



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

Applicant: George Samuel  
Agency: Canterbury City Council  
Report date: 03 December 2014  
IPC reference: IPC14/R000433  
Keywords: Government information – information not held – searches -  
decision to refuse to release information – public interest test -  
personal information – deliberative process – prejudice  
legitimate business interests – contravention of another Act or  
statutory rule – third party consultation

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## Summary

1. Mr George Samuel (the Applicant) applied for information from the Canterbury City Council (the Agency) under the *Government Information (Public Access) Act 2009* (GIPA Act).
2. On 23 August 2013 the Agency decided to release some information, to refuse access to some information, and that some information is not held.
3. The Applicant sought a review of the decision to withhold some information, as well as the decision that some information is not held. The Applicant also contended that the Agency held some relevant information that was not disclosed or referred to in the notice of decision.
4. On 2 May 2014 the Information and Privacy Commission (IPC) recommended under section 93 of the GIPA Act that the Agency make a new decision, by way of internal review within 15 working days, including new searches and a reconsideration of information that was withheld, except for the information that was received in Closed Council.
5. On 30 May 2014 the Agency made a new decision. The Agency decided to release some information in full, to refuse access to some information and that some information was not held.
6. The Applicant sought a review of the Agency's decisions of 30 May 2014.

## Background.

7. The Agency's decision of 30 May 2014 reconsidered the Applicant's request for information.
8. A summary of the Agency's decision in relation to each of the items is at **Appendix A**.

## Decisions under review

9. The decisions under review are the Agency's decisions:
  - a. to refuse to provide access to information requested and contained at Item 1, and
  - b. to provide partial access to information contained in Item 3 and Item 9 and
  - c. that some of the information requested ( Item 4, Item 5, Item 7, Item 10 and Item 11) is not held.
10. We have also considered the Agency's searches as part of this review in light of the Applicant's submission that additional relevant information is held but was not identified by the Agency.
11. In this review, the Agency bears the onus of establishing that its decision was justified under section 97(1) of the GIPA Act.
12. This report first considers the information identified by the Agency in its notice of decision to which access was not provided, and then considers the Agency's searches and decision that some information is not held. We have not reviewed information that was identified and released by the Agency.



## The public interest test

13. 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.
14. 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.
15. 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.
16. 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.
17. The Agency must apply the public interest test in accordance with the principles set out in section 15 of the GIPA Act.

## Third party consultation

18. An agency may be required to consult third parties before making a decision about an access application if the information is of a kind requiring consultation. Section 54 of the GIPA Act sets out when consultation is required. For example, consultation may be required if:
  - a. the information concerns a person (or entity)'s business, commercial, professional or financial interests, and
  - b. the person (or entity) may reasonably be expected to have concerns about the disclosure of the information, and
  - c. those concerns may reasonably be expected to be relevant to the question of whether there is a public interest consideration against disclosure.
19. An agency must take any third party objection into account in making its decision, but an objection is not in itself determinative of an overriding public interest consideration against disclosure.
20. An agency may decide to release information despite receiving an objection from a third party. However under section 54(6) and (7) the agency must notify the third party of its decision, and not release the information until the third party's review rights have expired.
21. The Information Commissioner has published *Guideline 5: consultation on public interest considerations under section 54 of the GIPA Act*. This Guideline

is available on the IPC website. Agencies must have regard to this Guideline pursuant to section 15(b) of the GIPA Act.

22. The Agency consulted with some third parties in the course of dealing with the access application.

### **Public interest considerations in favour of disclosure**

23. 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. Section 12(2) provides that the Agency may take into account any other considerations in favour of disclosure which may be relevant.
24. In its notice of decision, the Agency listed the following public interest considerations in favour of disclosure of the information in issue:
  - a. the general public interest in favour of disclosing government information
  - b. disclosure 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.
  - c. Inform the public about the operations of agencies...
  - d. the considerations identified by the Applicant, which are Government accountability, public participation, public awareness, protection against discrimination, protection of public land, and public recreational activity.
25. It is our view that disclosure would also inform the public about the operations of the Agency and provide transparency in the reasons for the Agency's decisions regarding the Canterbury Bowling Club.

