



information
and privacy
commission
new south wales

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

Applicant: The Applicant
Agency: Department of Premier and Cabinet
Report date: 30 March 2015
IPC reference: IPC14/R000713
Keywords: Government information – searches for information –
unreasonable and substantial diversion of agency’s resources
– amendment of application

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Summary

1. The Applicant applied for an external review of a decision made under section 58(1)(e) of the *Government Information (Public Access) Act 2009* (GIPA Act) by the Department of Premier and Cabinet (Agency).
2. The Agency decided to refuse to deal with the application because it would require an unreasonable and substantial diversion of the Agency's resources.
3. The Information Commissioner is satisfied that the decision of the Agency is justified and makes no recommendations against the decision.

Background

4. The Applicant applied under the GIPA Act to the Agency for access to the following information:
 - a. On 11 March 2004, then NSW Premier Mr Bob Carr said in Parliament:

“So it was reasonable to talk to Austeel. In 1997 Mr Paul Butler, who was attached to the Department of State and Regional Development and the Premier’s Department, prepared a preliminary report on the Austeel project. He reported that the preliminary view was that the project appears viable and would be of significant benefit. In May 1997 the Treasurer wrote to Clive Palmer and said that notwithstanding the apparent technical merits of the project there remained concerns in Austeel’s proposal, mainly about the existence of investment partners, that needed to be resolved. Mr Palmer responded by saying that he had a memorandum of understanding with the Chinese Government. In 1999, an analysis by Deloitte Touche reported that the overall project appeared viable. In 2000 Austeel provided a pre-feasibility document, which included a marketing agreement with MacSteel to market 70 per cent of the output around the world...”

Hansard, Legislative Assembly, 11 March 2004, page 7161

We request each of the documents referred to by Mr Carr, specifically:

 - (i) The preliminary report prepared by Mr Butler during 1997;
 - (ii) The letter forwarded by the Treasurer to Mr Palmer during May 1997;
 - (iii) The letter of response from Mr Palmer to the Treasurer;
 - (iv) The analysis provided by Deloitte Touche during 1999; and
 - (v) The pre-feasibility document provided by Austeel in 2000.”
5. In its decision issued on 4 June 2014, the Agency decided:
 - a. to provide access to the preliminary report referred to as item (i) in the application, under section 58(1)(a); and
 - b. to refuse to deal with the remainder of the application under section 58(1)(e) of the GIPA Act, on the grounds that processing the remainder of the application would require an unreasonable and substantial diversion of resources according to section 60(1)(a) of the GIPA Act.
6. On 2 July 2014, the Applicant sought internal review of the decision at paragraph 5b. above.

7. On 26 September 2014, the Agency confirmed its decision to refuse to deal with the remainder of the application under section 58(1)(e) of the GIPA Act, on the basis that it would require an unreasonable and substantial diversion of resources.
8. In seeking a review of the decision by the Information Commissioner, the Applicant confirmed that it had been granted access to the same 5 documents through a GIPA application to the Department of Trade & Investment. The Applicant submitted that:
 - access to the documents does not make the subject request for information redundant and
 - it seeks access to “*the documents and notes produced by [the Agency] in relation to these documents*”.
9. The request for *access to documents and notes produced by the Agency in relation to these documents* is wider than the original access application.
10. If the Applicant wishes to widen the scope of its information access request, which is, in effect changing its information access request, it may lodge another application, in keeping with the requirements of section 41 of the GIPA Act.

Decision under review

11. The decision under review is the Agency’s decision to refuse to deal with the remainder of the application under section 58(1)(e) of the GIPA Act, on the grounds that processing the remainder of the application would require an unreasonable and substantial diversion of resources according to section 60(1)(a) of the GIPA Act. The remainder of the application concerns the following 4 documents:
 - (i) the letter forwarded by the Treasurer to Mr Palmer during May 1997;
 - (ii) the letter of response from Mr Palmer to the Treasurer;
 - (iii) the analysis provided by Deloitte Touche during 1999; and
 - (iv) the pre-feasibility document provided by Austeel in 2000.”
12. There are two issues in this review.
 - a. Searches, because the Agency attempted to locate the documents outlined in paragraph 11; and because that search failed,
 - b. the issue of unreasonable and substantial diversion of the Agency’s resources arises.

