



information  
and privacy  
commission  
new south wales

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

Applicant: Mr Joe Zidar  
Agency: Department of Justice  
Report date: 7 December 2017  
IPC reference: IPC17/R000555  
Agency reference: LEGAL3054/17  
Keywords: Government information – Conclusive presumption against disclosure – Legal professional privilege – Excluded information  
Legislation cited: *Government Information (Public Access) Act 2009*  
Cases cited: *AIN v Medical Council of New South Wales* [2015] NSWCATAP 241

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

### Summary

Mr Joe Zidar (the Applicant) applied for information from the Department of Justice (the Agency) under the *Government Information (Public Access) Act 2009* (GIPA Act). The information sought by the Applicant relates to correspondence between the Office of General Counsel, Office of the Legal Services Commissioner, Fraud Detection and Reporting Pty Ltd and any other entities or departments in regards to two previous access applications.

On internal review, the agency decided to provide access to some information, to refuse to provide access to some information and that some information is not held by the agency.

The Applicant applied for external review on 16 October 2017. The reviewer obtained information from the Agency including the information refused.

The review of the Agency's information and decision concluded that the Agency's decision was justified.

## Background

1. The Applicant applied under the GIPA Act to the Agency for access to information on 17 May 2017. On 18 May 2017 the Applicant amended the scope of his application for the following information:

- a. *Organisational chart for the Office of General Counsel (Entity);*
- b. *Scope of Documents*

*This application is restricted to all correspondence emanating (To & From) the Office of the General Counsel of NSW Department of Justice with the Office of the Legal Services Commissioner, Fraud Detection & Reporting Pty Ltd and any other Entities or Departments that any of the Primary parties engaged with relating to the following two (2) GIPA applications.*

*GIPA application 549/17*

*Primary parties: Ms Lida Kaban, Ms Jodie Shepherd, Ms Nicole Miller, Ms Rebecca Jeyasingham, Mr Giancarlo Nalapo & Mr Joe Zidar*

*All communications relating to the Scope of Documents defined above between any party, specifically any person defined as a Primary party, for the period between (6am 2 February 2017 to 23:59 pm 24 May 2017).*

*This includes internal and external:  
Emails (inbound and outbound)  
Letters (inbound and outbound)  
Video/ voice recordings  
File-notes / phone logs  
Minutes of meetings held*

- c. *GIPA application Internal review 1136/17*

*Primary parties: Ms Lida Kaban, Ms Jodie Shepard , Ms Nicole Miller, Ms Rebecca Jeyasingham, Mr Michael McIntosh & Mr Joe Zidar*

*All communications relating to the Scope of the Documents defined above between any Primary party, specifically any person defined as a Primary party, for the period between (6am 2 February 2017 to 23:59pm 24 May 2017).*

*This includes internal and external:  
Emails (inbound and outbound)  
Letters (inbound and outbound)  
Video/Voice records  
File-notes / phone logs  
Minutes of meetings held*

2. In its decision on internal review issued on 18 August 2017, the Agency decided to provide access to some information, to refuse to provide access to some information and that some information is not held by the agency.

3. In seeking a review of the decision by the Information Commissioner, the Applicant confirmed that he seeks a review of the Agency's internal review decision.

### **Decisions under review**

4. The Information Commissioner has jurisdiction to review the decision made by the Agency pursuant to section 89 of the GIPA Act.
5. The two decisions under review are the Agency's decision:
  - a. To refuse to provide access to information in response to an access application; and
  - b. That government information is not held by the agency.
6. These are reviewable decisions under section 80(d) and 80(e) of the GIPA Act.

### **The public interest test**

7. 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 (Annexure A).

### **Public interest considerations in favour of disclosure**

8. In its notice of decision, the Agency listed the following public interest considerations in favour of disclosure of the information in issue:
  - a. The statutory presumption in favour of disclosure of government information;
  - b. The information sought relates to the applicant; and
  - c. Disclosure of the information could reasonably be expected to inform the Applicant and the public about the operations of the Department.
9. I agree that these are valid considerations in favour of public disclosure.

### **Public interest considerations against disclosure**

10. In its notice of decision the Agency did not identify any public interest considerations against disclosure of the information.

### **Information Refused**

#### **Legal professional privilege – Clause 5 of Schedule 1**

11. 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 grounds of client legal privilege (legal professional privilege), unless the person in whose favour the privilege exists has waived the privilege.*

