

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

Applicant: The Applicant
Agency: Sydney Water Corporation
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Summary

1. The Applicant applied for information from the Sydney Water Corporation (the Agency) under the *Government Information (Public Access) Act 2009* (GIPA Act).
2. The Agency decided to refuse to provide access to the information.
3. The Information Commissioner recommends, under section 93 of the GIPA Act, that the Agency make a new decision.

Background

4. The Applicant applied under the GIPA Act to the Agency for access to the following information
"I am seeking correspondence for Strata Plan [redacted] which occurred between [redacted] and [redacted] for the periods June 2012 up until Aug 2013 and Sept 2015 – Jan 2016."
5. In its internal review decision issued on 27 October 2016, the Agency decided to refuse to provide access to the information.
6. In seeking a review of the decision by the Information Commissioner, the Applicant confirmed that they sought access to the refused information.

Decisions under review

7. The decision under review is the Agency's decision to refuse to provide access to information in response to an access application.
8. This decision is a reviewable decision under section 80(d) of the GIPA Act.

Third Party Consultation

9. An agency may be required to consult third parties before making a decision about an access application if the information is of a kind requiring consultation. Section 54 of the GIPA Act sets out when consultation is required. Consultation may be required if:
 - a. the information concerns a person (or entity)'s business, commercial, professional or financial interests, and
 - b. the person (or entity) may reasonably be expected to have concerns about the disclosure of the information, and
 - c. those concerns may reasonably be expected to be relevant to the question of whether there is a public interest consideration against disclosure.
10. An agency must take any third party objection into account in making its decision, but an objection is not in itself determinative of an overriding public interest consideration against disclosure.
11. An agency may decide to release information despite receiving an objection from a third party. However under section 54(6) and (7) the agency must notify

- the third party of its decision, and not release the information until the third party's review rights have expired.
12. The Information Commissioner has published *Guideline 5: consultation on public interest considerations under section 54 of the GIPA Act*. This Guideline is available on the IPC website. This guide is a helpful aide when undertaking consultation.
 13. The current access application required that the Agency consult with several third parties.
 14. The Agency conducted consultation and received objections from three parties to the release of the information.
 15. The parties assert that the content of the emails are of a confidential nature and protected by legal professional privilege.
 16. The parties asserted that the following public interest considerations against disclosure apply, and that release could reasonably be expected to:
 - a) disclose information that is privileged on the ground of legal professional privilege (Schedule 1, clause 5(1) of the GIPA Act);
 - b) prejudice the prevention, detection or investigation of a contravention or possible contravention of the law or prejudice the enforcement of the law (clause 2(b) of the table to section 14 of the GIPA Act);
 - c) disclose information that could reasonably be expected to reveal an individual's personal information (clause 3(a) of the table to section 14 of the GIPA Act);
 - d) prejudice any court proceedings (clause 3(c) of the table to section 14 of the GIPA Act);
 - e) expose a person to a risk of serious harm or of serious harassment or serious intimidation (clause 3(f) of the table to section 14 of the GIPA Act); and
 - f) prejudice any person's legitimate business, commercial, professional or financial interests (clause 4(d) of the table to section 14 of the GIPA Act).
 17. Section 54(5) of the GIPA Act provides that an agency must take into account any objection to the release of information made by a third party during the consultation process when an agency is making its decision about the existence of an overriding public interest against disclosure of information. The objection is to be taken into consideration in the balancing of the public interest test.
 18. In its notice of decision the Agency considered whether or not there was an overriding presumption against disclosure of information that is privileged on the grounds of legal professional privilege. The third party consultation contributed to the Agency's determination that legal professional privilege applied to the documents requested.
 19. In its notice of decision the Agency listed the other public interest considerations against disclosure of the information, but did not evaluate them in any detail. The Agency did not give these considerations any weight when balancing the public interest in favour of, and against disclosure.
 20. We are satisfied that the Agency has correctly discharged its obligations in regards to third party consultation under the requirements of section 54 of the GIPA Act.

21. In future decisions the notice of decision would benefit from a description of how the Agency evaluated each objection raised by third parties in relation to disclosure of information in balancing the public interest test.

The public interest test

22. 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.
23. 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.
24. 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.
25. 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.
26. 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

27. 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).
28. In its notice of decision, the Agency listed the following public interest considerations in favour of disclosure of the information in issue that were raised by the Applicant:
 - a) *[redacted] has waived privilege to the emails by granting you [The Applicant] permission to seek documents.*
 - b) *No confidential nature exists as all owners have the right to access any records or documents required to be kept under Division 2 of the Strata Schemes Management Act 1996.*
 - c) *The documents indicate that actions were taken without the consent or knowledge of [redacted] and therefore are not subject to the lawyer client relationship.*
 - d) *Withholding documents from owners is a denial of natural justice.*
 - e) *Reasonable concern exists that the documents detail misconduct, negligent, improper or unlawful conduct.*

29. In the notice of decision the Agency stated it was able to place little to no weight to these considerations in the public interest test. The Applicant raised considerations that related to the *Strata Schemes Management Act 1996* (b), Fair Trading investigation(c), and reasonable concern that the documents detail misconduct, negligent, improper and unlawful conduct (e). The notice of decision states that these matters do not have any bearing on the Agency's operations or activities and the Agency cannot make comment or determinations in relation these considerations raised by the Applicant.
30. It was further explained in the notice of decision that legal professional privilege had not been waived, thus the decision maker was unable to place weight on the other considerations (a)(d).
31. The Agency has come to the view that these considerations do not apply and have not attributed any weight to them as such.
32. We agree that the Agency has turned its mind to and addressed relevant considerations when considering public interest considerations in favour of disclosure.

