



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 six emails.
5. In its decision issued on 19 February 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.

Decision 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.

The public interest test

9. According to section 9(1) of the GIPA Act, an access applicant has a legally enforceable right to access the information requested, unless there is an overriding public interest against disclosing the information. 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.
10. 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.
11. 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.
12. 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.
13. 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

14. 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 (section s12(2) of the GIPA Act).
15. In its notice of decision, the Agency raised sections 12(2)(a) to 12(2)(e) of the GIPA Act as public interest considerations in favour of disclosure of the information in issue.
16. The Applicant submitted that the Agency “must be able to justify the inclusion of a pro or anti-disclosure considerations” as it “including pro-disclosure considerations merely in response to my suggesting these... is not complying with the GIPA Act”.
17. Section 12(2) of the GIPA Act requires agencies to take into account any relevant public interest considerations in favour of disclosure when it conducts the public interest test. There is no further requirement on agencies to justify the reason why it had identified these considerations.
18. The Agency has accordingly identified considerations in favour of disclosure and taken these into account when it conducted the public interest test.
19. The Agency has complied within the requirements of the GIPA Act.

Public interest considerations against disclosure

20. The only public interest considerations against disclosure that can be considered are those in Schedule 1 and in the table to section 14 of the GIPA Act.
21. In order for the considerations against disclosure set out in the table 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.
22. In its notice of decision, the Agency raised public interest consideration 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) in the table to section 14 of the GIPA Act);
 - b. prejudice the effective exercise by an agency of the agency’s functions (clause 1(f) in the table to section 14 of the GIPA Act);
 - c. found an action against an agency for breach of confidence or otherwise result in the disclosure of information provided to an agency in confidence (clause 1(g) in the table to section 14 of the GIPA Act);
 - d. 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) in the table to section 14 of the GIPA Act);

- e. prejudice any person's legitimate business, commercial, professional or financial interests (clause 4(d) in the table to section 14 of the GIPA Act); and
23. The notice of decision also decided that there is a conclusive presumption that the public interest does not favour disclosure of information on the basis of legal professional privilege (clause 5, Schedule 1 of the GIPA Act).
 24. I will discuss each of these considerations in turn.

Considering the views of third parties

25. Section 54 of the GIPA Act requires agencies to consult with third parties before providing access to information where it satisfies certain criteria. The notice of decision describes consultation that has occurred pursuant to this section.
26. We recognise that the information that is subject to this access request would not ordinarily be held by the Agency as it is about the affairs of third parties that is not related to the Agency. This increases the Agency's reliance on the feedback provided by third parties to inform its decision making.
27. These third parties bear the onus of establishing to the Agency that the consideration applies to information relating to that third party. It is not reasonable to expect the Agency to be able to justify the applicability of considerations as it was not involved in the process.
28. The Agency does not need to establish considerations on behalf of the third parties. If the Agency is not satisfied that the third party has adequately described how each consideration applies to the information, and the elements of that consideration has been met, it is open to the Agency to decide that the consideration does not apply to the information or to give little weight to it.
29. Alternatively, if the Agency comes to the view that the third party has adequately described how the consideration applies to the information it should appropriately attribute weight to that consideration when conducting the public interest test.

Legal professional privilege – clause 5 of Schedule 1

30. Clause 5(1) of Schedule 1 to the GIPA Act states:

It is to be 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.
31. An agency is not required to balance the public interest considerations for and against disclosure before refusing access to information that has legal professional privilege. This is because there is a conclusive presumption against disclosure on privileged information.
32. The onus of establishing the claim for client legal privilege falls on the person that holds the privilege. In this case, it would be the client to whom the legal services have been provided.

33. The notice of decision stated that “the [report] was commissioned by [an individual] on behalf of [an entity]. LPP is a protected relationship and clearly applies to the records in question”.
34. We note that it would appear the claim of legal privilege falls on [an entity] and not the managing director as he acted in his role to procure services on behalf of [an entity]. On that basis, the managing director does not appear to have any right to claim legal privilege in his individual capacity.
35. The notice of decision further states that “during the consultation process [an entity] did not waive its entitlements to claim LPP”. As the [entity] does not appear to have claimed legal privilege it would follow that this conclusive presumption against disclosure has not been raised as applying to the information.
36. The Agency does not need to establish considerations on behalf of the third parties. The onus of establishing this consideration lies with the third party as it is information concerning that third party.
37. On that basis, we are not satisfied that the application of this conclusive presumption of overriding public interest against disclosure is justified.
38. More information on the application of privilege is contained in our fact sheet: [Legal Professional Privilege](#).

Consideration 1(d) – supply of confidential information

39. 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.
40. 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.
41. The information that is subject to this consideration is the [report].
42. The notice of decision stated that “during the investigative process the willingness of interviewees to come forward and provide confidential information to facilitate the investigation is key to this function”. This Agency is referring to an investigative process undertaken by the [entity].
43. It further added that “release of the records would cause real detriment or disadvantage to the agency with future investigations, whereby possible contributors to an investigation may refrain from engaging with an investigator. This could prejudice the agency obtaining confidential information necessary to make a decision”.
44. The Applicant submits that the Agency has not defined what is “confidential information” and that the information is not confidential as in the “final report, [an individual] also quotes repeatedly from what the interviewees had to say to him... it is therefore difficult to accept that those engaging with the investigator

in 2008 were told by [an individual] or the University that their involvement was on a private and confidential basis”.

