



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

Applicant: The Applicant
Agency: Minister for Industry, Resources & Energy
Report date: 11 July 2016
IPC reference: IPC16/R000318
Keywords: Government information – information not held – searches for
information – transfer of application – recommendation to
reconsider Agency’s decision

Contents

Contents	1
Summary	2
Background.....	2
Decision under review	3
Part of the application not addressed.....	3
Searches for information	3
Transfer of application	4
Recommendations.....	5
Review rights	5
Completion of this review	6

Summary

1. The Applicant applied for information from the Minister for Industry, Resources & Energy (the Agency) under the *Government Information (Public Access) Act 2009* (GIPA Act).
2. The Agency decided that the information requested is not held by the Agency.
3. The Information Commissioner concludes that the decision of the Agency is not justified, pursuant to section 97(1) of the GIPA Act.
4. The Information Commissioner recommends:
 - a. pursuant to section 93 of the GIPA Act, that the Agency reconsider its decision;
 - b. pursuant to section 92 of the GIPA Act that, if the Agency reconsiders its decision, it note the guidance in this report with respect to searches for information and transfer of applications; and
 - c. pursuant to section 95 of the GIPA Act that the Agency note the guidance contained in this report when dealing with future GIPA applications.

Background

5. On 3 March 2016 the Applicant applied under the GIPA Act to the Agency for access to all documents from January 2013 to date, being or evidencing:
 - a. *The appointment of a consultant in 2013 by the Minister for Resources and Energy to review that area in the Hunter coalfields which includes the area where Exploration Licences are held by Bickham Coal Company Pty Limited (Exploration Licence No 5306, County of Brisbane, Map Sheet (9034), area of 3040ha; and Exploration Licence No 5888, County of Brisbane, Map Sheet (9034), area of 2040HA, together, the “Bickham ELs”) and any reports or findings of the consultant; and*
 - b. *Changes to government position or policies regarding future mining in the Hunter coalfield.*
6. In its decision issued on 28 April 2016, the Agency decided that information “*within the scope of any future policy changes in the Hunter due to the consultant’s findings*” is not held by the Agency. This appears to address part (b) of the Applicant’s request. Part (a) is not addressed in the notice of decision.
7. In seeking a review of the decision by the Information Commissioner, the Applicant:
 - a. attached documents in which reference was made to the engagement of JBA Urban Planning Consultants (JBA) to “*undertake an independent review of the suitability of the area embraced by the Bickham coal exploration licences for mining*”; and
 - b. confirmed that he would like the Agency to release the Report commissioned by the then Minister Chris Hartcher from JBA, reviewing the suitability of the Bickham EL areas for mining.

Decision under review

8. The decision under review is the decision that information is not held, which is reviewable under section 80(e) of the GIPA Act.
9. Issues that arise in this review are the adequacy of searches for information, potential transfer of the access application and that part (a) of the application is not addressed.

Part of the application not addressed

10. The Applicant clearly articulates a request for access to information that includes part (a) and part (b).
11. In the notice of decision the Agency appears to only refer to part (b) of the application for information and states:

A search of our records did not identify any records held by this Office within the scope of any future policy changes in the Hunter due to the consultant's findings.
12. Part (a) of the application is not addressed.
13. The Agency's notice of decision should address all elements of the Applicant's request and make a decision available in the GIPA Act, in relation to each item of information requested.
14. Whatever decisions are made with respect to a GIPA application, there is an onus on the Agency to justify its decisions pursuant to section 97(1) of the GIPA Act.
15. As part (a) of the Applicant's request is not addressed in the notice of decision, we conclude that the Agency's decision is not justified and recommend pursuant to section 93 of the GIPA Act that the Agency reconsider its decision, and address both parts of the Applicant's request.

