



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

Applicant: The Applicant
Agency: Sydney Water Corporation
Report date: 1 December 2015
IPC reference: IPC15/R000373
Keywords: Government information – prejudice the effective exercise of an agency’s functions – prejudice an investigation – reveal personal information – prejudice business interests

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Summary

1. The Applicant requested an internal review of a decision made by Sydney Water Corporation (the Agency) under the *Government Information (Public Access) Act 2009* (GIPA Act).
2. The Agency decided to refuse the Applicant access to the information requested.
3. The Information Commissioner recommends, under section 93 of the GIPA Act, that the Agency make a new decision, by way of internal review.

Background

4. The Applicant previously applied for access to information and the Agency decided to refuse access to information requested.
5. The information requested is six emails, five of which have reports attached.
6. The Applicant requested an internal review of that decision and the Agency again decided to refuse access to all the information requested.
7. In seeking a review of the decision by the Information Commissioner, the Applicant confirmed that he disagrees with the Agency's decision and seeks access to the information requested.

Decisions under review

8. The decision under review is the Agency's decision, made in the internal review dated 13 July 2015, to refuse access to the information requested.
9. This is a reviewable decision under section 80(d) of the GIPA Act.

The public interest test

10. 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.
11. 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.
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.
13. 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.

14. 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

15. 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).
16. In its notice of decision, the Agency stated that the fact that one document contains some of the Applicant's personal information is a public interest consideration in favour of disclosure of the information in issue.
17. This is an example of a public interest consideration in favour of disclosure provided in the notes to section 12(2) of the GIPA Act.
18. When making his application for external review the Applicant attached a copy of a submission he provided to the Agency. In his submission the Applicant raised the possibility that the information he is seeking access to could confirm his suspicions of maladministration and breaches of a code of practice. This appears to be a reference to the example consideration in favour of disclosure provided at point (e) in the notes to section 12 of the GIPA Act.
19. In the notice of decision the Agency notes that the Applicant made a submission and that it was considered. The notice of decision makes no further comment about the Applicant's submission or the public interest consideration in favour of disclosure he raised. Therefore it is not clear whether the public interest consideration put forward by the Applicant was used when the public interest test was conducted.
20. The notice of decision would benefit from providing a more detailed description of how the Agency considered the Applicant's submission and what affect this had on the conducting of the public interest test, if any.

Public interest considerations against disclosure

21. The only public interest considerations against disclosure that can be considered are those in schedule 1 and section 14 of the GIPA Act.
22. 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.
23. 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.
24. In its notice of decision the Agency raised four public interest considerations against disclosure of the information, deciding that its release could reasonably be expected to:
 - a. 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);
 - b. prejudice the conduct, effectiveness or integrity of any audit, test, investigation or review conducted by or on behalf of an agency by

- revealing its purpose, conduct or results (whether or not commenced and whether or not completed) (clause 1(h) of the table to section 14 of the GIPA Act);
- c. reveal an individual's personal information (clause 3(a) of the table to section 14 of the GIPA Act); and
 - d. prejudice any person's legitimate business, commercial, professional or financial interests (clause 4(d) of the table to section 14 of the GIPA Act).
25. The considerations are discussed below.

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

26. 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.*
27. 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.
28. The meaning of the word prejudice is to 'cause detriment or disadvantage'.
29. The notice of decision identifies the [University] as the agency to which this consideration applies. It further states that the relevant function of that agency as conducting investigations. The notice of decision would benefit from providing a more detailed description of the type of investigation to ensure that it is a relevant function of the agency.
30. Based on the context of the information in question, the type of investigation is investigations into allegations of misconduct and corruption. This appears to be a legitimate function of a university.
31. The notice of decision goes on to state:
- As the University has only relied upon the final report (which was released to you), release of draft reports could reasonably be expected to prejudice the University's effective exercise of its functions, i.e. the University's ability to conduct effective investigations as a government agency could undermine its ability to ensure that it is appropriately performing the underlying function which is the subject of the investigation.*
32. This does not provide a clear and coherent explanation as to why the disclosure of the information could reasonably be expected to prejudice the University's ability to exercise its investigatory functions. It is unclear why the draft status of the report is relevant.
33. The Agency has not established the second element of consideration 1(f). Therefore its use in the public interest test is not justified.

