisfied as to the Agency's decision to refuse access to the information, or make recommendations against a decision, we must be independently satisfied that the information has been properly categorised by the Agency.

Decision under review

18. The Agency decided there is a conclusive presumption against disclosure of the information because it is Cabinet information. The Agency categorised the information as the type described in clause 2(1)(c) of Schedule 1 to the GIPA Act, which is:

a document prepared for the purpose of its being submitted to Cabinet for Cabinet's approval for the document to be used for the dominant purpose for which it was prepared (whether or not the document is actually submitted to Cabinet and whether or not the approval is actually given).
19. The notice of decision says:

- a. *the information is a copy of, or part of, or contains an extract of information which was prepared for the purpose of being part of the Business Case which will be submitted to Cabinet for Cabinet's consideration of the Parramatta North Urban Transformation Project;*
- b. *it is therefore a document prepared for the purpose of being submitted to Cabinet for Cabinet's approval and this is the dominant purpose for which it was prepared. (Schedule 1(2)(1)(c)); and*
- c. *we note that Cabinet information also includes a document that is a preliminary draft of, or a copy of, or part of, or contains an extract from, a document referred to in Schedule 1(2)(1)(a)-(e).*

20. To be satisfied that the conclusive presumption against disclosure applies to the information, it must be determined that none of the exceptions apply.

- a. Whether the information is solely factual in nature. If the information contains "*...opinions or recommendations about the desirability, likelihood and attainability of certain outcomes. It is not solely factual material*".¹

Having examined the information, we are satisfied that it is not solely factual in nature. Our inspection confirms that the information does contain three dimensional montages of the Parramatta North Urban Renewal Project, which are defined as pictures made from a

*method of arranging in one composition pictorial elements borrowed from several sources so that the elements are both distinct and blended into a whole, through techniques such as superimposition.*²

The use of the words "*Renewal*" and "*Transformation*" to describe the Project, suggest that the compositions comprise a view, opinion or recommendation that is not currently in existence. Our inspection of the information confirms that this is the case.

- b. Whether public disclosure of the information has been approved by the Premier or Cabinet, or 10 years have passed since the end of the calendar year in which the document came into existence, pursuant to clause 2(2)(a) and 2(2)(b) of Schedule 1 to the GIPA Act.

During the course of this review, the Agency advised that the information came into existence in 2015. As such, 10 years have not passed since the end of the calendar year in which the document came into existence. The Agency also confirmed that neither the Premier nor Cabinet have approved public disclosure of the information. For these reasons, the information does not meet clause 2(2)(a) or 2(2)(b) of Schedule 1 to the GIPA Act.

21. It must be established that the montages are:

- a. information
- b. contained in a document
- c. prepared for the purpose of being submitted to Cabinet for Cabinet's approval for the document to be used for the dominant purpose for which

¹ D'Adam v New South Wales Treasury [2014] NSWCATAD 68 at [71]

² Macquarie Dictionary online, 6th edition, 2013

it was prepared (whether or not the document is actually submitted to Cabinet and whether or not the approval is actually given.)

22. We are satisfied that the montages meet the condition of being “information” for the purposes of the GIPA Act, which means “*information contained in a record held by an agency*” (section 4 of the GIPA Act.) Record means “*any document or other source of information compiled, recorded or stored in written form or by electronic process, or in any other manner or by any other means*” (Schedule 4 (clause 10) to the GIPA Act.)
23. During the course of this review, the Agency described the circumstances in which the information was presented to the Heritage Council, as follows:

The digital model was presented as part of a power point presentation...as part of a broader discussion on...the site. The model was presented on an [Agency] laptop and a copy of the model was not left with the Heritage Council...At that stage the information was part of a collection of information that was being prepared for a Cabinet Minute at a later date (December 2015).
24. Guidance with respect to information prepared for the purpose of being submitted to Cabinet is cited in *D’Adam v New South Wales Treasury [2014] NSWCATAD 68* at [51]. While this decision is distinguished from the present case in that the respondent relied primarily on clause 2(1)(b) of Schedule 1 to the GIPA Act, the dominant purpose must be “*causative in the sense that, but for its presence*” the information would not have been prepared.³
25. Applied to the present case, the notice of decision states that the dominant purpose for which the information was prepared is as part of a Business Case for submission to Cabinet for Cabinet’s consideration of the Parramatta North Urban Transformation Project. We note also the contextual description provided by the Agency during the course of this review which indicates that the information “*was part of a collection of information that was being prepared for a Cabinet Minute at a later date (December 2015.)*”
26. We are therefore satisfied that the information is in fact Cabinet information and that the decision of the Agency is justified.
27. For this reason, we have not examined the Agency’s application of the public interest test and its identification of relevant public interest considerations for and against disclosure of the information.

Recommendations

28. The Information Commissioner makes no recommendations in relation to the Agency’s decision.
29. The Information Commissioner recommends pursuant to section 95 of the GIPA Act, that the Agency note the guidance in this report with respect to dealing with future GIPA applications in which a claim of conclusive presumption against disclosure of Cabinet information is made.

³ Secretary to the Department of Treasury and Finance v Dalla-Riva [2007] VSCA 11 [13]

Review rights

30. 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.
31. The Applicant has the right to ask the NCAT to review the Agency's decision.
32. 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

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

Elizabeth Tydd
Information Commissioner