



**Report under the
Government Information (Public Access) Act 2009**

Applicant:	Mr F
Agency:	Strathfield Council
OIC reference:	11-109
Date review request received:	21 April 2011
Date of this report:	30 March 2012

Summary of report

1. On 21 April 2011 Mr F requested we review Strathfield Council's (**Council's**) decision concerning his request for access to:
 - o All documentation pertaining to a General Penalty Notice, penalty number: [x]
 - o All documentation in determining your claim of my responsibility
2. The decision made by Council was to provide partial access to the information sought by Mr F and withhold the remaining information on the basis that it is to be conclusively presumed there is an overriding public interest against disclosure of information that would be privileged from production in legal proceedings. A decision to provide access or to refuse to provide access to information is a reviewable decision under section 80(d) of the GIPA Act.
3. We have reviewed the information that Council claims is subject to legal professional privilege and in our view the conclusive presumption that there is an overriding public interest against disclosure does not apply to all of the information it withheld.
4. We therefore recommend under section 93 of the GIPA Act that Council:
 - a. make a new decision by way of internal review within 15 working days from the date of this report (subject to any permissible extensions under the GIPA Act). There is no fee payable in accordance with section 93(6) of the GIPA Act;

- b. apply the public interest test properly using the guidance in this report to the information that was withheld and is not captured by the conclusive presumption against disclosure; and
- c. if it decides to refuse access to part or all of the information requested, provide the general nature and format of the records containing the information falling within the scope of Mr F's request, and provide reasons for the refusal as required by section 61 of the GIPA Act.

Our review

5. Mr F wrote to us on 21 April 2011 and requested we review the decision made by Council under section 80(d) of the GIPA Act, which was to provide partial access to the information sought by his access application.
6. In conducting our review we examined:
 - o Council's GIPA file;
 - o Council's submission included with the file; and
 - o Mr F's letter included with his request for external review.
7. We also carried out a preliminary examination of the information withheld, and discussed it with Council as we were not satisfied that the conclusive presumption against disclosure applied to all the information contained therein. Consequently we asked the Council if it would be prepared to reconsider whether it wished to continue to claim legal professional privilege over all the information contained in these documents.
8. The Council agreed to reconsider the matter and advised us on both the 21 and 29 March 2012 that it was prepared to release significantly more information including three documents it had previously claimed legal professional privilege over. However, it was not prepared to waive its legal professional privilege with respect to information contained in 10 documents. A schedule of the information Council will now release is annexed to this report.
9. We reviewed the documents that the Council originally claimed attracted legal professional privilege and provided to us as part of this review. The Council's decision to withhold 10 documents that it continues to claim attract legal professional privilege is the focus of this review.

The public interest test

10. A person who makes an access application for government information has a legally enforceable right to access the information requested unless there is an overriding public interest against disclosing the information, pursuant to section 9(1) of the GIPA Act.
11. Section 13 of the GIPA Act sets out the public interest test as follows:

There is an overriding public interest against disclosure of government information for the purposes of this Act if (and only if) there are public interest considerations against disclosure and, on balance, those considerations outweigh the public interest considerations in favour of disclosure.

12. When applying the public interest test, an agency should begin with the general presumption in favour of disclosure of government information provided for at section 5 of the GIPA Act.
13. The agency must then:
 - a. identify further public interest considerations in favour of disclosure;
 - b. identify any relevant public interest considerations against disclosure;
 - c. determine the weight of the public interest considerations in favour of and against disclosure; and
 - d. determine where the balance between those interests lies.
14. In applying the public interest test agencies must follow 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 provides that there is a general public interest in favour of the disclosure of government information. This consideration must always be weighed in the application of the public interest test.
16. Section 12(2) of the GIPA Act sets out examples of public interest considerations in favour of disclosure, including but not limited to:
 - a. promoting open discussion of public affairs, enhancing government accountability or contributing to positive and informed debate on issues of public importance;
 - b. informing the public about the operations of agencies and their policies and practices for dealing with the public;
 - c. ensuring effective oversight of the expenditure of public funds;
 - d. the information is personal information of the person to whom it is to be disclosed; and
 - e. revealing or substantiating that an agency (or officer of an agency) has engaged in misconduct or negligent, improper or unlawful conduct.

