



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

Applicant: The Applicant
Agency: Transport for NSW
Report date: 02 August 2016
IPC reference: IPC16/R000410
Keywords: Government information – decision to refuse access –
prejudice supply of confidential information that facilitates
agency’s function – prejudice effective exercise of agency’s
functions – found an action for breach of confidence

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Summary

1. The Applicant applied for information from Transport for NSW (the Agency) under the *Government Information (Public Access) Act 2009* (GIPA Act).
2. The Agency decided to refuse access to information because of an overriding public interest against its disclosure.
3. The Information Commissioner concludes that the decision of the Agency is justified pursuant to section 97(1) of the GIPA Act and makes no recommendations in relation to this decision.

Background

4. The Applicant applied under the GIPA Act to the Agency for access to the following information:

All referee reports used in conjunction with my application for the Sydney Trains position 00003N13, and panel member interview notes if available. The interview was held on 13 July 2015.
5. In its decision issued on 23 June 2016, the Agency decided that panel member interview notes were not held and decided to refuse access to referee reports because of an overriding public interest against their disclosure.
6. In seeking a review of the decision by the Information Commissioner, the Applicant submits that referees should be aware that any report supplied to the Agency may be shared and utilised to evaluate the data contained [therein].

Decisions under review

7. The decision under review is the Agency's decision to refuse access to information, which is a reviewable decision under section 80(d) of the GIPA Act.
8. In undertaking this review, we have had access to the information to which access was refused.

The public interest test

9. 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.
10. 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.
11. 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.
12. 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

13. 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).
14. In its notice of decision, the Agency identified that disclosure of the information applied for could reasonably be expected to inform the public about questions put to referees and their subsequent responses, when providing a reference for candidates applying for a job position within Sydney Trains.
15. The notice of decision also states that the Agency took into account personal factors of the application, including that the information relates to the Applicant's employment application and includes his personal information.
16. We are satisfied these are relevant considerations in favour of disclosure.

Public interest considerations against disclosure

17. The only public interest considerations against disclosure that can be considered are those in schedule 1 and section 14 of the GIPA Act.
18. 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.
19. 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.
20. In its notice of decision the Agency raised three public interest considerations against disclosure of the information, deciding that its release could reasonably be expected to:
 - a. prejudice the supply to an agency of confidential information that facilitates the effective exercise of that agency's function (clause 1(d) 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 to section 14 of the GIPA Act); and
 - c. found an action against an agency for breach of confidence or otherwise result in the disclosure of information provided to an agency in confidence (clause 1(g) of the table to section 14 of the GIPA Act).
21. I will discuss each of these considerations in turn.

Consideration 1(d) – prejudice the supply to an agency of confidential information that facilitates the effective exercise of that agency functions

22. Clause 1(d) 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 supply to an agency of confidential information that facilitates the effective exercise of that agency's functions (whether in a particular case or generally).
23. In order for this to be a relevant consideration against disclosure, the Agency must be satisfied that:
 - a. the information was obtained in confidence;
 - b. disclosure of the information could reasonably be expected to prejudice the supply of such information to the Agency in future; and
 - c. the information facilitates the effective exercise of the Agency's functions.
24. Although the GIPA Act does not use the phrase "future supply", the nature of the prejudice that this consideration deems to be contrary to the public interest, is implicit. This future effect is one aspect of the abstract nature of the enquiry. The other abstract element is supply in a general sense and whether disclosure will impact supply of similar information by persons to the agency in the future.
25. It is commonly understood that information will have a confidential quality if the person was not bound to disclose the information but did so on the basis of an express or inferred understanding that the information would be kept confidential.
26. The notice of decision states that:
 - a. in order to effectively exercise its functions and achieve its principal objectives, it is important that the Agency attracts and recruits individuals who possess the most suitable skills, and best meet the needs of the Agency;
 - b. referee checking is a major part of the selection process, so that the Agency can verify claims made by candidates about their experience, work performance and history with individuals who have worked with the applicant;
 - c. the Agency relies on referees to provide information honestly and voluntarily and it is commonly understood that individuals provide such information on the understanding it will be treated confidentially;
 - d. disclosing such information could reasonably be expected to prejudice the supply of confidential information to the Agency that facilitates its ability to identify the most suitable candidate for employment, because referees are likely to be more guarded and selective in responses, or be dissuaded from providing feedback altogether if they believe that information would be disclosed.
27. We are satisfied that the Agency has established the relevance of this consideration against disclosure to the information in question.

Consideration 1(f) – prejudice the effective exercise by an agency of the agency's functions

28. 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.

29. To show that this is a relevant consideration against disclosure, the agency must establish:

- a. the relevant function of the agency; and
- b. that is or would be prejudiced by release of the information.

30. The meaning of the word prejudice is to “cause detriment or disadvantage”.

31. The notice of decision states that:

- a. the Agency's functions, as outlined in the *Transport Administration Act 1988* include transport planning and policy, oversight and delivery of transport infrastructure and coordination of transport services, including timetabling;
- b. it is reasonable to presume that the Agency's functions are created with the aim of achieving its principal objectives, to deliver safe and reliable railway passenger and freight services in NSW in an efficient, effective and financially responsible;
- c. in order to effectively exercise its functions and achieve its principal objectives, it is important that the Agency attracts and recruits individuals who possess the most suitable skills, and best meet the needs of the Agency;
- d. it is important that the Agency maintains the integrity and confidentiality of referees to ensure that it can identify the most suitable individuals for employment; and
- e. release of the information could reasonably be expected to have a prejudicial effect on the Agency's ability to obtain information needed to select the most suitable candidates for employment with the Agency.

32. We are satisfied that the Agency has established the relevance of this consideration against disclosure to the information in question.

Consideration 1(g) – found an action against an agency for breach of confidence or otherwise result in the disclosure of information provided to an agency in confidence

33. Clause 1(g) 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 found an action against an agency for breach of confidence or otherwise result in the disclosure of information provided to an agency in confidence (whether in a particular case or generally).

34. To show that this is a relevant consideration against disclosure, the Agency must establish:

- a. the information was obtained in confidence; and
 - b. disclosure of the information could reasonably be expected to found an action against an agency for breach of confidence; or
 - c. otherwise result in the disclosure of information provided.
35. In raising this public interest consideration against disclosure the Agency needs to ensure the information is in fact confidential.
36. Once satisfied that the information is confidential information, the agency should then turn its mind to what constitutes a breach of confidence. A breach of confidence arises out of an unauthorised disclosure of, or other use of information, which is subject to an obligation of confidentiality.
37. We refer to the Agency's comments summarised at paragraph 26(c) and are satisfied that the Agency has established:
- a. the confidential nature of the information and the circumstances in which it was obtained in confidence from referees; and
 - b. that its release could reasonably be expected to result in the disclosure of confidential information.
38. We are satisfied that the Agency has established this is a relevant consideration against disclosure.

Balancing the public interest

39. 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 may 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.
40. We are satisfied that the Agency undertook appropriate consultations on public interest considerations pursuant to section 54 of the GIPA Act, which have been taken into account in determining whether there is an overriding public interest against disclosure of the information.
41. We are satisfied that in its attribution of weight to the considerations for and against disclosure, the Agency has applied the public interest test in accordance with the requirements of the GIPA Act.

Conclusion

42. The Information Commissioner concludes that the decision of the Agency is justified pursuant to section 97(1) of the GIPA Act.

Review rights

43. 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.
44. The Applicant has the right to ask the NCAT to review the Agency's decision.

45. 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

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

Elizabeth Tydd
Information Commissioner