



Investigation by the NSW Information Commissioner into Barangaroo Delivery Authority's exercise of its functions under the *Government Information (Public Access) Act 2009* ('GIPA Act')

Date of investigation report: 14 April 2011

A Background

1. This investigation was commenced in response to the release by the Barangaroo Delivery Authority ('BDA') of a redacted version of its Project Development Agreement with Lend Lease ('the contract') for the development of the Barangaroo site situated on the western side of Sydney's CBD.
2. Sections 27-31 of the GIPA Act require that contracts of more than \$5 million be made available in full as open access information.
3. The contract had been significantly redacted and the OIC was concerned that BDA had not fully complied with its open access obligations under the GIPA Act.
4. The redactions were initially justified by BDA pursuant to the commercial in confidence provisions under section 32 of the GIPA Act with little further explanation. The OIC's concern was the extent to which these provisions were applied and the absence of a proper explanation for BDA's approach, as required by section 32(2) of the GIPA Act.
5. The OIC also received a complaint from the Barangaroo Action Group ('BAG'). Its concerns also centred on the extent of the redactions and the OIC accepted the complaint as forming part of its investigation.

B Issue

6. Whether the Barangaroo Delivery Authority contravened its open access obligations under the GIPA Act concerning the publication of the Project Development Agreement.

C Summary of findings

7. The initial publication of the development agreement was compromised by the significant redactions to the document and did not appear to fully comply with the open access provisions of the GIPA Act.

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8. The efforts of BDA to address these shortcomings have improved its response to the requirements of the GIPA Act and also demonstrated the need for agencies to think more broadly about how to comply with open access obligations. The improved compliance is based on the release of further information, the provision of far more detail in the explanatory table and, significantly, an undertaking to an ongoing review of the redactions as commercial sensitivities abate over time.

D Discussion

9. Under section 19 of the *Government Information (Information Commissioner) Act 2009* ('GIIC Act'), the Information Commissioner has a broad scope in determining appropriate measures to resolve investigations. The OIC can report on how an agency exercises its functions and make recommendations as to how agencies can best respond to their obligations under the GIPA Act.
10. The OIC held meetings with representatives of BDA and the Barangaroo developer Lend Lease, and a separate meeting with representatives of BAG.
11. The OIC also organised a meeting between all of the parties, to be held in early December 2010 but, because of litigation in a separate matter involving the parties, key representatives were unable to attend. The OIC therefore gave the complainant and agency an opportunity to provide written submissions. The final date for submissions was 21 January 2011.
12. Neither party provided any further written material so this report is based on the information provided in the initial documentation, correspondence between the OIC and the parties, the OIC's meetings with the parties and some further information provided by BDA on the approach taken to release of information following these meetings.
13. The OIC can require information be produced for inspection but cannot make orders for information to be published. Under section 35 of the GIIC Act the OIC cannot disclose information provided to the OIC in the course of an investigation where there is (or an agency claims there is) an overriding public interest against disclosure.
14. Given these parameters to the OIC's jurisdiction, the OIC seeks to work with all parties to promote the objects of the GIPA Act with a long term view of improving understanding of and compliance with legislative obligations concerning disclosure of government information.
15. The GIPA Act expressly acknowledges that there is a potential public interest against disclosure of certain commercially sensitive information. The requirement for publication of contracts as open access information does not apply to 'the commercial-in-confidence provisions of a contract' (section 32(1)(a)) or information in relation to a contract that is of such a nature that its inclusion in a record would result in there being an overriding public interest against disclosure of the record (section 32(1)(d)).