### **Public interest considerations against disclosure**

26. The only public interest considerations against disclosure that can be considered are those in schedule 1 and section 14 of the GIPA Act.
27. 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.
28. 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.
29. In its notice of decision the Agency raised six public interest considerations against disclosure of the information, deciding that its release could reasonably be expected to:
  - a. reveal a deliberation or consultation conducted, or an opinion, advice or recommendation given, in such a way as to prejudice a deliberative process of government or an agency (clause 1(e) of the table to section 14 of the GIPA Act);
  - b. prejudice the effective exercise by an agency of the agency's functions (clause 1(f) of the table at section 14);
  - c. diminish the competitive commercial value of any information to any person ( clause 4(c)of the table at section 14);



- d. prejudice any person's legitimate business, commercial, professional or financial interests (clause 4(d) of the table to section 14 of the GIPA Act); and
- e. 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 exemptions (clause 6 of the table to section 14 of the GIPA Act).
- f. conclusive presumption of an overriding public interest against disclosure (clause 5(1) of schedule 1).

### **Consideration 1(e) – deliberative process**

30. Clause 1(e) of the table at section 14 states:

*There is a public interest consideration against disclosure if disclosure of the information could reasonably be expected to reveal a deliberation or consultation conducted, or an opinion, advice or recommendation given, in such a way as to prejudice a deliberative process of government or an agency (whether in a particular case or generally).*

31. In order for clause 1(e) to apply, the Agency must establish that disclosing the information could reasonably be expected to 'reveal':

- a. a deliberation or consultation conducted; or
- b. an opinion or recommendation;
- c. in such a way as to prejudice a deliberative process of the agency.

32. The term 'reveal' is defined in schedule 4, clause 1 of the GIPA Act to mean:

*To disclose information that has not already been publicly disclosed (otherwise than by lawful means).*

33. The Agency applied this consideration to documents identified in response to the following items requested by the Applicant:

Item 1     *I seek a copy of the consultants report conducted on the future use of Canterbury Bowling and Community Club initiated in the first half of 2013 and referred to in the minutes of May 2013, and the instructions to the consultant regarding the terms of reference of the consultants report.*

34. In the notice of decision the Agency informed the Applicant that although a consultant's report was not referred to in the Council Minutes for 23 May 2013, a consultant was appointed in March 2013 to investigate the highest and best use for the site at 15 Close Street. The Agency refused access to the consultant's report.

35. With respect to the public interest consideration against disclosure the Agency stated:

*It is my view that the report submitted as a result of investigations undertaken to determine best and highest use for the Club provides recommendations for Council's information so that a way forward can be determined. The release of the report and recommendations would prejudice the deliberative process of Council in determining the future use of the site. As this matter is yet to be resolved, releasing working documents is not considered to be in the public interests.*

*In my opinion, the public interest considerations against disclosure outweigh the public interest in favour of disclosure and access to the report is not supported.*

36. We understand that the Consultant's report is the *Urban Design Study and Options : 15 Close Street Canterbury*, prepared by Olsson & Associates (Sphere Company). Referred to as the Sphere Report.
37. The Agency's reasons demonstrate that a deliberative process was underway when at the time the internal review decision was made in May 2014.
38. The Agency has noted that release of the information contained in item 1 would *"prior to Council making a decision on future use, ...result in speculation, lobbying, and undue public pressures on Council and councillors which may in turn impeded Council's ability to make an informed decision..."*.
39. I acknowledge that release of the information could increase public participation in Council's deliberative process. The Agency has however not identified the manner in which public participation could have a detrimental or prejudicial impact upon the deliberative process if the information was disclosed.
40. I also make reference to section 12(2) of the GIPA Act cited by the Agency as a factor in favour of disclosure – disclosure 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.
41. Based upon the information provided to date we are not satisfied that the Agency has established that this consideration against disclosure applies to the information.