Searches for information held by the Agency

13. Section 53 of the GIPA Act sets out the requirement to conduct searches:
 - (1) *The obligation of an agency to provide access to government information in response to an access application is limited to information held by the agency when the application is received.*
 - (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.*

(3) *The obligation of an agency to undertake reasonable searches extends to searches using any resources reasonably available to the agency including resources that facilitate the retrieval of information stored electronically.*

(4) *An agency is not required to search for information in records held by the agency in an electronic backup system unless a record containing the information has been lost to the agency as a result of having been destroyed, transferred, or otherwise dealt with, in contravention of the State Records Act 1998 or contrary to the agency's established record management procedures.*

(5) *An agency is not required to undertake any search for information that would require an unreasonable and substantial diversion of the agency's resources.*

14. Annexure A to the notice of decision is a statement of reasons for the Agency's decision, which provides details of searches conducted, search terms used, parameters of searches, reasons for not locating documents, and details as to archived storage and the volume of material. Annexure A also explains the difficulty of searching for the requested information given the age of the documents sought, to the extent that:
 - limited information is available electronically; and
 - the Agency's database does not provide sufficient information about files from this period to enable a narrower, more targeted search
15. The Agency reports that searches of its electronic database identified 22 files with materials that have been archived with a filename or other metadata that includes the search term "Austeel", and these files themselves comprise 112 file parts in total. Forty of the file parts considered most likely to contain reports and correspondence from the specified timeframe were retrieved from archives, manually searched and the documents were not located.
16. With respect to the likely volume of documents to be searched, Annexure A refers to an Order for papers made in the NSW Legislative Council on 18 March 2004, (the Order) which sought "*all documents in the possession, custody or control of government relating to the Austeel project in Newcastle.*"
17. Annexure A states that the index of papers tabled in response to this order, available on the NSW Parliament website, is 471 pages long and a review of the index reveals:
 - Premier's Department produced 34 boxes of documents in response to the Order, including some documents in respect of which a privilege claim was made; and
 - Cabinet Office produced 110 documents in response to the Order, claimed 14 were privileged and made a commercial-in-confidence claim in respect of a further three documents.
18. The Agency submits that while it is unclear whether the documents tabled in response to the Order included the specific documents requested by the subject GIPA application, it suggests that:
 - they would fall within the scope of the Order; and
 - it is likely that if the documents were held by government at the time, they would have been included in the return.

19. The Agency suggests that the Applicant is entitled to search those documents and provides the URL for the searchable index and details for inspection at the Legislative Council's Table Office.
20. We are satisfied from the description provided that the searches were undertaken in compliance with the requirements of section 53(2) of the GIPA Act.
21. We are also satisfied as to the Agency's position that further searches would require an unreasonable and substantial diversion of the Agency's resources, pursuant to section 53(5) of the GIPA Act, and discuss our reasons below.

