

Summary

1. The Applicant applied for the following information from the Department of Trade and Investment Regional Infrastructure and Services (the Agency) under the *Government Information (Public Access) Act 2009* (GIPA Act):

‘I request access to copies of documents not previously released due to privacy claims by third parties (.....) have personally provided their personal contact details to either my wife or me. We request these documents so we can address the issues raised within. We would be satisfied with the contents of documents with the contact details redacted’.
2. In its decision issued on 23 July 2013, the Agency decided there are public interest considerations both in favour of disclosure and against disclosure. Following third party consultation, the Agency decided to release the requested information, but with personal information redacted.
3. The Information Commissioner does not make any recommendations in relation to the Agency’s decision.

Decision under review

4. The decision under review is the Agency’s decisions to refuse to provide access to some information in response to the Applicant’s access application. This is a reviewable decision under section 80(d) of the GIPA Act. In particular, the Agency refused access to:
 - a. documents 21, 24 and 59 and
 - b. Partially released documents 28 and 33.

Under section 97(1) of the GIPA Act, the Agency bears the onus of establishing that their decision is justified in this review.

The public interest test

5. 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.
6. 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.
7. 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.
8. 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.
9. 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

10. Section 12(1) of the GIPA Act sets out a general public interest in favour of disclosing government information, which must always be weighed in the application of the public interest test. The Agency may take into account any other considerations in favour of disclosure which may be relevant (s12(2) GIPA Act).
11. In its notice of decision, the Agency listed the following public interest consideration in favour of disclosure of the information in issue:

“we request these documents so we can address the issues raised within. We would be satisfied with contents of documents – with the contact details redacted.”
12. It is not apparent on what basis this is a public interest consideration in favour of disclosure.
13. An example of a relevant public interest consideration in favour of disclosure is that disclosure could reasonably be expected to promote open discussion of public affairs, and enhance Government accountability.

Public interest considerations against disclosure

14. 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.
15. 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.
16. In its notice of decision the Agency relied on one public interest consideration against disclosure of the information, deciding that its release could reasonably be expected to reveal an individual’s personal information.

Consideration 3(a) – reveal an individual’s personal information

17. Clause 3(a) of the table at section 14 as a public interest consideration against disclosure 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.
18. Personal information is defined in the GIPA Act as being:

...information or an opinion (including information or an opinion forming part of a database and whether or not recorded in a material form) about an individual (whether living or dead) whose identity is apparent or can reasonably be ascertained from the information or opinion. [Schedule 4(4)(1) GIPA Act]

19. 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.
20. The Information Commissioner has published *Guideline 4 – Personal information as a public interest consideration under the GIPA Act* in December 2011. This Guideline sets out what is meant by ‘personal information’ in the GIPA Act and includes (in paragraph 1.2) examples of what should be considered personal information.
21. In order to establish that this consideration applies, the Agency has to:
 - a. identify whether the information is personal information
 - b. consider whether the information would be revealed by disclosing it under the GIPA Act.
22. We have reviewed an unredacted copy of the relevant information. Section 91 of the GIPA Act prohibits the Information Commissioner from disclosing the content of the withheld information. However, we are satisfied from the content of the documents that this consideration applies. This is because we agree with the Agency’s decision that the release of the above documents, even with personal contact details redacted, would still allow third parties to be identified.

Balance of public interest

23. 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 must 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.
24. The Agency dealt with an access application and decided not to disclose the information requested by the Applicant. The decision considered the public interest considerations for and against disclosure and found that the balance was weighed against disclosure. Based on that weighing of the public interest the Agency made a decision to not disclose the information the applicant requested. This is a decision available to the Agency under the GIPA Act.
25. Based on the available information we are satisfied that the Agency has established that there is an overriding public interest against disclosure of the information.

Recommendations

26. The Information Commissioner is satisfied that the Agency’s decision is justified.
27. The Information Commission does not make any recommendations in relation to the Agency’s decision

Review rights

28. Our reviews 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 NSW Civil and Administrative Tribunal (NCAT) for a review of that decision.

29. 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.
30. 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:

Registry for the Administrative and Equal Opportunity
and Operational Division
NSW Civil and Administrative Tribunal
Level 10, 86 Goulburn Street
Sydney NSW 2000

Phone: 1300 006 228 press 3 for the Administrative and Equal
Opportunity Division

Website: <http://www.ncat.nsw.gov.au>

Completion of this review

31. This review is now complete.
32. If you have any questions in relation to this report or the review process contact the Information and Privacy Commission on 1800 472 679.

Elizabeth Tydd
Information Commissioner

16 April 2014