Consideration 1(h) – prejudice the conduct, effectiveness or integrity of any audit, test, investigation or review conducted by or on behalf of an agency by revealing its purpose, conduct or results (whether or not commenced and whether or not completed)

34. Clause 1(h) of the table at section 14 states:

There is a public interest consideration against disclosure of information if disclosure of the information could reasonably be expected to prejudice the conduct, effectiveness or integrity of any audit, test, investigation or review conducted by or on behalf of an agency by revealing its purpose, conduct or results (whether or not commenced and whether or not completed).

35. To show that this is a relevant consideration against disclosure, the Agency must establish disclosure of the information could reasonably be expected to prejudice the conduct, effectiveness or integrity of an audit, test, investigation or review conducted by or on behalf of an agency. In particular, an agency should identify the audit, test, investigation or review that would be prejudiced, and also identify the anticipated prejudice. In order to justify the application of the consideration, an agency must demonstrate the causal nexus between the disclosure of the information and the prejudice that is expected.
36. The notice of decision states that the disclosure of the information could deter future contributors from engaging with investigators in similar investigations conducted in the future. This would in turn prejudice the conduct and effectiveness of future investigations.
37. The Agency appears to have demonstrated that the effects of consideration 1(h) are reasonably expectable and the use of it in the public interest test is justified.

Consideration 3(a) – reveal an individual’s personal information

38. Clause 3(a) of the table at section 14 as a public interest consideration against disclosure states:

There is a public interest consideration against disclosure of information if disclosure of the information could reasonably be expected to reveal an individual’s personal information.

39. Personal information is defined in the GIPA Act as being:

...information or an opinion (including information or an opinion forming part of a database and whether or not recorded in a material form) about an individual (whether living or dead) whose identity is apparent or can reasonably be ascertained from the information or opinion. [Schedule 4(4)(1) GIPA Act]

40. Section 15(b) of the GIPA Act provides that agencies must have regard to any relevant guidelines issued by the Information Commissioner when determining whether there is an overriding public interest against disclosure.
41. The Information Commissioner has published *Guideline 4 – Personal information as a public interest consideration under the GIPA Act* in December 2011. This Guideline sets out what is meant by ‘personal information’ in the GIPA Act and includes (in paragraph 1.2) examples of what should be considered personal information.

42. In order to establish that this consideration applies, the Agency has to:
 - a. identify whether the information is personal information; and
 - b. consider whether the information would be revealed by disclosing it under the GIPA Act.
43. The notice of decision states that the information contains the personal information of a person other than the Applicant. A review of the information indicates that this is correct. Therefore the first element of the consideration is established.
44. The notice of decision goes on to state that releasing the information would contravene an information protection principle (IPP) under the *Privacy and Personal Information Protection Act 1998* (the PPIP Act). This goes some way to addressing the second element of the consideration but does not establish it. It also raises the issue of which considerations the Agency seeks to claim over the information.
45. The reference to the IPP appears to be an assertion that the personal information would be revealed if it was disclosed through this application. 'Reveal' is defined in schedule 4 to the GIPA Act. The notice of decision does not address this element of consideration 3(a) in the context of the definition of reveal provided by the GIPA Act. Therefore it does not appear that both the necessary elements of the consideration are established and the use of consideration 3(a) is not justified.
46. The reasonable expectation of a contravention of an IPP is its own distinct public interest consideration against disclosure provided at clause 3(b) of the table to section 14 of the GIPA Act. If the Agency seeks to rely on this when conducting the public interest test it should be addressed separately.
47. If an agency relies on clause 3(b) of the table to section 14 as a consideration against disclosure, it must demonstrate a reasonable expectation that an information protection principle or health privacy principle would be contravened by disclosure of the information.
48. It is not sufficient to simply assert that such a contravention would occur. The agency must identify the principle/s that would be contravened and show how the disclosure would breach the principle.

Consideration 4(d) – prejudice business interests

49. Clause 4(d) of the table to section 14 of the GIPA Act provides:

There is a public interest consideration against disclosure of information if disclosure of the information could reasonably be expected to prejudice any person's legitimate business, commercial, professional or financial interests
50. In order to rely on this clause as a consideration against disclosure, an agency must show that releasing the information could reasonably be expected to have the effect outlined in clause 4(d) and base this on substantial grounds.
51. In particular, an agency must identify the party whose interests would be prejudiced, and the relevant interest/s. In order to justify the application of the consideration, an agency must demonstrate the causal nexus between the disclosure of the information and the prejudice to that interest.
52. The notice of decision identifies two people as potentially having their business interests prejudiced by the release of the information. The first is the

investigator who produced the report to which the Applicant seeks access. The second is an unidentified third party.

