

Review under the GIPA Act

Email Annexure C	Withheld	<p>The Premier's office did not show how the elements of the considerations apply.</p> <p>Pursuant to section 93 of the GIPA Act, we recommend the Premier's office reconsider its decision, to withhold the information described in Annexure C, with the exception of the house folder notes in Annexure C.</p> <p>Pursuant to section 94 of the GIPA Act, we recommend against the Premier's decision that there is an overriding public interest against the disclosure of some personal information contain in an email between Premier's Office, Minister Souris' Office and a particular business on 19 July 2011.</p>
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In the course of conducting this review it became apparent that there may be further information held by the Premier's office that might fall within the scope of Mr Whan's application. The submission made by the Premier's office includes details of its searches which indicate a relevant person was not in the office at the time searches were conducted and there was no indication that records or files applicable to Mr Whan's access application were searched for.

Therefore we also recommend that the Premier's office conduct additional searches if it accepts our recommendations for reconsideration of this matter.

1.3 Next steps

This review is now closed.

We ask that the Premier's office advises us and the Hon. Steve Whan MLC by **8 April 2013** of the actions it intends to take in response to the Information Commissioner's recommendations.

2 Context

2.1 Original application

On 22 March 2012 the Premier's office received Mr Whan's access application made under the GIPA Act which sought access to:

All documents (since 1 July 2011) in the custody or possession of the Premier or the Minister for Gaming, Racing, Hospitality and the Arts or their office related to the Star Casino.

2.2 Agency response

In its notice of decision dated 4 May 2012 the Premier's office stated that it had undertaken reasonable searches to identify the information (documents) falling within the scope of Mr Whan's access application.

The Premier's office decided Mr Whan's application by making more than one decision as follows:

- to disclose the information contained in records described in Annexure A;
- to provide partial access to the information contained in the records described in Annexure B;
- to refuse to provide access to the information contained in the records described in Annexure C.

2.3 Request for review

On 23 May 2012 we received Mr Whan's request for external review of the decision made by the Premier's Office. The Premier's office decided to withhold some information on the basis of Parliamentary privilege and an overriding public interest against disclosure.

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3 Public interest test

A person who applies to access government information has a legal right to access it unless there is an overriding public interest for it not to be disclosed. An agency must weigh considerations for and against releasing information before making its decision.

This is known as the public interest test, which is outlined in the GIPA Act:

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 (section 13)

Balancing considerations

The GIPA Act does not provide a set formula for working out the weight of considerations for or against disclosure, or deciding if one set of considerations outweighs the other.

Decision makers may take their own approach, as long as they act in good faith and are consistent with the Act. They may weigh questions of fact or degree differently, coming up with different answers without being wrong.

However, an agency must follow the principles in section 15:

- agencies must exercise their functions in a way that promotes the object of the Act
- agencies must bear in mind any applicable Information Commissioner guidelines
- it is irrelevant if disclosure might cause embarrassment to, or loss of confidence in, the agency
- it is irrelevant if any disclosed information might be misinterpreted or misunderstood
- agencies cannot put conditions on the use of disclosed information for a formal access application.

Considerations for and against disclosure

Section 12(2) does not limit the considerations in favour of disclosure that might be relevant, but gives some examples. Section 14 sets out the considerations against disclosure.

Section 14(1) says that if information falls within the scope of any of the clauses in schedule 1, its release is not in the public interest. This means the

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agency does not have to balance the considerations before refusing access to the information.

Section 14(2) says that the only other relevant considerations against disclosure are those in the table to section 14. If the agency raises any of the points in clauses 1 to 6, it must establish that disclosing the information ‘... could reasonably be expected to have ... the effect’ outlined in that table. The agency must therefore:

- identify the information
- show that it falls within a clause in the section 14 table
- provide evidence that disclosing the information could have the effect outlined in the table.

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4 House Folder notes

Information	Agency decision	Our findings and recommendation
House Folder notes	Withheld	<p>We agree that the Premier's office has justified its decision that the conclusive presumption of an overriding public interest against disclosure set out in clause 4 of Schedule 1 to the GIPA Act applies to the information held in those documents described as house folder notes in Annexures B and C</p> <p>We do not make any recommendations against this decision.</p>

In its notice of decision the Premier's office explained that access to the information contained in the house folder notes was refused, as it was subject to a conclusive presumption that there is an overriding public interest against disclosure.

Section 14(1) of the GIPA Act provides:

It is to be conclusively presumed that there is an overriding public interest against disclosure of any of the government information described in Schedule 1.