12. 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.
13. In the internal review the schedule of documents indicates that “Email - 7 April 2017” has been refused on the basis of a conclusive presumption against disclosure pursuant to clause 5 of schedule 1, that is, on the basis of legal professional privilege.
14. The Agency states that the communication referred to in the schedule of documents was prepared by NSW Crown Solicitor’s Office for the dominant purpose of providing legal advice to employees of the Department’s Office of General Counsel. The Agency states that there is an established client / lawyer relationship between them and an express obligation in maintaining the confidentiality of legal advice received.
15. In the internal review the Agency states that they considered whether it was appropriate to waive privilege and decided it was not.
16. In the case of *AIN v Medical Council of New South Wales* [2015] NSWCATAP 241 (*AIN*) the appeal panel found that:  
*“Where an agency claims that certain information would be privileged from production in legal proceedings on the ground of client legal privilege, it has the onus of establishing this (see GIPA Act, s 105 and Sch 1, cl 5). This means it is required to establish the factual matters necessary to found a claim under s 118 or s 119 of the Evidence Act, including that relevant persons are a client and a lawyer, that a document or communication is confidential and that the dominant purpose for which a communication was made or a document was prepared is one contemplated by the provision relied upon. Whilst some of these matters can, in some cases, be found in or inferred from the document the subject of the privilege claim, it is almost always necessary to provide some evidence relevant to the privilege claim before it can be concluded that s 118 or s 119 applies”.*
17. Having had the benefit of reviewing the information in conjunction with the factual matters outlined in the Agency’s internal review, I am satisfied that the communication in question was created by a legal professional for the dominant purpose of providing the Agency with legal advice. I am further satisfied that the Agency has not waived The legal professional privilege and that this material would therefore be privileged from production in legal proceedings in NSW on the grounds of legal professional privilege.
18. Based on the above I am satisfied that there remains a conclusive presumption against disclosure of this information and that, as recognised in the case of *AIN* the Agency has successfully established the factual ground for legal professional privilege to exist.
19. On this basis, I make no recommendations to the Agency in this regard.

### **Excluded Information – Clause 2 of Schedule 2 – Complaints handling and investigative information**

20. Schedule 2 of the GIPA Act states:

*Information that relates to a function specified in this Schedule in relation to an agency specified in this Schedule is **excluded information** of the agency.*

*Under Schedule 1 it is to be conclusively presumed that there is an overriding public interest against disclosure of excluded information of an agency (unless the agency consents to disclosure). Section 43 prevents an access application from being made to an agency for excluded information of the agency.*

21. In the case of *Whyte v Medical Council of NSW* [2014] NSWCATAD 190, Principal Member S Higgins found that:

*“Subsection 43(1) of the GIPA Act provides that an access application cannot be made to an agency for access to ‘excluded information’ of that agency. Subsection 43(2) provides that an application for government information that is ‘excluded information’ is not a valid access application to the extent the application is made in contravention of subs 43(1). As I have noted, the respondent also relies on subsection 43(2) in that the applicant’s application for access is not a valid application”.*
22. In the internal review the schedule of documents indicates that “Email and Attachment – 2 March 2017” has been refused on the basis of excluded information pursuant to clause 2 of schedule 2 of the GIPA Act, that is, information that relates to the complaints handling and investigative functions of the Office of the Legal Services Commission (OLSC).
23. In the internal review the Agency states that the OLSC complaints handling procedure manual is information that relates to the complaint handling functions of the OLSC and is inextricably linked to the OLSC’s complaint handling functions. The Agency states that the complaints handling manual describes the processes and policies adopted by the OLSC when dealing with complaints and reviews.
24. The Agency further states that reasonable enquiries were made of the OLSC as to whether the OLSC would consent to the disclosure of the some or all of the information applied for however, OLSC declined to consent to release of the information.
25. I note that the IPC has previously had the opportunity of reviewing the information in issue during the course of a preceding review, nevertheless, for completeness I have reviewed the information in conjunction with the Agency’s internal review and applicable provisions of the GIPA Act.
26. Information is excluded information of an agency if it relates to any functions specified in Clause 2 of Schedule 2 of the GIPA Act. In relation to the Office of the Legal Services Commission, the functions specified are complaint handling, investigative, review and reporting functions.
27. Clause 6 of Schedule 1 of the GIPA Act provides that 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 which the agency has consented to disclose.
28. I have reviewed the information in issue and I am satisfied that the information relates to the OLSC’s complaint handling functions and is therefore excluded information under the GIPA Act. I am further satisfied that consent was sought by the Agency however not provided by the OLSC in response to this access application. Having determined the information is excluded information, the appropriate course of action is to make no recommendation to the Agency.

## Government information not held

29. Section 53 of the GIPA Act requires Agencies to undertake such reasonable searches as may be necessary to find any government information applied for that was held by the Agency when the application was received.
30. When considering if there are reasonable grounds to believe that information exists and whether searches to locate information were reasonable, the facts, circumstances and context of the application are relevant.
31. In the internal review the Agency states that search requests were sent to the primary parties identified in the Applicant's access request: Ms Lida Kaban, Ms Jodie Shepherd, Ms Nicole Miller, Ms Rebecca Jeyasingam, Mr Michael McIntosh and Mr Gian Nalapo. The Agency states that these individuals searched deleted received and sent emails using the terms "Office of Legal Services Commissioner" and "Fraud Detection and Reporting Pty Ltd".
32. The Agency states that further searches were conducted using the electronic record management system and EDRMS. Keywords used include the access application IDs LEGAL 549/17 and LEGAL 1136/17 and also the Applicant's name.
33. Based on the information available the searches conducted by the Agency to locate any government information falling within the scope of the request appear to have been reasonable in the circumstances of this case. The Agency used appropriate keywords when searching for information and appears to have pursued numerous databases, business units and individuals to locate any government information falling within the scope of the request.
34. Based on the above I am satisfied the Agency's decision, that government information is not held, is justified. Accordingly I make no recommendations to the Agency.

## Conclusion

35. On the information available, I am satisfied that the Agency's decisions under review are justified.

## Recommendation

36. I make no recommendations to the agency.

## Applicant review rights

37. 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.
38. The Applicant has the right to ask the NCAT to review the Agency's decision.
39. 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**

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

Tihara Clayton

Investigation and Review Officer