53. The notice of decision states that ‘...releasing the draft reports could prejudice the investigator’s legitimate business practices’. This raises two issues. The first is that consideration 4(d) applies to a person’s legitimate business interests, not their business practices. It may be that the revelation of the investigator’s business practices could prejudice their business interests but this is not articulated in the notice of decision. This leads to the second issue.
54. The second issue is that the notice of decision does not explain why the revelation of the information would be prejudicial to the investigator. The Agency has not demonstrated the nexus between the disclosure of the information and the prejudice to the investigator’s business interests.
55. With regards to the unidentified third party, the same issue of not identifying their legitimate business interest arises. Without the party or their legitimate business interest being identified the use of consideration 4(d) cannot be justified.
56. The use of consideration 4(d) in the public interest test is not justified.

Third party consultation

57. The notice of decision states that the Agency took objections of third parties to the release of the information into account but it does not provide any further information about this.
58. Under section 54(4) of the GIPA Act the purpose of consultation is to ascertain whether third parties have objections to the disclosure of the relevant information and the reasons for the objection.
59. Under section 54(5) of the GIPA Act an agency must take any objection into account when determining whether there is an overriding public interest against disclosure of government information. Third party objections are not determinative of whether information can be released and information can be released even when there is a third party objection.
60. The notice of decision does not state how many objections were received, establish that they are correctly classified as public interest considerations against disclosure allowed under section 14 of the GIPA Act, or assign weight to them.
61. Therefore the notice of decision does not establish that the use of third party objections as considerations against disclosure is justified.
62. The Information Commissioner published Guideline 5: consultation on public interest considerations under section 54 of the GIPA Act. This Guideline is available on the IPC website. Agencies must have regard to this Guideline pursuant to section 15(b) of the GIPA Act.

Balancing the public interest test

63. 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.

64. Agencies should:
 - a. set out the considerations in favour of disclosure, identify the evidence that affects the weight to be given to each consideration, and give weight to each consideration;
 - b. set out the considerations against disclosure, identify the evidence that affects the weight to be given to each consideration, and give weight to each consideration;
 - c. make a decision about which way the balance lies, in light of the weight in favour and against
65. If at this stage the agency considers that there is an overriding public interest against disclosing the information, the GIPA Act contains a number of provisions that may apply to mitigate the effect of, or reduce the weight of, public interest considerations against disclosure or even avoid an overriding public interest consideration against disclosure altogether. These provisions are found in sections 72 to 78 of the GIPA Act.
66. It is consistent with the objects of the GIPA Act that these provisions be considered, where relevant, before a decision is made to not disclose information because there is an overriding public interest consideration against disclosure.
67. Once all of the above steps have been finalised, an agency should explain its reasons for the decision to the applicant.
68. The notice of decision demonstrates that the Agency identified considerations in favour and against disclosure. However, as noted above, it is not clear whether the Agency took a consideration in favour of disclosure suggested by the Applicant into account. Additionally, not all the considerations against disclosure appear to have been justified.
69. Therefore it is not clear that the public interest test has been conducted using the appropriate and justified public interest considerations (both for and against disclosure).
70. Further, the notice of decision does not demonstrate that the Agency gave weight to the considerations. Therefore, even if the use of all the considerations was justified, it would not be clear why the Agency believed that the public interest test was weighed such that there was an overriding public interest against disclosure.
71. For the above reasons, the decision to refuse access to the information requested does not appear to be justified.

Recommendations

72. The Information Commissioner recommends, under section 93 of the GIPA Act, that agency make a new decision, by way of internal review.
73. In making a new decision, have regard to the matters raised and guidance given in this report.
74. We ask that the Agency advise the Applicant and us by **18 December 2015** of the actions to be taken in response to our recommendations.

Review rights

75. 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.
76. The Applicant has the right to ask the NCAT to review the Agency's decision.
77. 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>

78. If the Agency makes a new reviewable decision as a result of our review, the Applicant will have new review rights attached to that new 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

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