Clause 4(c) of Schedule 1 to the GIPA Act is relevant and provides that it is to be conclusively presumed that there is an overriding public interest against disclosure of information that would infringe the privilege of Parliament.

We considered the Premier's decision about the house folder notes in light of *Tziolas v NSW Department of Education and Communities*¹.

The Administrative Decisions Tribunal decided there is a conclusive presumption of an overriding public interest against disclosure of house folder notes. In making this decision Judicial Member Isenberg had regard to *In the matter of OPEL Networks Pty Ltd (In Liq) (2010) 77 NSWLR 128* in which Austin J considered 'there to be two general principles as to why briefing notes should be privileged from production'. Judicial member Isenberg found these principles to be relevant to the scope and application of clause 4(c) of schedule 1 to the GIPA Act.

We examined the information described as house folder notes listed in Annexures B and C and we are satisfied that this information was prepared for the purpose of answering questions that might be raised in Parliament. Consequently we are satisfied that the conclusive presumption of an overriding public interest against disclosure applies to this information.

¹ [2012] NSWADT 69

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5 Emails (two examples)

Information	Agency decision	Our findings and recommendation
B4 - Annexure B	Partial refusal	<p>The Premier's office did not show how the elements of the considerations apply; consequently it has not demonstrated an application of the public interest test nor has it explained its reasons for withholding information in accordance with section 61 of the GIPA Act.</p> <p>Pursuant to section 93 of the GIPA Act, we recommend the Premier's office reconsider its decision, with the exception of the house folder notes.</p>
C1 – Annexure C	Withheld	<p>The Premier's office did not show how the elements of the considerations apply.</p> <p>Pursuant to section 93 of the GIPA Act, we recommend the Premier's office reconsider its decision, to withhold the information described in Annexure C, with the exception of the house folder notes.</p> <p>Pursuant to section 94 of the GIPA Act, we recommend against the Premier's decision that there is an overriding public interest against the disclosure of personal information contain in an email between Premier's Office, Minster Souris' Office and a particular business on 19 July 2011.</p>

The Premier's office has not demonstrated an application of the public interest test in either its notice of decision or in the submission received by our office on 9 July 2012. Consequently the Premier's office has not established that there is an overriding public interest against disclosure of the information described in Annexures B and C, with the exception of the house folder notes already discussed in the previous section. This is because even though the Premier's office identified public interest considerations for and against disclosure of the information contained in emails listed in Annexures B and C, it did not show how the elements of these considerations apply nor did it discuss the weight of them.

In order to assist the Premier's office, we have considered two records "B4" and "C1" and provide in the report detailed feedback about the public interest considerations against disclosure applied to each record. Our intention is that these two examples will assist the Premier's office apply the public interest test to the other information Mr Whan asked for. The remainder of this report sets out this feedback and guidance.

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5.1 Considerations in favour of disclosure

Promote open discussion of public affairs

In its notice of decision the Premier's office stated that there may be public interest considerations in favour of disclosure that apply to the information described in Annexures B and C, such as:

disclosure of the information could reasonably be expected to promote open discussion of public affairs, enhance Government accountability or contribute to positive and informed debate on issues of public importance

Mr Whan's motive for seeking access to this information is evident from a media release *O'Farrell trying to hide Souris: Labor to lodge GIPA to get to bottom of Star Casino Affair* published on his webpage on 7 March 2012.

In his request for external review Mr Whan told us that he was concerned the withheld information "may provide important information including details of the actions and motives of the Premier, Minister for Tourism, Major Events Hospitality and Racing and staff members in relation to the Star Casino".

Given Mr Whan's motive for making his application and the functions and power of the Premier's office we consider the following public interest considerations in favour of disclosure apply:

- 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; and
- disclosure of the information could reasonably be expected to reveal or substantiate whether an agency or official has engaged in misconduct or negligent, improper or unlawful conduct.

In its decision the Premier's office should not only identify those public interest considerations in favour of disclosure it considers applies, but also explain how they apply, what weight it attributes to those considerations and why.

5.2 Considerations against disclosure

In its notice of decision the Premier's office stated that after taking into account objections it received from third parties it was satisfied that the information listed in Annexures B and C could reasonably be expected to have the effect as described in the five public interest considerations against disclosure it listed in the notice of decision. These considerations come from the table at section 14 of the GIPA Act and provide that there is a public interest against disclosure of information if disclosure of the information could reasonably be expected to:

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

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- 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).
- clause 6(1) – (disregarding the operation of this Act) be expected to constitute a contravention of a provision of any other Act or statutory rule (of this or another State or of the Commonwealth) that prohibits the disclosure of information, whether or not the prohibition is subject to specified qualifications or exceptions.