**Clause 1(f) of the table at section 14 states:**

42. Clause 1(f) of the table at section 14 states:

*There is a public interest consideration against disclosure if disclosure of the information could reasonably be expected to prejudice the effective exercise by an agency of the agency's functions*
43. To show that this is a relevant consideration against disclosure, the agency must establish:
  - a. the relevant function of the agency;
  - b. that is or would be prejudiced by release of the information.
44. The meaning of the word prejudice is to "cause detriment or disadvantage".
45. The Agency applied this consideration to documents identified in response to the following items requested by the Applicant:
  - Item 3 *A copy of all information pertaining to consultants or other reports regarding the recent tender process and decision of the recent tender of Canterbury Bowling Club*
  - Item 9 *information on the negotiations between Canterbury Council and Canterbury Bowling club culminating in the denying of the existence of a lease between the club and the council*
46. Information contained at Item 3 is a report discussing the tender for the lease of the Canterbury Bowling and Community Club considered by Closed Council on 26 April 2012.



47. In its decision of 30 May 2014 the Agency reconsidered the release of the information contained at Item 3 and Item 9 and raised consideration 1(f) from the table at section 14 as a factor against release of the information in question.

48. In particular the Agency noted:

...Proposals often contain business or commercial information that is relevant to their proposal. Public disclosure of such information may result in organisations being placed at a commercial disadvantage. This could lead to their being reluctant to submit proposals to Council in the future thus prejudicing Council's ability to obtain the best use of public land.

49. In order for consideration 1(f) to be a relevant consideration the Agency would be required to clearly establish the relevant function of the Agency and secondly demonstrate how this would be prejudiced by release of the information.

50. I do not consider that the Agency has sufficiently identified the Agency's functions nor has the Agency demonstrated how its functions would be prejudiced by the release of the information contained at item 3 and Item 9.

51. Without identification of the specific functions of the agency and the prejudice the Agency anticipates as a consequence of the disclosure of the information we are not satisfied that the Agency has established that this consideration against disclosure applies to the information.

52. However I take this opportunity to make reference to the IPC's external review decision on 2 May 2014 at paragraph 82 which previously considered the release of the information contained at Item 3 and Item 9. The IPC decision advised as follows:

We are satisfied that the Agency has established that this consideration [Clause 6(1) of the table at section 14(2)] applied to the information received in Closed Council. We are also satisfied that the Agency has shown that there is an overriding public interest against the disclosure of information received in Closed Council, although we are of the view that this decision would have been better informed if the Agency had consulted with the affected third parties, such as the tenderers.

We do not make any recommendations about the information received in Closed Council.

53. Relevantly I note that the Agency has not in making its decisions on 30 May 2014 consulted with the affected third parties, such as the tenderers.

54. Nevertheless we make no recommendations in relation to the Agency's reconsideration regarding the information contained at Item 3 and Item 9 in light of the IPC's external review decision of 2 May 2014, the relevant sections of which are extracted above.

#### **Consideration 4(c) - diminish the competitive commercial value of any information to any person**

55. Clause 4(c) of the table to section 14 of the GIPA Act provides:

#### 4 Business interests of agencies and other persons

*There is a public interest consideration against disclosure of information if disclosure of the information could reasonably be expected to have one or more of the following effects:*

...

*(c) diminish the competitive commercial value of any information to any person*

56. In order to rely on this clause as a consideration against disclosure, an agency must show that releasing the information could reasonably be expected to have the effect outlined in clause 4(c) and base this on substantial grounds.
57. The definition of the phrase "could reasonably be expected to" means more than a mere possibility, risk or chance and must be based on real and substantial grounds and not be purely speculative, fanciful, imaginary or contrived.
58. In particular, an agency must identify why the information has a competitive commercial value, and how that value would be adversely affected if the information was disclosed.
59. In the context of the access to information regime, 'commercial value' may be defined in several ways, including:
  - a. information may have 'commercial value' to an agency or person if it was valuable for the purposes of carrying on the commercial activity in which that agency or other person was engaged;
  - b. a genuine buyer is prepared to pay to obtain that information;
  - c. the information is capable of being described as commercial in character
60. The Agency applied this consideration to documents identified in response to the following items requested by the Applicant:
  - Item 1 *I seek a copy of the consultants report conducted on the future use of Canterbury Bowling and Community Club initiated in the first half of 2013 and referred to in the minutes of May 2013, and the instructions to the consultant regarding the terms of reference of the consultants report.*
61. The Agency noted that:

The Sphere report contains financial projections of the various options for future use of the site including anticipated sales figures should the site ultimately be rezoned and sold. Release of this information at this stage to potential developers, purchasers or others with an interest in the site could diminish the value of the information to Council.
62. The Applicant has demonstrated that the required elements of clause 4(c) are satisfied and has made out that the effects of clause 4(c) can reasonably be expected to occur. Therefore the Applicant has made a case that clause 4(c) is a relevant public interest consideration against disclosure and it should be given weight when balancing the public interest test.



