



information
and privacy
commission
new south wales

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

Applicant: Trevor Jackson
Agency: University of New South Wales
Report date: 6 July 2017
IPC reference: IPC17/R000305
Agency reference: Unknown
Keywords: Government information – legal professional privilege
Legislation cited: *Government Information (Public Access) Act 2009*
Cases cited: nil

This review has been conducted under delegation by the Information Commissioner pursuant to Section 13 of the *Government Information (Information Commissioner) Act 2009*

Summary

Trevor Jackson (the Applicant) applied for information from the University of NSW (the Agency) under the *Government Information (Public Access) Act 2009* (GIPA Act). The information sought by the Applicant includes correspondence and documents involving or naming the Applicant and/or [a third party].

The Agency decided to provide access to eleven documents, partial access to one document and to refuse access to thirteen documents.

The Applicant applied for external review on 13 June 2017. The reviewer obtained information from the Agency including the notice of decision and the Agency's GIPA file.

The review of the Agency's information and decision concluded that its decision is not justified.

The reviewer recommends the Agency make a new decision.

Background

1. The Applicant applied under the GIPA Act to the Agency for access to the following information:
 - a. All correspondence in which my name is mentioned or my identity alluded to from/to [a third party] including emails, records of meetings, telephone conversations and all other documents in which [a third party] either sent, received or was otherwise involved in in relation to me.
2. In its decision issued on 9 June 2017, the Agency decided to:
 - a. provide access to eleven documents;
 - b. provide partial access to one document and
 - c. refuse access to thirteen documents
3. In seeking a review of the decision by the Information Commissioner, the Applicant confirmed that he is seeking access to the withheld information.

Decision under review

4. The Information Commissioner has jurisdiction to review the decision made by the Agency pursuant to section 89 of the GIPA Act.
5. The decision under review is the Agency's decisions to refuse access to the information refused under clause 5 of Schedule 1 to the GIPA Act.
6. These are reviewable decisions under section 80(d) of the GIPA Act.

The public interest test

7. 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. For further information on the public interest test, see the resource sheet at the end of this report.

Public interest considerations in favour of disclosure

8. There is a presumption in favour of the disclosure of government information unless there is an overriding public interest against disclosure. An agency is not limited in identifying public interest considerations in favour of disclosure.
9. In its notice of decision, the Agency listed the following public interest consideration in favour of disclosure of the information in issue:
 - a. Section 9(1) of the GIPA Act where applicants have a legally enforceable right to access the information requested unless there is an overriding public interest against disclosure.

Public interest considerations against disclosure

10. The only public interest considerations against disclosure that can be considered are those in schedule 1 and section 14 of the GIPA Act.

11. In its notice of decision the Agency noted that had identified public interest considerations against disclosure, deciding that release could reasonably be expected to disclose information that is privileged on the grounds of:
 - a. Legal professional privilege – clause 5 of schedule 1

Consideration clause 5 of schedule 1 – Legal professional privilege

12. An Agency is not required to balance the public interest considerations for and against disclosure before refusing access to information that is legal professional privilege.
13. This is because information of this nature is considered information for which there is a conclusive presumption of overriding public interest against disclosure.
14. The onus of establishing the claim for client legal professional privilege falls on the Agency.
15. In its notice of decision, the Agency stated one document would be partially released, on the basis that part of the record is subject to a claim of legal professional privilege and that thirteen documents were refused on the basis that such records are subject to the claim of legal professional privilege.
16. 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:
 - the existence of a client and lawyer relationship, and
 - the confidential nature of the communication or document, and
 - the communication or document was brought into existence for the dominant purpose of either:
 - enabling the client to obtain, or the lawyer to give legal advice or provide legal services, or
 - for use in existing or anticipated litigation.
17. A review of the information and the notice of decision indicates that one or more of the elements of legal professional privilege are not present in some of the information over which the Agency claims privilege.
18. In its notice of decision, the Agency stated that the withheld information (and the redacted information in the partially released document) was not released as they were:

“...email correspondence between solicitors employed within the UNSW Legal Office and [a third party] and two handwritten notes by the Legal Counsel. These documents...are confidential communications between a client (the University) and its lawyers, or confidential documents prepared by a lawyer, for the dominant purpose of the lawyers providing legal advice to the University.”
19. The Agency needs to do more than re-state the words of clause 5 of schedule 1 of the GIPA Act. The Agency must show how all the elements of the consideration are satisfied to demonstrate that disclosure would reasonably result in the described effect.

20. The Agency has not established, and on face value the information does not appear to establish, that the dominant purpose for which the information was brought into existence was to enable the Agency to obtain (or the other party to provide legal advice) or to be used in existing or anticipated litigation. We would expect the notice of decision provide a description of how the information could be privileged on the grounds that of existing or anticipated litigation or how the dominant purpose was to obtain or give legal advice.
21. Without all three of these elements of legal professional privilege being satisfied, the decision not to release the information on the basis of legal professional privilege is not justified.

Conclusion

22. On the information available, I am not satisfied the Agency has justified the application of this conclusive presumption against disclosure over all the information over which it has been claimed.

Recommendation

23. I recommend the Agency make a new decision, pursuant to section 93 of the GIPA Act.
24. I ask that the Agency advise the Applicant and the IPC within 10 working days of the actions to be taken in response to our recommendations.

Applicant review rights

25. This review is not binding and is 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.
26. The Applicant has the right to ask the NCAT to review the Agency's decision.
27. 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>

28. 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

29. This review is now complete.

30. If you have any questions about this report please contact the Information and Privacy Commission on 1800 472 679.