Merely listing public interest considerations against disclosure does not meet the requirements of the public interest test. It is also not enough to meet the requirements for notices of decisions set out in section 61 of the GIPA Act. If the Premier’s office raises a public interest consideration against disclosure, it needs to show how the elements of the consideration apply to the particular information.

If any of the elements of a public interest consideration against disclosure are not met, the consideration does not apply.

A public interest consideration against disclosure only applies to such information if it meets all of the elements of the consideration.

Once the elements have been met, the Premier’s office can proceed to determine the weight to be attributed to each of the considerations and whether or not they override the public interest considerations in favour of disclosure through the application of the public interest test.

We have included guidance on three of the public interest considerations against disclosure (listed below) in this report:

No	Description of Record	Public interest consideration against disclosure
B4	Email between Premier’s Office and Journalist – 4 March 2012	6(1) of the table at section 14(2)
C1	Email between Premier’s Office, Minister Souris’ Office and business – 19 July 2011	3(a) and 4(d) of the table at section 14(2)

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B4 – email between Premier’s Office and Journalist 4 March 2012

Secrecy Provisions

The Premier’s office identified clause 6(1) of the table at section 14(2) as a public interest consideration against disclosure of the email between the Premier’s office and a journalist on 4 March 2012. This clause provides:

There is a public interest consideration against disclosure of information if disclosure of the information by any person could (disregarding the operation of this Act) reasonably be expected to constitute a contravention of a provision of any other Act or statutory rule (of this or another State or of the Commonwealth) that prohibits the disclosure of information, whether or not the prohibition is subject to specified qualifications or exceptions.

The notice of decision does not explain how the elements of this consideration apply to the information withheld. However, the submission made by the Premier’s office makes reference to section 143B of the *Casino Control Act 1992* and states that the information withheld is the name of a person who should not be publically named. This is relevant information that should be included in a notice of decision.

Section 143B of the *Casino Control Act 1992* provides:

143B Restriction on publication of information

- (1) The person presiding at an inquiry being conducted by or on behalf of the Authority under section 143 may, by order in writing, direct that:
 - (a) any evidence given at the inquiry, or
 - (b) the contents of any document, or a description of any thing, produced at the inquiry, or
 - (c) any information that might enable a person who has given or may be about to give evidence at the inquiry to be identified or located, or
 - (d) the fact that any person has given or may be about to give evidence at the inquiry, is not to be published at all, or is not to be published except in such manner, and to such persons, as the person presiding at the inquiry may specify.
- (2) Such a direction is not to be given unless the person presiding at the inquiry is satisfied that the direction is necessary in the public interest or that there are other exceptional circumstances that require the direction to be given.
- (3) A person must not make a publication in contravention of a direction given under this section.

Maximum penalty (subsection (3)): 50 penalty units or imprisonment for 12 months, or both.

In essence the respective provisions of section 143B of the *Casino Control Act 1992* take on the character of a secrecy provision once a direction (written order) is given by the person presiding at an inquiry.

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Accordingly the notice of decision needs to show that the provisions of section 143B of the *Casino Control Act 1992* have been invoked in order to establish that clause 6(1) of the table at section 14(2) applies. This may be achieved by explaining:

- which inquiry is to be or has been conducted;
- who gave the direction;
- the date the direction (written order) came into effect;
- a statement explaining the effect of the direction.

Clause 6(2) of the table at section 14(2) of the GIPA Act provides that:

The public interest consideration under this clause extends to consideration of the policy that underlies the prohibition against disclosure.

Taking into account such policy considerations serves to inform the decision maker as to whether disclosure of information obtained as part of the administration of a particular Act should take place in a controlled and balanced manner or whether the secrecy provision was designed to limit disclosure of particular information altogether.

Given that this is a consideration against disclosure and not a conclusive presumption of an overriding public interest against disclosure, identifying the policy implications behind a secrecy provision will assist the decision maker attribute weight to this consideration.

We are of the view that if the Premier's office can show that clause 6(1) of the GIPA Act does in fact apply to the email between its office and a journalist on 4 March 2012, it would be a weighty consideration, as section 143B(2) of the *Casino Control Act 1992* requires that the person presiding at an inquiry must not issue such a direction unless it is in the public interest to do so.

C1 – email between Premier's Office, Minister Souris' Office and business 19 July 2012.