## Consideration 4(d) – prejudice legitimate interests

63. Clause 4(d) of the table to section 14 of the GIPA Act 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*

64. In order to rely on this clause as a consideration against disclosure, an agency must show that releasing the information could reasonably be expected to have the effect outlined in clause 4(d) and base this on substantial grounds.
65. The definition of the phrase "could reasonably be expected to" means more than a mere possibility, risk or chance and must be based on real and substantial grounds and not be purely speculative, fanciful, imaginary or contrived.
66. In particular, an agency must identify the party whose interests would be prejudiced, and the relevant interest/s. In order to justify the application of the consideration, an agency must demonstrate the causal nexus between the disclosure of the information and the prejudice to that interest
67. The Agency applied this consideration to documents identified in response to the following items requested by the Applicant:

- Item 1     *I seek a copy of the consultants report conducted on the future use of Canterbury Bowling and Community Club initiated in the first half of 2013 and referred to in the minutes of May 2013, and the instructions to the consultant regarding the terms of reference of the consultants report.*
- Item 3     *A copy of all information pertaining to consultants or other reports regarding the recent tender process and decision of the recent tender of Canterbury Bowling Club*
- Item 9     *information on the negotiations between Canterbury Council and Canterbury Bowling club culminating in the denying of the existence of a lease between the club and the council*

### Item 1: Access to the Sphere Report

68. With respect to Item 1 the Agency advised:

*Release of the information in the Sphere report at this stage to potential developers, purchasers or others with an interest in the site could prejudice Council's ability to maximise any future returns from the site.*

69. In considering the disclosure of the information contained in Item 1 I am satisfied that the Agency has identified risks to its commercial and financial interest as a legitimate interest that would be prejudiced if the information contained in Item 1 were to be disclosed.
70. The second limb of consideration 4(d) requires the Agency explain how the interests would be prejudiced if the information in Item 1 were to be disclosed.
71. I have considered the information contained in Item 1 and the Agency's notice of decision dated 30 May 2014 and note the Agency's claim that disclosure of the information in Item 1 would prejudice Council's ability to obtain and consider commercial and other information regarding options for the site in a

way that would prejudice Council's ability to ultimately achieve the best outcome.

72. I appreciate the Agency's submission that premature release of the information contained in Item 1 could prejudice the Council's ability to realise the full financial benefit of the site if a detailed site analysis outlining opportunities and challenges for the site were provided to potential developers, purchasers or others with an interest in the site prior to Council making a decision in relation to the future use of the site.
73. I am satisfied that the Applicant has demonstrated that the required elements of clause 4(d) are satisfied and the Agency has made out that the effects of clause 4(d) can reasonably be expected to occur. Therefore the Agency has established that clause 4(d) is a relevant public interest consideration against disclosure in relation to Item 1 and it should be given weight when balancing the public interest.

Item 3 and 9: Negotiations between Canterbury Council and Canterbury Bowling Club

74. With respect to item 3 and 9, the Agency noted that :
- “ A search of Council's records revealed four reports to Council, 39 items of correspondence, 1 internal memo and 4 items of legal advice directly relating to negotiations between Council and Canterbury Bowling Club...”
75. I note that Council's decision of 30 May 2014 was to release in full the 39 items of correspondence and the internal memo with personal information withheld. I understand that your correspondence to the Agency dated 8 May 2014 advised that you did not wish to pursue access to the personal information withheld.
76. With respect to the four Council reports the Agency noted as follows:
- Canterbury Bowling Club and the site at 15 Close street, Canterbury, have been the subject of four report to Council since March 2012 when the lease expired....All reports were considered in Close Council and the recommendations for each report were subsequently adopted by Council.
77. The Agency further notes that
- Tenders and proposal generally contain business or commercial information regarding the proponents of the proposal being forwarded by the proponent. Public disclosure of this information may place the proponent at a commercial disadvantage.
78. In the IPC external review decisions of 2 May 2014 which previously considered the release of this information the IPC found that in the absence of consultation with the affected third party and without identification of the prejudice that the Agency anticipates to the management entity's interests, we were not satisfied that the Agency has established that this consideration against disclosure applies to the information.
79. I note that the current Agency's notice of decision does not reflect any Agency consultation with the affected third parties in this instance and has failed to adopt the IPC recommendations in this regard. As noted above and for the same reasons as provided previously by the IPC on 2 May 2014 we are not satisfied that the Agency has established that this consideration against disclosure applies to the information.