16. The prescribed public interest considerations against disclosure, as set out in the table in section 14 of the GIPA Act include:

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:

- (a) undermine competitive neutrality in connection with any functions of an agency in respect of which it competes with any person or otherwise place an agency at a competitive advantage or disadvantage in any market,
- (b) reveal commercial-in-confidence provisions of a government contract,
- (c) diminish the competitive commercial value of any information to any person,
- (d) prejudice any person's legitimate business, commercial, professional or financial interests,

17. Further while all contracts between government and the private sector must anticipate the requirement for access to information, the GIPA Act balances this, and its access provisions, with recognition of the commercial realities of competition. Section 121(1) of the GIPA Act requires agencies to ensure they have access to specified information held in the records of private sector entities with which they contract to provide services to the public. Section 121(2) restricts this requirement such that an agency is not required to have an immediate right of access to any of the following information:

- a. information that discloses or would tend to disclose the contractor's financing arrangements, financial modelling, cost structure or profit margins,
- b. information that the contractor is prohibited from disclosing to the agency by provision made by or under any Act (of this or another State or of the Commonwealth),
- c. information that, if disclosed to the agency, could reasonably be expected to place the contractor at a substantial commercial disadvantage in relation to the agency, whether at present or in the future

18. The commercial in confidence provisions are thus available for agencies to rely on where they can demonstrate that disclosure of the information would be detrimental to their commercial interests or the interests of private entities with which they contract including where this presents a legitimate public interest concern. While the GIPA Act is not directly concerned with the interests of a private entity, the relevant provisions acknowledge the clear indirect public interest issues related to the consequences for a government agency if it is unable to properly contract with legitimate commercial partners.

19. The OIC does not consider that the characterisation of information as commercial in confidence as determinative in deciding whether or not information is, in fact, commercial in confidence. Some aspects of the definition of 'commercial in confidence', as provided in Schedule 4 to the GIPA Act, are specific, comprising provisions of the contract that disclose:

- a. the contractor's financing arrangements,
 - b. the contractor's cost structure or profit margins,
 - c. the contractor's full base case financial model,
 - d. any intellectual property in which the contractor has an interest, or
 - e. any matter the disclosure of which would place the contractor at a substantial commercial disadvantage in relation to other contractors or potential contractors, whether at present or in the future.
20. This provides a potentially broad coverage of information within contracts but, given the objects of the GIPA Act, the OIC considers that such characterisation should be only the beginning of the process. The GIPA Act requires that agencies demonstrate that the public interest against disclosure is such that it outweighs the broad public interest in favour of disclosure of government information.
21. In this case, in addition to the presumption in favour of disclosure provided for at section 5 of the GIPA Act, there was a clear public interest in the agreement between BDA and Lend Lease given the substantial sums involved, the considerable impact the development is to have on a central, high profile location involving public land and the debate that has surrounded the site and the plans.
22. Characterisation of information as commercial in confidence can be viewed as a consideration that an agency may take into account in weighing up the public interest for and against disclosure. Given the strong weight accorded public interest considerations in favour of disclosure, there must be clear evidence that an agency has properly assessed all relevant considerations to demonstrate how the considerations against disclosure prevail. Further, all considerations concern the public interest, therefore a decision maker must be able to articulate in what way it is against the public interest to not disclose the commercially sensitive information.¹
23. The OIC is satisfied that BDA redacted information from the contract in accordance with its understanding of the GIPA Act at the relevant time. To properly respond to the GIPA Act's requirements, however, there must be evidence of the basis for any withholding of information
24. The significant redactions had made the published contract difficult to understand and so undermined the purpose of the legislative provisions concerning the contract register, to provide transparency in relation to agreements and expenditure by government agencies.

¹ For a detailed discussion of the public interest considerations relevant to commercial in confidence matters, see the report of the Victorian Public Accounts and Estimates Committee Thirty-Fifth Report to Parliament, *Inquiry Into Commercial in Confidence Material and the Public Interest*, March 2000. Available at <http://www.parliament.vic.gov.au/images/stories/committees/paec/reports/35th_report_-_CommercialInConfidence_2000.pdf>

25. This was aggravated by the absence of any proper explanation of the basis for the redactions so there was no context to what had been published on BDA website.
26. The restrictions on naming people involved in the project was also a concern for the OIC as there is a legitimate public interest in the identity of those working on major public projects. Concerns about the privacy of those individuals could be addressed by releasing the information for access at the agency's office rather than on the website so there is some control as to who may be seeking access.
27. Following consultations between the OIC and BDA as to the redactions and the explanatory table there has been further disclosure of information, and far greater detail provided in the explanatory table. BDA also provided an undertaking to release information once it became less commercially sensitive. I consider this to be a proper response to the open access obligations under section 32(2) of the GIPA Act.