Reveal personal information

The Premier's office identified clause 3(a) of the table at section 14(2) as a public interest consideration against disclosure of the email between the Premier's office and Minister Souris' Office and business on 19 July 2011. This clause states:

There is a public interest consideration against disclosure of information if disclosure of the information could reasonably be expected to reveal an individual's personal information.

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Clause 4(1) of schedule 4 to the GIPA Act defines personal information to include information or an opinion about an individual whereby their identity is either apparent or can be reasonably ascertained from the information.

Schedule 4 to the GIPA Act defines “reveal” in the context of the GIPA Act to mean *to disclose information that has not already been publicly disclosed (otherwise than by unlawful disclosure)*.

In the matter of *Richards v Commissioner, Department of Corrective Services* [2011] NSWADT 98, Judicial Member Molony at [40] identified an important distinction between the previous Freedom of Information (FOI) regime and the GIPA Act. The definitions of ‘government information’, ‘personal information’ and ‘reveal’ operate on information alone, not on documents as under FOI. Therefore the issue is “not whether the document has been publicly disclosed, but whether the information they contain has been publicly disclosed”.

Section 15(b) of the GIPA Act provides that agencies must have regard to any relevant guidelines issued by the Information Commissioner when determining whether there is an overriding public interest against disclosure.

When making its new decision the Premier’s office should have regard to our *Guideline 4 – Personal information as a public interest consideration under the GIPA Act* released in December 2011, which deals with ‘personal information’ in terms of the GIPA Act.

Paragraph 1.2 of the guideline sets out examples of personal information, which includes a person’s name.

Paragraph 1.3 of the guideline states that personal information specifically includes opinions and that opinions would be considered “personal information” under the GIPA Act where that opinion is about an individual whose identity is apparent or can “reasonably be ascertained” from that opinion or from other accompanying information.

At paragraph 1.5 what is meant by “whose identity is apparent or can reasonably be ascertained” is said to be what gives the information its ‘personal’ context. The identity of a person will be apparent where the information includes his or her name, but also where the information is such that it could not be referring to anyone else. Whether then the identity of a person can “reasonably be ascertained” will depend on the type of information and the context in which it is being used.

We are satisfied that the name of the person who sent the initial email constitutes personal information. However, we are not satisfied that the names of the other individuals mentioned in the email constitute personal information for the purpose of the GIPA Act. Clause 4 of Schedule 4 to the GIPA Act sets out what is not considered personal information and provides that personal information does not include information about an individual

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(comprising the individual's name and nonpersonal contact details) that reveals nothing more than the fact that the person was engaged in the exercise of public functions.

This public interest consideration against disclosure applies to the name of the person who sent the initial email and the opinions contained therein. However, given the business context of the email it is unlikely to carry any more than marginal weight.

Consultation with NSW Privacy Commissioner

In accordance with section 94(2) of the GIPA Act we consulted with the Privacy Commissioner before we decided to recommend against the Office of the Premier's decision that there is an overriding public interest against disclosing the email referred to as C1.

The Privacy Commissioner reviewed the following information:

- email between Premier's office, Minister Souris' Office and business – 19 July 2011 (C1);
- the affected party's objection;
- the notice of decision; and
- the submission by the Premier's office in respect of this particular objection.

The Privacy Commissioner advised us that the name and mobile number of the individual (business representative) who sent the initial email is personal information. She confirmed that she does not consider the names of public officials appearing in this email to be personal information.

The Privacy Commissioner noted that the email was sent by the business representative in a professional capacity and, while noting this individual's objection to its release, formed the view that the email did not contain content of a personal nature.

We have formed the view, in concurrence with the Privacy Commissioner that the email should be released in full with the exception of the business representative's mobile number. The mobile number could be deleted in accordance with section 74 of the GIPA Act, so as to prevent an overriding public interest against disclosure of the other information contained in the email.

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Prejudice a person's legitimate business interests

The Premier's office raised clause 4(d) of the table at section 14(2) as a public interest consideration against disclosure of the email between the Premier's office and Minister Souris' office and a business on 19 July 2011. This consideration 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,

In order to show that the elements of this consideration are met, the Premier's office should consider questions such as:

1. 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?
2. Disclosure of the information could reasonably be expected to prejudice these interests
 - how?
 - what prejudice would be caused?

If any of the elements of a public interest consideration against disclosure are not met, the consideration does not apply. Therefore, before applying a consideration against disclosure to the information, the Premier's office 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. demonstrate that disclosure of the information could have the effect deemed not to be in the public interest.

The Premier's office has not shown that the information relates to a person's legitimate business or professional interests, nor has it demonstrated how it is that those interests would be prejudiced by the disclosure of the email because it has merely asserted that the public interest consideration against disclosure applies. Based on the information before us, the Premier's office has not justified this part of its decision.