## Consideration 6 – contravene another Act or statutory rule

80. The Agency identified clause 6(1) of the table at section 14(2) as a public interest consideration against disclosure of some of the requested information. 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.*

81. The Agency applied this consideration to documents identified in response to the following items requested by the Applicant:

Item 3      *A copy of all information pertaining to consultants or other reports regarding the recent tender process and decision of the recent tender of Canterbury Bowling Club*

Item 9      *information on the negotiations between Canterbury Council and Canterbury Bowling club culminating in the denying of the existence of a lease between the club and the council*

82. The notice of decision states that information withheld under this consideration includes reports referred for consideration in Closed Council in accordance with sections 10A and 10D of the *Local Government Act 1993*.

83. The relevant sections of the *Local Government Act 1993* are extracted in **Appendix 2**.

84. 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.*

85. 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.

86. 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 to attribute weight to this consideration.

87. With respect to item 3, the Agency stated in its original decision of 23 August 2013 :

*Reports referred for consideration in Closed Council are done so in accordance with the Local Government Act section 10A, which identifies the matters which may be discussed in closed session, and 10D which requires that we provide reasons for such referrals. These sections of the Local Government Act 1993 are quoted above.*

*The report relating to the Tender for the lease of the Club considered in Closed Council on 26 April 2012 was referred in accordance with s.10(2)(c) of the Local Government Act. The report included information provided to Council by tenderers on the basis that Council would treat it*

*as commercial in confidence. It is not in the public interest to reveal all details of these tenders or the assessment process. Tenderers have provided sensitive information about their operations in the confidence that their details will not be made public by Council. The practice of disclosure of sensitive information provided by tenderers could result in withholding of such information by tenderers and reduction in the provision of information relevant to Council's decision. However, I have determined to provide part access to the report with the sections subject to confidentiality redacted. The report is attached.*

88. With respect to item 9, the Agency stated:

*Reports referred for consideration in Closed Council are done so in accordance with the Local Government Act section 10A which identifies the matters which may be discussed in closed session, and 10D which requires that we provide reasons for such referrals. These sections of the Local Government Act are quoted in full earlier in this letter.*

*The reports relating to the Club considered in Closed Council on 14 April 2011, 26 April 2012, 13 December 2012 and 23 May 2013 were referred in accordance with s.10(2)(c) of the Local Government Act. The reports included commercial in confidence information provided by third parties. Release of the reports could constitute a contravention of provisions in the Local Government Act with regard to matters considered in closed session of Council. As future use of the site at 15 Close Street, Canterbury is not yet finalised, the reports remain confidential, however, I have determined to provide part access to the sections of reports that relate to your request. The reports are attached with the sections subject to confidentiality redacted.*

89. We are satisfied that the Agency has established that this consideration applies to the information received in Closed Council. We are also satisfied that the Agency has shown that there is an overriding public interest against the disclosure of information received in Closed Council, although we are of the view that this decision would have been better informed if the Agency had consulted with the affected third parties, such as the tenderers.
90. We do not make any recommendations about the information received in Closed Council.

### **Conclusive presumption of an overriding public interest against disclosure**

91. Clause 5(1) of schedule 1 states that is to be 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.*

92. This means that in order for an agency to rely on clause 5 of schedule 1 to the GIPA Act, the information must be of a kind that would not be required to be disclosed in legal proceedings in NSW because it is information that attracts legal professional privilege and the agency has not waived, either expressly or impliedly that privilege.
93. For the purpose of this review the Agency provided us with copies of the information it claims is subject to legal professional privilege.



