



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

Applicant: Anonymus
Agency: Department of Trade and Investment
Regional Infrastructure and Services
Report date: 17 January 2014
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exempt documents under FOI legislation

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Summary

1. The Applicant applied for information from the Department of Trade and Investment Regional Infrastructure and Services (the Agency) under the *Government Information (Public Access) Act 2009* (GIPA Act) for access to information.
2. The Agency refused access to the information it holds within the scope of the Applicant's access application.
3. The Information Commissioner recommends that the Agency reconsider its decision pursuant to section 93 of the GIPA Act.

Background

4. On 23 July 2012, the Applicant wrote to the PowerHouse Museum seeking access to information. The information asked for includes communications between the then Director for the PowerHouse Museum and the Federal Minister for Families, Community Services and Indigenous Affairs related to concerns about the governance of the Indigenous Land Corporation (ILC) and/or the role, conduct, performance or tenure of ILC Board Directors and the ILC CEO.
5. The Agency refused to deal with the application due to non-payment of an advance deposit fee. This decision was upheld on internal review. Around this time the Applicant received some documents in response to FOI applications submitted under one or more Commonwealth FOI applications. This led to an agreement between the Agency and the Applicant that a new access application would be processed for a reduced amount of information.
6. On 14 February 2013, the Agency provided the Applicant with its notice of decision in the second application. This is the decision under review by the Information Commissioner.
7. The notice of decision informed the Applicant that the only relevant information held by the Agency is emails and attachments sent to or from the then Director through her PowerHouse Museum email account. This is because the information was retained on Departmental servers. The Agency decided that other information held by the then Director personally for non-NSW Government related activities that was not filed or retained using Departmental resources – including hardcopy files, letters and documents – was not held by the Department.
8. The notice of decision also informed that Applicant that the Agency decided to refuse to provide access to the information that it holds because it decided that there is an overriding public interest against the disclosure of that information.

Decision under review

9. The decision under review is the Agency's decisions to refuse to provide access to the information that it holds within the scope of the access application. This is a reviewable decision under section 80(d) of the GIPA Act.
10. In this review, the burden of establishing that the decision is justified lies on the Agency, pursuant to section 97(1) 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. In its notice of decision, the Agency identified the presumption in favour of disclosure in section 5 of the GIPA Act.
17. The Agency identified the following public interest considerations in favour of disclosure. However it assessed these consideration as not relevant because the information concerns Commonwealth rather than NSW state functions and responsibilities:
 - a. enhance government accountability
 - b. inform the public about the operations of agencies
 - c. ensure effective oversight of public funds
 - d. reveal or substantiate whether an agency (or a member of an agency) has engaged in misconduct or negligent, improper or unlawful conduct.
18. The GIPA Act does not restrict public interest considerations in favour of disclosure to those related to NSW state functions and responsibilities. In contrast, section 12(2) of the GIPA Act provides that public interest considerations in favour of disclosure are not limited by anything in the GIPA Act.

Public interest considerations against disclosure

19. The only public interest considerations against disclosure that an agency can take into account are those set out in schedule 1 and section 14 of the GIPA Act.

20. In order for the considerations against disclosure set out in the table to section 14 of the GIPA Act to be raised as relevant, the Agency must establish that the disclosure of the information could reasonably be expected to have the effect outlined in the table.
21. The words “could reasonably be expected to” should be given their ordinary meaning. This requires a judgment to be made by the decision-maker as to whether it is reasonable, as distinct from irrational, absurd or ridiculous, to expect the effect outlined.
22. In its notice of decision the Agency referred to broad categories of public interest considerations against disclosure: personal information, business interests, and exempt information under the Commonwealth FOI legislation. The Agency also referred to the conclusive presumption of an overriding public interest against disclosure of information that is subject to legal professional privilege, which is set out in clause 5 of schedule 1 to the GIPA Act.
23. Although the Agency raised a number of considerations against disclosure, it did not identify which considerations related to which items of information. With respect to considerations against disclosure of personal information and business interests, the Agency did not identify which particular considerations it relies upon.
24. The notice of decision confirms that the scope of the Applicant’s access application includes information that was not covered by the ILC FOI decision. However it is not apparent from the notice of decision whether this information was located by the Agency or, if it was located but withheld, the reasons that it was not provided.

Our view

25. We are not satisfied that the Agency’s notice of decision establishes that the decision to refuse to provide access to the information is justified. This is because the Agency did not take into account broader public interest considerations in favour of disclosure, identify each of the considerations against disclosure that it relies upon or show which items of information each consideration applies to.

Recommendations

26. The Information Commissioner recommends under section 93 of the GIPA Act that agency make a new decision, by way of internal review within 15 working days.
27. In making a new decision, have regard to the matters raised and guidance given in this report. Further guidance regarding the public interest test, and a template notice of decision, are available on our website at www.ipc.nsw.gov.au.
28. We ask that the Agency advise the Applicant and us by **31 January 2014** of the actions to be taken in response to our recommendations.

Review rights

29. 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 and Equal Opportunity Division of the NSW Civil and Administrative Tribunal (NCAT) for a review of that decision.

30. If the Applicant is dissatisfied with our recommendations or the Agency's response to our recommendations, the Applicant may ask the NCAT to review the Agency's decision.
31. An application for NCAT review 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
John Maddison Tower
86-90 Goulburn Street
Sydney, NSW, 2000

Phone: 1300 006 228
TTY: 9377 3859
Website: <http://www.ncat.nsw.gov.au>

32. 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.

Closing our file

33. This file is now closed.
34. If you have any questions in relation to this report please contact the Information and Privacy Commission on 1800 472 679.

Elizabeth Tydd
Information Commissioner