Searches for information

16. Before the Agency decides that information requested is not held, the GIPA Act requires that sufficient searches be conducted.
17. The Agency's obligations with respect to searches are set out in section 53 of the GIPA Act. When deciding that information is not held, an agency must first comply with the requirements of section 53(2) of the GIPA Act and undertake 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.
18. When the Information Commissioner reviews whether an agency's search for information was sufficient, we consider two questions, derived from *Smith v Commissioner of Police [2012] NSWADT 85*.

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 been reasonable in all the circumstances of a particular case.*

19. 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 are relevant.
20. Based on the documents provided by the Applicant with his request for external review, (correspondence from the Director JBA to the A/g Director, Minerals Operations, Mineral Resources, Department of Trade and Investment and a Briefing Note from the A/g Director entitled Engagement of JBA Urban Planning Consultants, both dated November 2013) we are satisfied that there are reasonable grounds to believe that the requested information exists. Whether it is information of the Agency is a matter which the Agency should address, either in the notice of decision, or in a notice of transfer of application, pursuant to section 47 of the GIPA Act. Further guidance with respect to transfer of applications is at paragraph 26 below.
21. 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]).
22. Agencies should undertake a reasonable search on a flexible and common sense interpretation of the terms of the request, which will depend upon the circumstances of the request and the usual business practices of the agency. For further guidance regarding searches, we refer the Agency to our knowledge update on Reasonable searches under the GIPA Act, available at <https://www.ipc.nsw.gov.au>.
23. 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.
24. During the course of this review, the Agency was asked to provide information about searches conducted. The Agency advised that staff were questioned and that a search of email and “their database” was conducted. The Agency was unable to advise what search terms were used.
25. The Information Commissioner recommends under section 93 of the GIPA Act that the Agency make a new decision that addresses all aspects of the application for information. If, following reasonable searches by the Agency, it is the case that the information is not held by the Agency, the notice of decision should state this. It would also assist in justifying the decision if the Agency were to provide a description of searches undertaken.

Transfer of application

26. During the course of this review, the Agency reported that the Applicant was advised that he “*might want to try the Department instead.*”

27. We draw the Agency's attention to section 44 of the GIPA Act which provides that an agency that receives an access application can transfer the application to another agency either by agency-initiated transfer or by applicant-initiated transfer.
28. Section 45 of the GIPA Act provides that an agency-initiated transfer to another agency requires the consent of that other agency and cannot be done unless:
 - (a) the other agency is known to hold the information applied for and the information relates more closely to the functions of that other agency, or
 - (b) the agency that receives the application decides that it does not hold the information and the other agency is known or reasonably expected to hold the information.
29. The Agency should note that an agency-initiated transfer cannot be done more than 10 working days after the application was received.
30. Section 46 of the GIPA Act provides that:
 - (1) An applicant-initiated transfer of an access application to another agency cannot be done unless the applicant and the agency to which the application was made agree that the application should be transferred and it appears that the information relates more closely to the functions of the other agency.
 - (2) The consent of the other agency is not required for an applicant-initiated transfer and it does not matter whether the agency that is to transfer the application holds the information (or knows whether it holds the information).
31. The Agency should also refer to sections 46 and 47 of the GIPA Act for the respective requirements with respect to notice and effect of transfer of an application.
32. We recommend pursuant to section 92 of the GIPA Act that the Agency note this guidance in any reconsideration of its decision.

Recommendations

33. The Information Commissioner recommends:
 - a. pursuant to section 93 of the GIPA Act, that the Agency reconsider its decision;
 - b. pursuant to section 92 of the GIPA Act that, if the Agency reconsiders its decision, it note the guidance in this report with respect to searches for information and transfer of applications; and
 - c. pursuant to section 95 of the GIPA Act that the Agency note the guidance contained in this report when dealing with future GIPA applications.
34. We ask that the Agency advise the Applicant and us **within ten days of the date of this report** of the actions to be taken in response to our recommendations.

Review rights

35. 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.

36. The Applicant has the right to ask the NCAT to review the Agency's decision.
37. 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>

38. 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

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

Elizabeth Tydd
Information Commissioner