## Legal professional privilege – clause 5 of schedule 1

94. If information falls within the scope of one of the clauses in schedule 1 to the GIPA Act, then it is conclusively presumed that it is not in the public interest to release the information. This means that the agency is not required to balance the public interest considerations for and against disclosure before refusing access to the information.
95. Clause 5(1) 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.*
96. This means that in order for an Agency to rely on clause 5 of schedule 1 to the GIPA Act, the information must be of a kind that would not be required to be disclosed in legal proceedings in NSW because it is information that attracts client legal privilege and the Agency has not waived, either expressly or impliedly that privilege.
97. Under clause 5(2) of schedule 1 to the GIPA Act, an Agency must consider whether it is appropriate to waive privilege. An agency's decision about whether it will waive privilege in order to disclose the information requested in an access application is not a reviewable decision under the GIPA Act. However, if privilege has previously been waived, either expressly or impliedly, by an agency, then clause 5 of schedule 1 to the GIPA Act will not apply.
98. Client legal privilege protects confidential communications between a lawyer and a client made for the dominant purpose of the lawyer providing legal advice or professional legal services to the client or for use in current or anticipated litigation.
99. The existence and maintenance of privilege must always be considered in light of all the facts and circumstances that apply to the information.
100. In order for client legal privilege to attach to the information, each element of client legal privilege must be satisfied. The essential elements of client legal privilege are set out below:
- a. the existence of a client and lawyer relationship;
  - b. the confidential nature of the communication or document, and
  - c. the communication or document was brought into existence for the dominant purpose of either:
  - d. enabling the client to obtain, or the lawyer to give legal advice or provide legal services, or
  - e. for use in existing or anticipated litigation.
101. The Agency has considered whether it would be appropriate to waive legal professional privilege in accordance with clause 5(2) of Schedule 1 to the GIPA Act and determined that it would not be appropriate in this instance.
102. An agency's decision not to waive privilege, is not a reviewable decision under the GIPA Act
103. I have considered the information contained at Item 9 in regard to which the Agency claims legal professional privilege and am satisfied that the documents fall within Clause 5(1) of schedule 1.

## Searches and decision that information is not held

104. The information that the Agency decided it did not hold is listed below:

- Item 4 *All information on the cost of the recent consultant referred to above, and information on any attempts by the consultant to consult with voting Members of Canterbury bowling club, or the group of local residents using the premises on Friday nights and Weekends.*
- Item 5 *I seek all information regarding who is currently receiving the income from the use of the Canterbury Bowling Club car park by a private bus company*
- Item 7 *All information on whether a group permitted to use the public facility of Canterbury Bowling Club is also entitled to the income from the use of the car park by a private bus company*
- Item 10 *information on which councillors have voted in favour of rezoning the land of Canterbury Bowling Club as residential in ordinary council meetings, as the minutes do not disclose the votes of the electorate's representatives.*
- Item 11 *Any information regarding the decision of Council and all employees and consultants to fail to consult with all members of Canterbury Bowling Club before removing same from premises*

105. In addition, the Applicant contends that the Agency holds information within the scope of his access application that was not identified in the notice of decision.

106. By way of example, the Applicant informed us that he has sighted a letter from the Club's legal firm Collin Biggers and Paisley to the Agency and a reply by the lawyer for the Agency, who the Applicant believes may be named Mr Green. The Applicant stated that these letters are in relation to the question of whether a lease existed.

107. In the course of the IPC's previous external review of 2 May 2014 we raised this with the Agency. The Agency's position was that the Applicant did not specify in his access application that he was requested a copy of these letters, and the letters were not revealed by the file searches and so were not mentioned in the notice of decision.

108. As the IPC had not sighted these letters the IPC could not form a view about their relevance to the access application. However noted that, if the subject of the letter is as the Applicant states, the question of whether a lease existed between the Agency and the Canterbury Bowling Club, it is likely that the letters would fall within the scope of Item 9 of the access application:

- Item 9 *information on the negotiations between Canterbury Council and Canterbury Bowling club culminating in the denying of the existence of a lease between the club and the council*

109. The Applicant's position is that the Agency holds additional relevant letter, including but not limited to the two letters described above.