Unreasonable and substantial diversion of resources

22. Under section 60(1)(a) of the GIPA Act, an agency may refuse to deal with an access application if it appears that the work involved in processing the application would substantially and unreasonably divert the agency's resources.
23. Whether an application is one that would be an unreasonable and substantial diversion of resources depends on the facts of each case.
24. In making a decision that dealing with an application would require an unreasonable and substantial diversion of resources, an agency needs to identify what is involved in processing the application, the volume of information captured by the scope of the application, and the resources required to do this.
25. The GIPA Act does not define "unreasonable and substantial diversion," however guidance can be found in *Colefax v Department of Education and Communities No 2 [2013] NSWADT 130*. In the Colefax case, the Administrative Decisions Tribunal considered relevant factors that were outlined in an earlier case: *Cianfrano v Director General, Premier's Department [2006] NSWADT 137*. Cianfrano was decided under previous freedom of information legislation, which contained a provision similar to section 60(1)(a) of the GIPA Act. As noted by the Tribunal in Colefax, there is an important distinction between the tests under the previous FOI legislation and the GIPA Act. The distinction is that under the GIPA Act an applicant has a statutory right to access government information, and the Act instructs that discretions under it be exercised so as to enhance its objects.
26. The factors that were outlined in the Cianfrano case and reinforced in Colefax include:
 - a. terms of the request;
 - b. demonstrable importance of the document(s) to the applicant;
 - c. whether the request is a reasonably manageable one, having regard to the size of the agency and the extent of its resources usually available for dealing with information access applications;
 - d. agency's estimate as to the number of documents affected by the request, and the number of pages and the amount of officer time, and salary cost;
 - e. reasonableness of the agency's initial assessment and whether the applicant has taken a co-operative approach in redrawing the boundaries of the application;
 - f. the time lines binding on the agency, that is, the time in which it has to process the application;

- g. the degree of certainty that can be attached to the estimate that is made as to documents affected and hours to be consumed; and whether there is a real possibility that processing time may exceed to some degree the estimate first made;
27. It may also be relevant to consider whether the applicant is a repeat applicant to the agency in respect of applications of the same kind, or a repeat applicant across government in respect of applications of the same kind. If so, the agency may also consider the extent to which the present application may have been adequately met by those previous applications.
28. This is not an exhaustive list of factors, and there may be other circumstances that are relevant in deciding whether an application would require an unreasonable and substantial diversion of an agency's resources.
29. Having assessed the access application against the above factors, if an agency refuses to deal with the application then it must provide an applicant with a notice of decision that outlines in some detail why it considers the application to be both unreasonable and substantial diversion of resources (under section 60(5) of the GIPA Act).
30. The Agency's assessment as to the estimated costs of retrieval of 112 file parts from archives is \$1314. The assessment of time to conduct a manual search of 112 file parts excluding the 40 already searched is estimated to be 9 hours, if each part took 5 minutes to search. To manually search all files containing materials produced for the 2004 Standing Order no. 52 is estimated to take far longer, given the documents are likely distributed across a large volume of physical files and the Agency has not kept a collated file of copies of documents produced for the Order.
31. Under section 60(4) an agency must not refuse to deal with an access application without first providing the applicant with a reasonable opportunity to amend the application.
32. In light of the objectives of the GIPA Act, and other provisions contained within the GIPA Act requiring agencies to provide an applicant with advice and assistance (such as sections 16(1) and 52(3)), section 60(4) requires a positive approach by the agency to assist the applicant in reducing the scope of the application.
33. During the course of this review, we examined relevant parts of the Agency's GIPA working file, including the Agency's correspondence to the Applicant inviting it to consider narrowing the scope of its application, which demonstrate that the Agency provided such assistance by providing information about the relevant types or classes of information that it holds and how the Agency's records are kept.
34. We also note the Applicant's response dated 4 April 2014, referred to in the notice of decision, which indicates that the application seeking these documents is "clear and very particular" and "cannot be restricted in scope."

Conclusion

35. On the basis of the information before us, we are satisfied that the decision of the Agency is justified pursuant to section 97 of the GIPA Act.
36. The Information Commissioner makes no recommendations against the Agency's decision.

Review rights

37. 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.
38. The Applicant has the right to ask the NCAT to review the Agency's decision.
39. An application for a review by the NCAT 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
Level 10, John Maddison Tower
86-90 Goulburn Street,
Sydney NSW 2000

Phone: 1300 006 228

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

Completion of this review

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

Elizabeth Tydd
Information Commissioner