office of the information commissioner
new south wales

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

Applicant:	**The applicant**
Agency:	**Department of Trade and Investment**
OIC reference:	**11-324**
Date review request received:	**4 October 2011**
Date of review report:	**28 November 2011**

Summary of report

1. The applicant applied under the *Government Information (Public Access) Act 2009* (the GIPA Act) for statistical information held by the Department of Trade and Investment. He requested a spreadsheet showing breaches of licensing laws by licensed premises, including fines and matters going to court.
2. The agency advised that it would need to consult over 900 people to deal with the applicant's application, and that would be an unreasonable and substantial diversion of resources. If this were necessary, it would likely refuse the application under s.60 (1)(a) of the GIPA Act. Instead, the agency provided information using unique codes for premises. The applicant found that the information in this form was not of use to him and requested that we review the agency's decision.
3. Our view is that the agency has not established that there is an overriding public interest against disclosing the information in full. We therefore recommend:
    a. the agency make a new decision taking into account the factors outlined in this report; and
    b. in future, the agency consider proactively releasing information of this nature by publishing it, in accordance with s.7 (1) of the GIPA Act.

The decision and our review

4. An agency is able to refuse to deal with an application where to do so would be an unreasonable and substantial diversion of resources. It is also able to provide the

information in a different form to facilitate access, if it considers releasing it in the requested form would lead to an overriding public interest against disclosure.

5. In this case, the agency's rationale for its decision is based upon a general reading of s.54, which provides for a need to consult. As part of the discussion on consultation which we will have later in this report, it is first necessary to have a clear understanding of the application of the public interest test and its relationship with the need to consult.

The public interest test

6. 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 disclosure of the information.
7. There will only be an overriding public interest against disclosure when the public interest test in s.13 is satisfied. It sets out the public interest test as follows:

   > There is an ***overriding public interest against disclosure*** of government information for the purposes of the GIPA 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.

8. 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.
9. The agency must then:
   a. identify further public interest considerations in favour of disclosure
   b. identify any relevant public interest considerations against disclosure from the table at s.14 of the GIPA Act
   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.
10. 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

11. 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.
12. The applicant has advised that he requested the information to ascertain the impact of the proposed *Liquor Amendment (3 Strikes) Bill 2011* before State Parliament. He advises that under these proposed laws, licensees may lose their licence to trade liquor where they are found to have committed three "prescribed offences". It was his intention to assess the potential impact of these changes based on past breaches.
13. Disclosure of the information, therefore, could reasonably be expected to promote open discussion of public affairs, enhance Government accountability and contribute to positive and informed debate on an issue of public importance.
14. The nature of the information requested is statistical information and is factual in nature. The applicant has made almost identical applications to the department in 2009 and

2010 under the *Freedom of information Act 1989 (NSW)*. Each time he received the information in full in the form requested.

15. The department has also told us that it has received a number of similar applications from other journalists. In those cases, the department consulted with the top six listed licensees prior to releasing the information about those top six in full.

Public interest considerations against disclosure

16. With the exception of Schedule 1 of the GIPA Act, s.14 provides the only considerations that may be taken into account in applying the public interest test. In our view, section 14 table 4 (d) provides the only consideration against disclosure that could apply in this case. It states:

> There is a public interest consideration against disclosure of information if disclosure of the information could reasonably be expected to have one or more of the following effects:
>
> a. Prejudice any person's legitimate business, commercial, professional or financial interests.

Consultation

17. Section 54 (1) provides:

    a. An agency must take such steps (if any) as are reasonably practicable to consult with a person before providing access to information relating to the person in response to an access application if it appears that:
        (a) the information is of a kind that requires consultation under this section, and
        (b) the person may reasonably be expected to have concerns about the disclosure of the information, and
        (c) those concerns may reasonably be expected to be relevant to the question of whether there is a public interest consideration against disclosure of the information.

18. Information is of a kind that requires consultation under s.54 if it concerns the person's business, commercial, professional or financial interests. In this case, it may reasonably be expected that the hotel licensees may have concerns regarding their business interests that are relevant to a public interest consideration against disclosure.

19. The words *'must take such steps (if any) as are reasonably practicable'* in s.54 (1) imply that circumstances exist when an agency may not need to consult even when the provisions of s.54 (1)(a), (b) and (c) apply. The need to consult, as provided by s.54(1)(c), is to determine 'whether' there is a public interest consideration against disclosure. In this case, it is clear that there is a consideration provided at section 14 table 4(d). Then, on a strict reading of s.54, the requirement to consult is not enlivened, as it is evident that consideration exists.

20. Consultation is relevant when looking at the weight that should be given to a consideration. Any objection that may be raised through the consultation process must be considered in applying the public interest test. An objection in itself does not prohibit information from being released. The agency needs to balance the considerations 'for' and 'against' disclosure. That is, in all the circumstances of the case, would factors against disclosure outweigh factors in favour of release?

21. The weighing process of the public interest test starts with a statutory consideration in favour of release. Added to this, is the potential for public debate, transparency and accountability. If the agency had consulted and valid objections to disclosure were raised, the agency would have been able to weigh those considerations against those identified in favour of release.
22. Our view is that any conceivable consideration against disclosure, even at its strongest weight, would not outweigh the public interest considerations in favour of disclosure in this circumstance.

23. An agency should still consult as a matter of good practice. The burden is on the agency to justify and clearly document why it believes s.54 does not apply in a particular case.

Proactive release of information

22. Section 7(1) of the GIPA Act authorises an agency to make any government information held by it, publicly available, unless there is an overriding public interest against its disclosure. Section 7(3) requires an agency to review, at intervals of not more than 12 months, its program for the release of government information. An agency needs to identify the kinds of information held and whether there is a public interest in making it publicly available.

23. As the agency has received a number of applications of a similar nature, it should consider whether there is a public interest in this information being publicly available.

24. The agency should consider making the type of information sought by the applicant publicly available, with the approval of the principal officer.

Our recommendations

25. We recommend that the agency:

    a. make a new decision within 15 working days of this report (pursuant to s.93 of the GIPA Act) taking into account the matters discussed in this report;

    b. exercise its discretion to waive the internal review fee of $40 (pursuant to s.127 of the GIPA Act); and

    c. consider making the type of information applied for publicly available in the future (pursuant to s.7(1) of the GIPA Act).

Review rights

26. 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.
27. If the applicant is dissatisfied with the outcome of our review or the agency's response to our recommendations, then he may ask the ADT to review the agency's original decision.

28. The applicant can apply for an ADT review within four weeks of the date of this report, that is by 28 December 2011.

Closing our file

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

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