45. *Commissioner of Police NSW Police Force v Camilleri (GD) [2012] NSWADTAP 19* at paragraph 33 describes the general approach to be adopted for determining whether or not information is confidential:

In our view, the question of whether the information supplied is 'confidential information' must be examined, primarily at least, by reference to the agency's evidence as to the conditions under which it conducts the service within which the information was received.

46. The notice of decision states that confidential information is received through its provision as part of the [entity]'s investigation process.
47. We are of the view that the Agency has identified the context under which the information was received but has not articulated how confidentiality forms a part of that investigation process. The notice of decision does not describe any protocols followed or steps taken by the [entity] that demonstrate that the information has been received on a confidential basis. This may have included evidence contained in policy or other documents that confirm and document the confidential nature of this process.
48. On that basis, we are not satisfied that the notice of decision adequately characterises how confidentiality attaches to the information.
49. The Agency does not need to establish considerations on behalf of the third parties. The onus of establishing this consideration lies with the third party as it is information concerning that third party, which is consistent with section 97 of the GIPA Act.
50. While the notice of decision adequately describes the prejudice that may reasonably be expected to occur if the information is disclosed, it did not describe how the information was obtained confidentially. We are not satisfied that the Agency has justified that this consideration applies to the information.
51. However, we note in response to the Applicant's submission, that if confidential information is used and presented in an investigation report, this may not necessarily cause the information to lose its characterisation of confidentiality. This is because confidentiality deals with the conditions under which the information is received, handled and conducted by an agency.
52. We also note that the Applicant's submission raised the issue of procedural fairness. We would expect that procedural fairness mechanisms form a part of the investigation process itself. The GIPA Act only promotes access to information and is not a vehicle for the provision of procedural fairness.

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

53. 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.

54. To show that this is a relevant consideration against disclosure, the agency must establish:
- a. the relevant function of the agency; and

- b. that is or would be prejudiced by release of the information.
- 55. The information that is subject to this consideration is the [report].
- 56. The notice of decision stated that “All agencies have established processes and procedures to deal with complaints. The investigation undertaken by [redacted] was the exercise of this function by the [entity]”.
- 57. The Agency has identified the relevant function as the investigative function of the [entity]. From the context, it would appear that this relates to the investigation of misconduct and corruption allegations. This is a relevant function of the [entity].
- 58. The notice of decision further stated that “possible contributors or informants to an investigation may refrain from engaging with an investigator, which could generally prejudice the effectiveness of an agency to deal with future complaints or investigations or audits”.
- 59. The Agency has identified the prejudice that disclosure would have on the investigative function of the [entity].
- 60. The Applicant submits that the Agency “does not explain how this is linked to the issue of the release of the draft reports”. The nexus that can be drawn is that these two activities form a part of the investigative function of the [entity] which may be prejudiced by the release of the information. That is sufficient for the purposes of this consideration.
- 61. On that basis, we are satisfied that the Agency has justified that this consideration applies to the information.

Consideration 1(g) – breach of confidence

- 62. Clause 1(g) 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 found an action against an agency for breach of confidence or otherwise result in the disclosure of information provided to an agency in confidence (whether in a particular case or generally).
- 63. To show that this is a relevant consideration against disclosure, the Agency must establish:
 - a. the information was obtained or produced in confidence; and
 - b. disclosure of the information could reasonably be expected to found an action against an agency for breach of confidence; or
 - c. otherwise result in the disclosure of information provided.
- 64. In raising this public interest consideration against disclosure the Agency needs to ensure the information is in fact confidential. A breach of confidence arises out of an unauthorised disclosure of, or other use of information, which is subject to an obligation of confidentiality.
- 65. The information that is subject to this consideration is the [report].
- 66. For the reasons provided above in consideration 1(d), we are not satisfied that the notice of decision adequately characterises the information as confidential.
- 67. On that basis, we are not satisfied that the Agency has justified that this consideration applies to the information.

68. The Agency does not need to establish considerations on behalf of the third parties. The onus of establishing this consideration lies with the third party as it is information concerning that third party, which is consistent with section 97 of the GIPA Act.

Consideration 1(h) – conduct of any audit, test, investigation or review

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

There is a public interest consideration against disclosure if disclosure of 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).