17. The nature and scope of other public interest considerations in favour of disclosure which may be relevant in the application of the public interest test are not limited (s12(2) GIPA Act).
18. At least one of Mr F's reasons for seeking access to the information can be adduced from the description of the information he provided in his access application on 3 February 2011. Mr F requested access to: "All documentation in determining your claim of my responsibility".
19. The Council did not identify any public interest considerations in favour of disclosure in its notice of decision. Based on the description of the information provided by Mr F and having reviewed the information provided to us by Council, we are of the opinion that the public interest considerations in favour of disclosure that apply in this matter are as follows:
 - o disclosure of the information could reasonably be expected to reveal the reason for a government decision and any background or contextual information that informed the decision; and
 - o disclosure of the information could reasonably be expected to contribute to the administration of justice generally, including procedural fairness.
20. These public interest considerations in favour of disclosure carry significant weight as they support a broader public interest of procedural fairness, natural justice and transparency of Council decision making.
21. When writing its decision in response to an access application, the Council should list the considerations that it has taken into account and explain why the considerations identified apply to the information sought.

Legal Professional Privilege

22. Section 14(1) of the GIPA Act provides that it is to be conclusively presumed that there is an overriding public interest against disclosure of any of the information described in Schedule 1.
23. In its notice of decision the Council advised Mr F that it had identified documents it considered contained information subject to legal professional privilege and that access to these documents would not be provided as it had decided not to waive privilege.
24. Clause 5 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.
25. Also, under clause 5 of schedule 1 to the GIPA Act, an agency must consider whether it is appropriate to waive privilege. An agency's decision not to waive privilege is not a reviewable decision under the GIPA Act.

26. Whilst the Council is entitled to decide not to waive its privilege, before it can do so it must first demonstrate that privilege does in fact apply and to what information.
27. In our view the correct test for determining what legal professional privilege is under the GIPA Act is the *Evidence Act 1995* test.
28. Legal professional privilege protects confidential communications and confidential documents between a lawyer and a client made for the dominant purpose of the lawyer providing legal advice or professional legal services to the client.
29. Section 117 of the Evidence Act 1995 defines ‘confidential communication’ and ‘confidential document’ as:
- confidential communication** means a communication made in such circumstances that, when it was made:
- (a) the person who made it, or
 - (b) the person to whom it was made,
- was under an express or implied obligation not to disclose its contents, whether or not the obligation arises under law.
- confidential document** means a document prepared in such circumstances that, when it was prepared:
- (a) the person who prepared it, or
 - (b) the person for whom it was prepared,
- was under an express or implied obligation not to disclose its contents, whether or not the obligation arises under law.
30. Sections 118 and 119 of the *Evidence Act 1995 (NSW)* sets out when information is privileged from production in legal proceedings. The essential elements of demonstrating this privilege are:
- the existence of a client and lawyer relationship;
 - the confidential nature of the communication or document; and
 - the communication or document was for the dominant purpose of the lawyer providing the client with legal advice or legal services in relation to a proceeding.
31. The existence and maintenance of privilege must always be considered in light of all the facts and circumstances that apply to the information.
32. We are satisfied that the email from a Legal Assistant at Strathfield Council to a solicitor on 17 June 2010 at 3:34pm satisfies all the essential elements of legal professional privilege.
33. However, we have also identified that the Council applied legal professional privilege to documents that have not been prepared for the dominant purpose of legal advice or

legal proceedings. For example, we are not satisfied based on the information we have before us that the Council's claim that the photocopy of an entry of a ranger's evidence book, made on 3 June 2010, attracts legal professional privilege.

34. We are unable to comment on the substance of the information and note that section 91 of the GIPA Act which states:

The Information Commissioner must not, in the exercise of functions in connection with a review under this Division, disclose any information for which there is (or for which an agency claims there is) an overriding public interest against disclosure.

