



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

Applicant: Applicant
Agency: State Archives and Records Authority of NSW
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Summary

1. The Applicant applied for information from the State Archives and Records Authority of NSW (the Agency) under the *Government Information (Public Access) Act 2009* (GIPA Act), on 9 January 2017.
2. The Agency decided to provide access to some information and to refuse to provide access to some information.
3. The Information Commissioner recommends, under section 93 of the GIPA Act, that the Agency makes a new decision by way of internal review.

Background

4. The Applicant applied under the GIPA Act to the Agency, for copies of records including:
 - a. Council meeting notes and minutes;
 - b. Council records and file notes;
 - c. Information and policy documentation relating to Section 10 of the *State Records Act 1998* and its practical application; and
 - d. those pertaining to interactions the Applicant had with the Council regarding Section 10 of the *State Records Act 1998*.
5. After a phone discussion with the Agency, the Applicant agreed to amend the original access application on 17 January 2017.
6. In its decision issued on 9 February 2017, the Agency decided to provide access to some information and to refuse to provide access to some information.
7. The decision to refuse access to some information was made on the basis that legal professional privilege applies to that information.
8. In seeking a review of the decision by the Information Commissioner, the Applicant expressed concerns about whether the Agency's application of legal professional privilege regarding refused information was appropriately maintained.

Decisions under review

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

The public interest test

11. 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.
12. 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.

13. 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.
14. 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.
15. 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

16. 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).
17. In its notice of decision, the Agency listed the following as its consideration of public interest in favour of disclosure of information:
 - a. 'Disclosure of the information could reasonably be expected to promote open discussion of council decisions. I further consider that disclosure could reasonably be expected to enhance Government transparency and accountability, as well as ensure effective oversight of the council decision making processes.', and
 - b. 'I have given this public interest consideration in favour of disclosure of information significant weight.'
18. We consider the Agency's consideration of the public interest in favour of disclosure to be relevant, and agree that it is applicable to the information application.

Public interest considerations against disclosure

19. The only public interest considerations against disclosure that can be considered are those in schedule 1 and section 14 of the GIPA Act.
20. In its notice of decision the Agency noted that it had identified public interest considerations against disclosure of the information, deciding that its release could reasonably be expected to disclose information that is privileged on the grounds of legal professional privilege (Schedule 1, clause 5(1) of the GIPA Act).

Clause 5 of Schedule 1 - legal professional privilege

21. An agency is not required to balance the public interest considerations for and against disclosure before refusing access to information that is legal professional privilege.
22. This is because information of this nature is considered information for which there is a conclusive presumption of overriding public interest against disclosure.

23. 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.*
24. The onus of establishing the claim for client legal professional privilege falls on the Agency.
25. The concept of client legal privilege is contained in sections 117-119 of the Evidence Act 1995. In our review of client legal privilege we will have regard to this.
26. The notice of decision states 'There are email communications between State Archives NSW and DFSI Legal Team dated 22/12/2016 and 29/11/2016 that contains legal advice provided to State Archives NSW.'
27. Upon review of the information the Agency identified to be legally privileged information, we are satisfied that the information withheld is confidential information provided by the lawyer (from the Department of Finance, Services and Innovation) for the dominant purpose of the lawyer providing legal advice to the client (the Agency).
28. However, it is apparent that not all of the information the Agency withheld would be subject to legal professional privilege. This is because in our view, some of the information could be construed as administrative in nature and was not proposed for the dominant purpose of the provision or receipt of legal advice.
29. In this instance, the Agency had several emails contained in one record in their system. They made the decision to withhold the entire record on the basis that information contained in that singular record has attached legal professional privilege.
30. We consider that communication between a client and a lawyer may not automatically result in legal professional privilege being attached to that communication. As per our legal professional privilege fact sheet (attached), and in section 118 and 119 of *the Evidence Act 1995*, the essential elements of legal professional privilege are:
- a. the existence of a client/lawyer relationship,
 - b. a document or communication being confidential in nature, and
 - c. the document or communication being for the purpose of either:
 - i. legal advice to be given and received, or
 - ii. use in existing or anticipated litigation.
31. In determining if legal professional privileged information exists, agencies should carefully consider whether all three of the above elements apply to the information and articulate this in its notice of decision.
32. We consider the Agency has identified instances where legal professional privilege exists, and we are therefore satisfied that the Agency has established a conclusive presumption of an overriding public interest against disclosure in relation to some of the information in which legal professional privilege is claimed.
33. We are not satisfied that the privilege applies to all of the information over which it has been claimed.

34. We note that the Agency also considered if they would waive their legal professional privilege. They made the decision that it would not be appropriate to waive legal professional privilege where they considered it was applicable. We cannot review the Agency's decision to not waive that privilege (Schedule 1, clause 5(3) of the GIPA Act).
35. The Applicant considers that legal professional privilege has been waived on the basis that the Agency has:
 - a. advised the applicant on numerous occasions that they consider the matter closed, and
 - b. classified documents to have legal professional privileged information after the matter was closed, and
 - c. voluntarily consented to waive legal professional privilege by disclosing information that the Agency has obtained as 'legal advice'.
36. In light of this, we reviewed the information available to us and it does not appear that the Agency has waived their privilege regarding the withheld information through the ways expressed by the Applicant.

Recommendations

37. The Information Commissioner recommends, under section 93 of the GIPA Act, that the Agency makes a new decision by way of internal review. This recommendation is made only regarding email correspondence that has previously been withheld.
38. In making a new decision, have regard to the matters raised and guidance given in this report.
39. We ask that the Agency advise the Applicant and us within 10 business days of the actions to be taken in response to our recommendation.

Review rights

40. 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.
41. The Applicant has the right to ask the NCAT to review the Agency's decision.
42. 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>
43. 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

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