110. Section 53 of the GIPA Act sets out the requirement to conduct searches:

*53 Searches for information held by agency*



- (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.*
111. The expression 'government information' is defined in section 4 of the GIPA Act as 'information contained in a record held by an agency.'
112. Before deciding that it does not hold information, an agency must comply with the requirements of section 53(2) of the Act. The requirements are:
- undertake such reasonable searches as necessary to locate the information requested; and
  - use the most efficient means reasonably available to the agency.
113. In *Smith v Commissioner of Police [2012] NSWADT 85*, Judicial Member Isenberg said at paragraph 27:
- In making a decision as to the sufficiency of an agency's search for documents which an applicant claims to exist, there are two questions:*
- (a) are there reasonable grounds to believe that the requested documents exist and are the documents of the agency; and if so,*
- (b) have the search efforts made by the agency to locate such documents have been reasonable in all the circumstances of a particular case.*
114. When considering whether there are reasonable grounds to believe that information exists and whether searches to locate information were reasonable, the facts, circumstances and context of the application is relevant. Key factors in making an assessment about reasonable searches include "the clarity of the request, the way the agency's recordkeeping system is organised and the ability to retrieve any documents that are the subject of the request, by reference to the identifiers supplied by the applicant or those that can be inferred reasonably by the agency from any other information supplied by the applicant" (*Miriani v Commissioner of Police, NSW Police Force [2005] NSWADT 187* at [30]).
115. The GIPA Act does not require an agency to include details of its searches in a notice of decision. However, it is good practice for written decisions to clearly explain what the search processes were, what was found, an explanation if no records were found, what was released and what was held back. Details of searches should include where and how the agency searched, a list of any

records found – and if appropriate a reference to the business centre holding the records, the key words used to search digital records (including alternative spellings used) and a description of the paper records that were searched.

116. In the Agency's notice of decision it stated

"I reviewed all hard copy documents contained on the physical file number C22-2 Part5,6,61 as well as the electronic version stored in Council's Electronic Document Management System. I also conducted a key word search in Council's Electronic Document Management system for all documentation relating to Canterbury Bowling Club 15 Close St Canterbury".

117. The information which the Applicant states is held by the Agency and not identified in its notice of decisions pertains to correspondence between the Club's legal firm Collin Biggers and Paisley to the Agency and a reply by the lawyer for the Agency, who the Applicant believes may be named Mr Green.

118. Given the specific identifiers provided by the Applicant it would be reasonable for the Agency to incorporate in its search information held by its legal representative which may fall within the scope of the Applicant's request for access to information. The information provided by the Agency to date does indicate that searches were conducted with the Agency's legal representative.

119. For this reason the Information Commissioner recommends that the Agency repeat its searches for the information if it adopts the recommendation to reconsider its decision.

## **Findings and recommendations**

120. The Information Commissioner recommends under section 93 of the GIPA Act that the Agency make a new decision, by way of internal review within 15 working days, including new searches and a reconsideration of information that was withheld, except for the information that was received in Closed Council.

121. In making a new decision, have regard to the matters raised and guidance given in this report.

122. We ask that the Agency advise the Applicant and the IPC within 15 days of the date of this decision of the actions to be taken in response to our recommendations.

## **Review rights**

123. 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.

124. The Applicant has the right to ask the NCAT to review the Agency's decision.

125. 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>

126. 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.

