



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

Applicant:	Mr Geoff Iles
Agency:	WorkCover NSW
OIC reference:	11-359
Date review request received:	21 October 2011
Date of this report:	4 May 2012

Summary of report

1. Mr Iles seeks access to any information that constitutes the internal review by WorkCover of decisions it made and actions it took against a product he imported known as Snow White Stacked Stone.
2. We have reviewed the decision made by WorkCover and found that it did not properly apply the public interest test to particular information it decided to withhold in full.
3. Therefore we recommend that WorkCover review the information it withheld in full and make a new decision. Our reasons for this are explained in this report.

Background

4. In an email to WorkCover on the 10 December 2010, Mr Iles set out his concerns about the manner in which WorkCover handled the testing for asbestos of a product he imported known as Snow White Stacked Stone.
5. On the 15 December 2010 WorkCover responded to Mr Iles email and informed him that a review of the matters he raised in his email would be undertaken and that he would be informed of the outcome of that review.
6. On 15 June 2011 WorkCover wrote to Mr Iles and informed him that WorkCover's actions including that of the issuance of prohibition notices in relation to the Snow

White Stacked Stone product were reviewed by its legal advisors. It further stated that the findings of the review are contained in numerous legal advices which are subject to legal professional privilege, of which there is a conclusive presumption of overriding public interest against disclosure in schedule 1 of the GIPA Act.

7. Mr Iles submitted an access application to WorkCover on 19 July 2012, seeking access to:
 - o the file of WorkCover (ref wc00649/11) together with any file or papers that constitute the review of the WorkCover file (ref wc00649/11) referred to in a letter from John the General Manager Workplace Health and Safety addressed to me and dated 15 June 2011.
 - o the file of [XXXXX].

Our review

8. Mr Iles wrote to us on 21 October 2011 and requested we review WorkCover's decision to provide partial access to the information sought in his access application. This decision is a reviewable decision under under section 80(d) of the GIPA Act.
9. In its notice of decision dated 22 August 2011, WorkCover relied on the following:
 - a. clause 3(a) of the table at section 14(2) of the GIPA Act for withholding some personal information.
 - b. all the public interest considerations against disclosure set out in clause 4 of the table at section 14(s) of the GIPA Act for withholding information in full that it classified as business interests of agencies and other persons; and
 - c. clause 5 of schedule 1 to the GIPA Act as reasons for withholding information in full that it claims is subject to legal professional privilege.
10. We contacted Mr Iles who told us that he was interested in a report or document that details the outcome of a review undertaken by WorkCover on or about March 2011. We understand the review was to focus on the decisions made and actions taken by WorkCover concerning the testing for asbestos of the Snow White Stacked Stone product. He also told us that he had no issue with WorkCover's decision to withhold personal information.
11. We examined the GIPA file provided to us by WorkCover and found that it included a redacted version of documents (190 pages) and unredacted version of the documents (198 pages) containing information considered to be within the scope of Mr Iles's access application. However, it did not include the information it claims is subject to legal professional privilege or that it classified as business interests of agencies and other persons, that is the information it withheld in full.
12. We asked WorkCover why the unredacted version of documents did not include the information it withheld in full and they told us it was due to an oversight, as these documents had not been scanned along with those documents released to Mr Iles.
13. We spoke with both parties and explained that as WorkCover had not properly applied the public interest test to the information withheld in full, we would be recommending

they make a new decision. In light of this and in the circumstances, the parties agreed that it would be reasonable to recommend WorkCover reconsider their decision even though we had not examined the information it withheld in full.

14. Therefore, this report will serve as guidance for WorkCover when making a new decision and inform Mr Iles as to what is expected of WorkCover when making a new decision about the information it withheld in full.

The public interest test

15. 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.

16. 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.

17. 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.

18. WorkCover 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

19. Public interest considerations for and against disclosure should be systematically evaluated. Each consideration should be treated separately, its relevance to the public interest test and the weight to be attributed to it demonstrated by reference to evidence.

20. If the finding under the public interest test is that public interest considerations against disclosure “override” the presumption and all public interest considerations in favour of disclosure, the GIPA Act contains a number of provisions that may apply to:

- a. avoid an overriding public interest against disclosure (s 72(1) & 72(2)(d), 73(2), 74, 75, 76 and 78).

- b. mitigate the effect or reduce the weight of public interest considerations against disclosure (s 54), and/or
 - c. provide for resolution of the application, for example, by providing access on a confidential basis (s 8 of the GIPA Act).
21. It is consistent with the object of the GIPA Act that these provisions be considered, where relevant, before a decision is made not to disclose information because there is an overriding public interest consideration against disclosure.
22. Once all of the above steps have been finalised, WorkCover should explain its reasons for the decision to the applicant. If WorkCover 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.
23. In applying the public interest test agencies must follow the principles set out in section 15 of the GIPA Act.
24. To assist WorkCover in applying the public interest test, we attach the OIC publication "How to apply the public interest test".

Public interest considerations in favour of disclosure

25. 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.
26. 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). However, they must be considerations which reflect the public interest, not mere individual considerations regarding the applicant.
27. Section 12 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.