35. We recommend that in making a new decision, the Council review the information over which it may claim legal professional privilege, and reassess whether the information attracts legal professional privilege in accordance with the guidance in this report, and if so, again consider whether it is appropriate in the circumstances for the Council to waive its privilege, or if it decides the information does not attract privilege, apply the public interest test to the information in question.

Public interest considerations against disclosure

36. While the public interest considerations in favour of the disclosure of government information are not limited, the public interest considerations against disclosure are limited to those considerations set out in section 14 of the GIPA Act.
37. In order for the considerations against disclosure set out in the table to section 14 of the GIPA Act to be raised as relevant considerations, the Council must establish that the disclosure of the information "...could reasonably be expected to have...the...effect" outlined in the table.
38. Therefore before applying a consideration against disclosure to the information, the Council must:
- a. identify the information;
 - b. characterise it as information to which a public interest consideration against disclosure set out in the table to section 14 of the GIPA Act applies, and
 - c. prove that disclosure of the information could have the effect deemed not to be in the public interest.

Balancing the public interest

39. 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.

40. The Council 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.
41. If at this stage the Council 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 (see for example sections 72 to 78 of the GIPA Act). For example it is open to Council to identify what information that legal professional privilege applies to, and withhold that information by deleting it in accordance with section 74 of the GIPA Act.
42. 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.
43. Once all of the above steps have been finalised, the Council should explain its reasons for the decision to the applicant. If the Council decides that there is an overriding public interest against disclosing the information its notice of decision must meet the notice requirements in section 61 of the GIPA Act.
44. To assist the Council in applying the public interest test, we attach the OIC publication "How to apply the public interest test".

Requirements for notices of decisions

45. Section 61 of the GIPA Act sets out the requirements for a notice of decision when an agency refuses to release information falling within the scope of an access application.
46. The Council's notice of decision has not complied with section 61 of GIPA Act because:
 - a. it does not include detailed reasons for its decision;
 - b. it does not include findings on any key questions of fact, and the source of the information on which the findings are based; and
 - c. it does not include a schedule of the documents identified as falling within the scope of Mr F's application.

47. To assist the Council, we have provided further detail about the requirements of notices of decisions in **Attachment A** to this report.

Our recommendations

48. We recommend the Council:
- a. in accordance with section 93 of the GIPA Act, make a new decision by way of internal review within 15 working days from the date of this report (subject to any permissible extensions under the GIPA Act). There is no fee payable in accordance with section 93(6) of the GIPA Act;
 - b. apply the public interest test properly as explained in this report, to all of the information located and identified as falling within Mr F's request; and
 - c. if it decides to refuse access to part or all of the information requested, provide a list of the information falling within the scope of Mr F's access application, and provide reasons for the refusal as required by section 61 of the GIPA Act.
49. We ask that the Council:
- provide Mr F with access to the information (documents) it told us it was prepared to release to him during the course of this review; and
 - advise us and Mr F by 10 April 2012 of the actions it intends to take in response to our recommendations.

Review rights

50. Our recommendations 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 Administrative Decisions Tribunal (**ADT**) for a review of that decision.
51. If Mr F is dissatisfied with:
- a. our recommendations, or
 - b. Strathfield Council's response to the recommendations,
- Mr F may ask the ADT to review the original decision of the Council.
52. An application for ADT review can be made up to **20 working days** from the date of this report. After this date, the ADT can only review the decision if it agrees to extend this deadline. The ADT's contact details are:

Administrative Decisions Tribunal

Level 10, 86 Goulburn Street,

Sydney, NSW, 2000

Telephone (02) 9377 5711

Facsimile (02) 9377 5723

TTY (02) 9377 5859

Internet <http://www.lawlink.nsw.gov.au/adt>

e-mail ag_adt@agd.nsw.gov.au

53. If Strathfield Council makes a new reviewable decision as a result of our review, Mr F 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 OIC or ADT.

Closing our file

54. This file is now closed.

55. If you have any questions about this report please contact the IPC on 1800 472 679.