70. To show that this is a relevant consideration against disclosure, the agency must establish:
- the audit, test, investigation or review conducted (whether or not commenced and whether or not completed);
 - the purpose, conduct or results that would be revealed; and
 - the prejudice to the conduct, effectiveness or integrity of the audit, test, investigation or review resulting from the release of the information.
71. The information that is subject to this consideration is the [report].
72. The notice of decision stated that “disclosure of the record could deter future contributors from engaging in similar investigations conducted in the future. This in turn prejudice the conduct and effectiveness of future investigations by the agency”.
73. We are satisfied that the [report] contains information regarding the conduct and results of an investigation conducted into allegations of wrongdoing.
74. The notice of decision describes the prejudice as the [entity]’s inability to effectively conduct future investigations because contributors are deterred from engaging in these investigations.
75. We are satisfied that the Agency has articulated the prejudice to the effectiveness of the [entity] investigation resulting from the release of the information.
76. On that basis, we are satisfied that the Agency has justified that this consideration applies to the information.

Consideration 4(d) – business, commercial, professional or financial interests

77. 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

78. The Agency must identify the party whose interests would be prejudiced and the relevant interest(s) prejudiced.
79. The information that is subject to this consideration is the [report].

80. The notice of decision states that "... raised objections based upon the prejudice the release of the records will have on his business, professional and commercial interests. The [redacted] was commissioned by him in his capacity as external lawyer for [entity]..."
81. We note that the Agency consulted in order to inform itself whether or not access is to be provided as required under section 54 of the GIPA Act and an objection was received. It took this objection into account when conducting the public interest test.
82. We reviewed the information and are satisfied that the information relates to the business interests of the third party as it was produced in the course of legitimate business dealings of that person.
83. The notice of decision further states that "The records are not usually documents that you could access to if you issued a subpoena in legal proceedings... There is a strong public interest against releasing documents which are created through the client and lawyer relationship... it's against public policy for members of the public to have access to documents protected by LPP".
84. However, the notice of decision does not detail the prejudice that would be suffered by the third party through disclosure of the information. In order to satisfy this element of the consideration, a description of the disadvantage or detriment to the managing director's business interest that would reasonably be expected to result from disclosure of the information is required.
85. Although we note, as above, it appears the claim of legal privilege falls on [an entity] and not the managing director as he acted in his role to procure services on behalf of the [entity]. On that basis, the managing director does not appear to have any right to claim legal privilege in his individual capacity so it is unclear to us what the disadvantage or detriment the managing director would suffer to his business interest as a result of disclosure.
86. On that basis, we are not satisfied that the Agency has justified that this consideration applies to all of the information over which it has been claimed.
87. The Agency does not need to establish considerations on behalf of the third parties. The onus of establishing this consideration lies with the third party as it is information concerning that third party.

Applying the public interest test

88. The GIPA Act requires agencies to balance the considerations in favour and against disclosure through the application of weights when conducting the public interest test.
89. The Agency has done this by assessing how each public interest consideration in favour and against disclosure applies to the specific information to which access has been sought taking into account the context that was raised by the Applicant.
90. The Applicant submitted that the Agency, when weighing the considerations in favour of disclosure, "seems to cast doubt that... the pro-disclosure considerations are really valid" and that the Agency "consistently undervalues the public interest considerations in favour of disclosure, due to his error in a finding of fact, and from this he misunderstands that nature of the allegation of corrupt and dishonest conduct".

91. The Applicant further submitted that the Agency “either does not understand or has chosen to ignore the thrust of the allegation of dishonest and corrupt conduct in this matter”.
92. Section 3a of the notice of decision considered the issue of fraud, corruption and maladministration raised by the Applicant as a public interest consideration for disclosure and gave it a moderate weighting when conducting the public interest test.
93. However, the notice of decision stated that it “will not comment on whether these [fraud, corruption and maladministration] allegations are reasonable, nor will I delve into the disclosure under the *Public Interest Disclosure Act 1994* as these are not factors relevant to this decision”.
94. We note that it is not the role of the Agency to make a finding on issues of fraud, corruption and maladministration when deciding a formal access application under the GIPA Act. Consideration of its relevance in the identification of public interest considerations for disclosure is sufficient to discharge this obligation. The Applicant may wish to pursue separate avenues of enquiry with other oversight bodies with respect to obtaining findings of this nature.
95. Our view is that the Agency has appropriately discharged its requirement to conduct the public interest test by identifying and considering this issue as a public interest consideration for disclosure. The GIPA Act places no further obligations upon the Agency aside from this.
96. We are satisfied that the Agency has undertaken the public interest test in accordance with the GIPA Act by considering and weighing factors in favour and against disclosure.

Dealing with applicant submissions – provided for guidance

97. Lastly, the Applicant submitted that the Agency had not taken into consideration the submissions provided by him to the Agency.
98. We note that there is no obligation in the GIPA Act that requires agencies to consider submissions by applicants. Agencies may find that considering applicant submissions better informs them of the factors that could be taken into account when conducting the public interest test. These include personal factors which are described in section 55 of the GIPA Act.
99. Our revised fact sheet (January 2016) discusses this concept further: [What is the public interest test?](#)

Recommendations

100. The Information Commissioner recommends, under section 93 of the GIPA Act, that the Agency make a new decision.
101. In making a new decision, have regard to the matters raised and guidance given in this report.
102. 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

103. 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.
104. The Applicant has the right to ask the NCAT to review the Agency's decision.
105. 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>

106. 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

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