28. 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).
29. Mr Iles told us that WorkCover issued prohibition notices with respect to Snow White Stacked Stone which is a product he imported. Mr Iles also told us that WorkCover made statements and claims about the product which were incorrect and resulted in detrimental affects to his business and so he wishes to know what informed the decisions made by WorkCover.
30. WorkCover did not identify any public interest considerations in favour of disclosure in its notice of decision. Based on Mr Iles's reasons for making an access application, we consider the following public interest considerations in favour of disclosure apply:
 - a. 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.
 - b. disclosure of the information could reasonably be expected to advance the fair treatment of individuals and other entities in accordance with the law in their dealings with agencies.
 - c. disclosure of the information could reasonably be expected to allow or assist inquiry into possible deficiencies in the conduct or administration of an agency or official.
 - d. disclosure of the information could reasonably be expected to reveal environmental or health risks or measure relating to public health and safety
 - e. disclosure of the information could reasonably be expected to contribute to the administration of justice generally, including procedural fairness.
31. These public interest considerations in favour of disclosure carry significant weight as they uphold the object of the GIPA Act and support a broader public interest of procedural fairness, natural justice and transparency of WorkCover's decision making.
32. When writing its decision in response to an access application, WorkCover should list the considerations that it has taken into account and explain why and how the considerations identified apply to the information sought.

Legal Professional Privilege

33. In its notice of decision WorkCover advised Mr Iles that it had identified correspondence it considered contained information subject to legal professional privilege and that these documents would be withheld in full.
34. We were not provided with copies of the documents WorkCover claims contains information subject to legal professional privilege for the purpose of this review. As such the following guidance is based on our examination of WorkCovers notice of decision.
35. 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.

36. 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.

37. 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 to waive or not to waive privilege is not a reviewable decision under the GIPA Act.
38. Whilst WorkCover is entitled to decide not to waive its privilege, before it can do so it must first demonstrate that privilege does in fact apply to the information.
39. In our view the correct test for determining what legal professional privilege is under the GIPA Act is contained in the *Evidence Act 1995* test. 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.
40. The existence and maintenance of privilege must always be considered in light of all the facts and circumstances that apply to the information.
41. We recommend that in making a new decision, WorkCover review the information over which it may claim legal professional privilege, and assess 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 WorkCover 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

42. With the exception of schedule 1 to the GIPA Act, the table in section 14 provides the only considerations against disclosure that may be taken into account in applying the public interest test.
43. In their decision WorkCover relied on clause 3(a) and all the public interest considerations against disclosure set out in clause 4 of the table at section 14(2) of the GIPA Act. These clauses provide that there is a public interest consideration against disclosing the information if disclosure of the information could reasonably be expected to:

clause 3(a) – reveal an individual's personal information

clause 4(a) - undermine competitive neutrality in connection with any functions of an agency in respect of which it competes with any person or otherwise place an agency at a competitive advantage or disadvantage in any market,

clause 4(b) - reveal commercial-in-confidence provisions of a government contract,

clause 4(c) - diminish the competitive commercial value of any information to any person,

clause 4(d) - prejudice any person's legitimate business, commercial, professional or financial interests,

clause 4(e) - prejudice the conduct, effectiveness or integrity of any research by revealing its purpose, conduct or results (whether or not commenced and whether or not completed).

44. Mr Iles told us that he is not concerned with WorkCover's decision to withhold personal information in reliance of clause 3(a) of the table to section 14(2) of the GIPA Act and that he does not press for access to this information. Therefore we will not discuss this public interest consideration against disclosure in this report.
45. Furthermore, we cannot discuss WorkCover's reliance on all the public interest considerations against disclosure set out in clause 4 of the table at section 14(2) of the GIPA Act, as we were not provided copies of the information it withheld in full and categorised as business interests of agencies and other persons.
46. However, it should be noted that if WorkCover raises a public interest consideration against disclosure, they need to show the elements of each consideration applies before they apply the public interest test.
47. For example, to raise the public interest considerations against disclosure at clause 4(d) of the table at section 14(2) of the GIPA Act WorkCover must show in its notice of decision that the following two elements are met:
 - The information relates to a person's legitimate business, commercial, professional or financial interests
 - who?
 - what are these interests?
 - how does the information relate to them?
 - Disclosure of the information could reasonably be expected to prejudice these interests
 - how?
 - what prejudice would be caused?
48. If any of the elements of a public interest consideration against disclosure are not met, the consideration does not apply. Similarly a public interest consideration against disclosure only applies to such information as it meets all of the elements of the consideration. Therefore it may apply to some, but not other information in the same document.
49. Once the elements have been met, WorkCover can proceed to considering the weight of the consideration and whether or not it overrides the public interest considerations in favour of disclosure (either on its own or in conjunction with other public interest considerations against disclosure).
50. Therefore before applying a consideration against disclosure to the information, the Department 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. show that disclosure of the information could have the effect deemed not to be in the public interest.

Balancing the public interest

33. 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.
34. WorkCover 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
51. If at this stage WorkCover 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).
52. 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.
53. Once all of the above steps have been finalised, WorkCover should explain its reasons for the decision to the applicant. If WorkCover 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.

Requirements for notices of decisions

54. 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.
55. WorkCover'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 Iles's application.

56. We encourage WorkCover to contact us if it would like further information about how to comply with this requirement.

Our recommendations

57. We recommend WorkCover:
- 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 as explained in this report, to all of the information located and identified as falling within Mr Iles'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 Iles's access application, and provide reasons for the refusal as required by section 61 of the GIPA Act.
58. We ask WorkCover advise us and Mr Iles by **18 May 2012** of the actions it intends to take in response to our recommendations.

Review rights

59. 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.
60. If Mr Iles is dissatisfied with:
- a. our recommendations, or
 - b. WorkCover's response to the recommendations,
 - c. Mr Iles may ask the ADT to review the original decision of the WorkCover.
61. 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

46. If WorkCover makes a new reviewable decision as a result of our review, Mr Iles 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.

Questions?

47. This file is now closed.
48. If you have any questions about this report please contact us on 1800 472 679.