Public interest considerations against disclosure

33. The only public interest considerations against disclosure that can be considered are those in schedule 1 and section 14 of the GIPA Act.
34. 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.
35. 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.
36. In its notice of decision the Agency raised one public interest consideration against disclosure of the information, deciding that its release could reasonably be expected to:
 - a) disclose information that is privileged on the ground of legal professional privilege (Schedule 1, clause 5(1) of the GIPA Act);
37. I will discuss this consideration.

Conclusive presumption of overriding public interest against disclosure Schedule 1 clause 5(1) – Legal professional privilege

38. If information falls within the scope of one of the clauses in schedule 1 to the GIPA Act, then it is conclusively presumed that it is not in the public interest to release the information. This means that the agency is not required to balance the public interest considerations for and against disclosure before refusing access to the information.
39. Clause 5(1) of schedule 1 to the GIPA Act states that it is conclusively presumed that there is an overriding public interest against disclosure of information:

that would be privileged from production in legal proceedings on the ground of client legal privilege (legal professional privilege), unless the person in whose favour the privilege exists has waived the privilege.

40. This means that in order for an agency to rely on clause 5 of schedule 1 to the GIPA Act, the information must be of a kind that would not be required to be disclosed in legal proceedings in NSW because it is information that attracts client legal privilege and the agency has not waived, either expressly or impliedly that privilege.
41. Clause 5(2) of schedule 1 to the GIPA Act states:

If an access application is made to an agency in whose favour legal professional privilege exists in all or some of the government information to which access is sought, the agency is required to consider whether it would be appropriate for the agency to waive that privilege before the agency refuses to provide access to government information on the basis of this clause.
42. Under clause 5(2) of schedule 1 to the GIPA Act, an agency must consider whether it is appropriate to waive privilege. An agency's decision about whether it will waive privilege in order to disclose the information requested in an access application is not a reviewable decision under the GIPA Act. However, if privilege has previously been waived, either expressly or impliedly, by an agency, then clause 5 of schedule 1 to the GIPA Act will not apply.
43. Client legal privilege protects confidential communications between a lawyer and a client made for the dominant purpose of the lawyer providing legal advice or professional legal services to the client or for use in current or anticipated litigation.
44. The existence and maintenance of privilege must always be considered in light of all the facts and circumstances that apply to the information.
45. In order for client legal privilege to attach to the information, each element of client legal privilege must be satisfied. The essential elements of client legal privilege are set out below:
 - a. the existence of a client and lawyer relationship; and
 - b. the confidential nature of the communication or document, and
 - c. the communication or document was brought into existence for the dominant purpose of either:
 - enabling the client to obtain, or the lawyer to give legal advice or provide legal services, or
 - for use in existing or anticipated litigation.
46. In regards to all elements, the Agency contacted third parties during the consultation process to confirm that there was a client and lawyer relationship, that parties were under an express or implied obligation to keep the communication confidential, and that the parties communicated for the purpose of obtaining legal advice and services in relation to legal proceedings.

47. In its notice of decision the Agency considered that the nature of the information provided sufficient evidence that a client and lawyer relationship exists. The authors of the emails further confirmed the existence of such a relationship during the consultation process.
48. We are satisfied that there is a client and lawyer relationship between the Owners Corporation and the lawyers.
49. We are further satisfied that legal professional privilege exists on some of the information over which it has been claimed.
50. However, we are of the view that the conclusive presumption of overriding public interest of disclosure in Clause 5(1) of Schedule 1 only applies in situations where an Agency holds legal privilege in their favour. In other words, the Agency cannot assert that privileged information falls under this conclusive presumption if they are not a party to the client and lawyer relationship over which the privilege exists.
51. In this case, the legal privilege exists in the favour of a person who is not the Agency.
52. On this basis, the Agency is not able to rely on the conclusive presumption of overriding public interest against disclosure under Clause 5(1) of Schedule 1 in relation to the withheld information.
53. We are not satisfied that the Agency has justified that this consideration applies to the information over which it has claimed.
54. The Information Commissioner recommends in accordance with section 93, that the Agency reconsider its decision with respect to the conclusive presumption of an overriding public interest against disclosure.
55. In these circumstances, the Agency may wish to consider whether the information attracts other public interest considerations against disclosure. In determining this the Agency should consider the considerations against disclosure of information raised by third party objectors.
56. In addition to this, it appears that some information over which privilege has been claimed does not meet the requirements set out in section 118 of the *Evidence Act 1995*.
57. The decision maker must determine that each individual piece of information attracts the privilege. The information must have been brought into existence for the dominant purpose of either enabling the client to obtain, or the lawyer to give legal advice or provide legal services; or for the use in existing or anticipated litigation. Legal professional privilege does not extend to cover communication which is administrative in nature just because a party to the communication is a legal practitioner.
58. Section 91 of the GIPA Act prevents the Information Commissioner from disclosing any information for which a public interest against disclosure has been claimed. In these circumstances, we will contact the Agency to provide further guidance about the application of legal professional privilege in this matter.

Recommendations

59. The Information Commissioner recommends that the Agency make a new decision pursuant to section 93 of the GIPA Act.
60. In making a new decision, the Agency should have regard to the matters raised and guidance given in this report.
61. We ask that the Agency advise the Applicant and us **within 10 business days** of the actions to be taken in response to our recommendations.

Review rights

62. 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.
63. The Applicant has the right to ask the NCAT to review the Agency's decision.
64. 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>
65. If the Agency makes a new reviewable decision as a result of our review, the Applicant will have new review rights attached to that 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

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

Elizabeth Tydd
Information Commissioner