### **Completion of this review**

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

Elizabeth Tydd  
Information Commissioner

## APPENDIX 1

<i>Item No.</i>	<i>Description of Item</i>	<i>Decision to release / withhold / information no held</i>	<i>Consideration cited against disclosure</i>
Item 1	<i>I seek a copy of the consultants report conducted on the future use of Canterbury Bowling and Community Club initiated in the first half of 2013 and referred to in the minutes of May 2013, and the instructions to the consultant regarding the terms of reference of the consultants report.</i>	<i>Withheld</i>	<i>1(e), 4(c), 4(d)</i>
Item 2	<i>The council acted on a report referred to in minutes of April 2011 in decided to put Canterbury Bowling Club out to tender. I seek a copy of that report and any information received by council regarding the decision to put the Canterbury Bowling Club out to tender</i>	<i>Released in full</i>	
Item 3	<i>A copy of all information pertaining to consultants or other reports regarding the recent tender process and decision of the recent tender of Canterbury Bowling Club</i>	<i>Released in part</i>	<i>6, 1(f), 4(d)</i>
Item 4	<i>All information on the cost of the recent consultant referred to above, and information on any attempts by the consultant to consult with voting Members of Canterbury bowling club, or the group of local residents using the premises on Friday nights and Weekends</i>	<i>Some of the information was not held</i> <i>Information that was held - Released</i>	
Item 5	<i>I seek all information regarding who is currently receiving the income from the use of the Canterbury Bowling Club car park by a private bus company</i>	<i>Information not held</i>	
Item 6	<i>I seek all information regarding whether a group, be it the theatre guild or another group, currently has a lease or agreement for the use, possession, control or management of Canterbury Bowling Club, and information on how this came about as there was no tender process</i>	<i>Open Access information</i> <i>Information previously provided</i>	



Item 7	All information on whether a group permitted to use the public facility of Canterbury Bowling Club is also entitled to the income from the use of the car park by a private bus company	Information not held	
Item 8	Information on the payment of rent by Canterbury bowling club from the period of June 2009 to June 2013	Released in full	
Item 9	information on the negotiations between Canterbury Council and Canterbury Bowling club culminating in the denying of the existence of a lease between the club and the council	<p>Full access provided to memo and correspondence</p> <p>documents of legal advice</p> <p>Reports to Council released in part</p>	<p>-----</p> <p>Clause 5(1) of schedule 1</p> <p>-----</p> <p>6, 1(f), 4(a)</p>
Item 10	information on which councillors have voted in favour of rezoning the land of Canterbury Bowling Club as residential in ordinary council meetings, as the minutes do not disclose the votes of the electorate's representatives.	Information not held	
Item 11	Any information regarding the decision of Council and all employees and consultants to fail to consult with all members of Canterbury Bowling Club before removing same from premises	Information not held	

1. Sections 10A and 10D of the *Local Government Act 1993* provide:

**10A Which parts of a meeting can be closed to the public?**

- (1) A council, or a committee of the council of which all the members are councillors, may close to the public so much of its meeting as comprises:
  - (a) the discussion of any of the matters listed in subclause (2), or
  - (b) the receipt or discussion of any of the information so listed.
- (2) The matters and information are the following:
  - (a) personnel matters concerning particular individuals (other than councillors),
  - (b) the personal hardship of any resident or ratepayer,
  - (c) information that would, if disclosed, confer a commercial advantage on a person with whom the council is conducting (or proposes to conduct) business,
  - (d) commercial information of a confidential nature that would, if disclosed:
    - (i) prejudice the commercial position of the person who supplied it, or
    - (ii) confer a commercial advantage on a competitor of the council, or
    - (iii) reveal a trade secret,
  - (e) information that would, if disclosed, prejudice the maintenance of law,
  - (f) matters affecting the security of the council, councillors, council staff or council property,
  - (g) advice concerning litigation, or advice that would otherwise be privileged from production in legal proceedings on the ground of legal professional privilege,
  - (h) information concerning the nature and location of a place or an item of Aboriginal significance on community land,
  - (i) alleged contraventions of any code of conduct requirements applicable under section 440.
- (3) A council, or a committee of the council of which all the members are councillors, may also close to the public so much of its meeting as comprises a motion to close another part of the meeting to the public.
- (4) A council, or a committee of a council, may allow members of the public to make representations to or at a meeting, before any part of the meeting is closed to the public, as to whether that part of the meeting should be closed.



#### **10D Grounds for closing part of meeting to be specified**

- (1) *The grounds on which part of a meeting is closed must be stated in the decision to close that part of the meeting and must be recorded in the minutes of the meeting.*
- (2) *The grounds must specify the following:*
  - (a) *the relevant provision of section 10A (2),*
  - (b) *the matter that is to be discussed during the closed part of the meeting,*
  - (c) *the reasons why the part of the meeting is being closed, including (if the matter concerned is a matter other than a personnel matter concerning particular individuals, the personal hardship of a resident or ratepayer or a trade secret) an explanation of the way in which discussion of the matter in an open meeting would be, on balance, contrary to the public interest.*