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Consultation on public interest considerations

The purpose of consultation is to ascertain whether the person has an objection to disclosure of some or all of the information and the reasons for any such objection.

In accordance with section 54 of the GIPA Act, the Premier's office consulted with the individual (third party) whose name and opinions appear in the email (C1) and in response, received an objection by the individual to the disclosure of this information.

If the Premier's office decides to make a new decision it should have regard to our *Guideline 5 – Consultation on public interest considerations under section 54 of the GIPA Act* released in February 2012, which sets out how section 54 relates to the public interest test.

The Premier's office needs to take any third party objection into account in making its decision. However, an objection to the disclosure of information is not in itself determinative of an overriding public interest against disclosure.

As captured by paragraph 2.4 of the guideline, the Information Commissioner considers that the views of third parties may "reasonably be expected" to be relevant to the question of whether there is a public interest consideration against disclosure in two respects:

- third parties can help establish if a public interest consideration against disclosure exists; and
- they can assist an agency decide how much weight to give those considerations.

The Premier's office may decide to release information despite receiving an objection from a third party. However under section 54(6) and (7), the Premier's office must notify the third party of its decision, and not release the information until the third party's review rights have expired.

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6 Reasonable searches

Section 53(2) of the GIPA Act sets out the requirement to conduct searches. It provides:

53 Searches for information held by agency

(2) An agency must undertake such reasonable searches as may be necessary to find any of the government information applied for that was held by the agency when the application was received. The agency's searches must be conducted using the most efficient means reasonably available to the agency.

The expression 'government information' is given a wide meaning by section 4 which provides that it is 'information contained in a record held by an agency.'

Clause 12(1) of schedule 4 to the GIPA Act provides that:

A reference in this Act to government information held by an agency is a reference to:

- (a) information contained in a record held by the agency, or
- (b) information contained in a record held by a private sector entity to which the agency has an immediate right of access, or
- (c) information contained in a record in the possession or custody of the State Records Authority (or that the Authority has in the custody or possession of some other person) to which the agency has an immediate right of access, other than a record that is withheld from public access under section 59 of the State Records Act 1998, or
- (d) information contained in a record that is in the possession, or under the control, of a person in his or her capacity as an officer or member of staff of the agency (including, in the case of a Minister, the personal staff of the Minister).

It appears to us from the information contained in the GIPA file provided by the Premier's office that there may be more information covered by the terms of Mr Whan's access application that was not identified by the Premier's office's searches.

We recommend that further searches are conducted as part of the internal review. We will discuss the additional information separately with the Premier's office in case the Premier's office wishes to claim an overriding public interest against disclosing what the information is, consistent with section 91 of the GIPA Act.

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7 Requirements for notices of decisions

The Premier's office did not clearly explain the reasons for its decision to withhold the information other than the information that attracts Parliamentary privilege. In order to assist the Premier's office, we attach some guidance on the requirements for reasons in a notice of decision to this report. These requirements are listed in section 61 of the GIPA Act and include:

- a) the agency's reasons for its decision,
- (b) the findings on any material questions of fact underlying those reasons, together with a reference to the sources of information on which those findings are based,
- (c) the general nature and the format of the records held by the agency that contain the information concerned.

Under section 92 of the GIPA Act, we recommend that the Premier's office have regard to these requirements when drafting future notices of decision.

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8 What happens next

8.1 Applying for a further review

Our recommendations are not binding and cannot be reviewed under the GIPA Act. However, the original decision of the agency can be reviewed by the Administrative Decisions Tribunal (ADT).

If Mr Whan is dissatisfied with either our recommendations or the response by the Premier's office to our recommendations, he may ask the ADT to review the original decision.

Mr Whan would need to apply to the ADT within 20 working days of the date of this report. After that, the ADT can only accept an application if it agrees to extend the deadline. For information about the process and costs of an ADT review, please contact:

Administrative Decisions Tribunal	Phone	(02) 9377 5711
Level 10, 86 Goulburn Street	Fax	(02) 9377 5723
Sydney NSW 2000	TTY	(02) 9377 5859
www.lawlink.nsw.gov.au/adt	Email	ag_adt@agd.nsw.gov.au

If the Premier's office makes a new decision because of our review, Mr Whan will have:

- new rights of review for that new decision
- 40 working days from the date of the new decision to request a review by us or the ADT.

8.2 Questions?

This file is now closed.

If you have any questions about this report please contact us on 1800 472 679 or email ipcinfo@ipc.nsw.gov.au