E Actions by BDA

28. Specific actions by BDA have included:

GIPAA Supplementary Information Report

- a. Release of a GIPAA Supplementary Information Report, titled 'Project Development Agreement Financial Information Disclosure',² which was published on BDA website in November 2010. The Authority has commented that it has provided the information in recognition of the genuine public interest in understanding the cost and value of the Barangaroo project.

Release of further information

- b. Further information was released on the following dates:
 - i. 11 November 2010 (information under the contract);
 - ii. 22 February 2011 (the Third Deed of Amendment);
 - iii. 29 March 2011 (information under the contract and the Third Deed of Agreement).
- c. Release of further information from the contract includes:
 - i. The table of contents in the contract was amended on 11 November 2010 to include more information.
 - ii. Clause 15.3 'Unscoped Barangaroo Works' initially did not disclose the sum or the discount rate applicable to the Innovation Centre (15.3(h)(i) and 15.3(j)). This item was specifically noted in the BAG complaint. It has now been disclosed.

² Available at <
<http://www.barangaroo.com/downloads/GIPAA%20Supplementary%20Information%20report%20111110.pdf>>

Future release of information

- d. BDA states that it continuously reviews whether it is possible to release the remaining non-disclosed parts of the Project Development Agreement. The future release of information is dependent on external factors including changes to the competitive commercial value of information contained in the agreement and/or the prejudice that would be suffered to business interests from the disclosure of that information.
- e. For example, BDA has stated that, once a binding agreement for lease has been signed between Lend Lease and the relevant tenant, and subject to any confidentiality provisions in that agreement, then Lend Lease should be able to reveal the name of that tenant. If due to confidentiality restrictions, Lend Lease is unable to reveal the details of that tenant after executing an agreement for lease, then Lend Lease should be able to reveal those details upon the lease with that tenant becoming effective.
- f. BDA has referred to other examples for future release: public disclosure of further payments by Lend Lease as part of the annual NSW budget process, changes in the status of negotiations in relation to the remediation of the site or matters otherwise becoming public knowledge may result in further disclosures.
- g. The explanatory table now includes references to review triggers for information that is currently withheld but may be disclosed at a later date. For example, at clause 9.10(c)(ii) the explanatory table now includes the comment that the currently redacted figure may be revealed once the RECs (renewable energy certificates) have been procured.
- h. In clause 16, which concerns remediation, the explanatory table now provides a review provision for all affected items in this clause which states:

Review: The Authority will continue to review whether this information can be disclosed as a result of changes in circumstances, such as concluded negotiations with the polluter, or changes to allocation of costs and risks under the Agreement.

E Further comments

- 29. The use of a future release mechanism for a significant amount of the redacted information is a positive step for BDA and responds to the requirements of section 32(2)(b) of the GIPA Act.
- 30. The OIC considers this is a useful process for agencies to demonstrate they are responding to their open access obligations in good faith. Given that commercial sensitivities will frequently relate to a particular period of time, an undertaking to release the information once the issue of competition is no longer relevant may assuage concerns that the information is being withheld to cloak corrupt activities.
- 31. I appreciate that the complainant BAG has broad concerns with the Barangaroo development and has raised serious allegations concerning corruption around

various aspects of this project.³ The extensive redactions in the initial publication of the contract without adequate explanation appear to have contributed to BAG's concerns around the nature of the information that was withheld.

32. Whether BDA was being overly cautious in its concerns as to the ramifications of releasing the information is extremely difficult for the OIC to gauge. The information withheld from publication concerned commercially sensitive items that may have compromised both this development and future negotiations with the private sector. I consider BDA significantly improved the response to its obligations, however, once it published the reworked agreement and the explanatory table and set up a process for the further release of information.
33. Given the ongoing high level of public interest in this matter the OIC will continue to monitor the release of information by BDA. The OIC will review the further release of information by BDA in three months from the release of this report (July 2011).
34. This investigation is now closed.

³ The OIC's jurisdiction concerns how agencies disclose government information. If such disclosure, or a failure to do so, points to other concerns then the OIC can refer these matters to the relevant agencies, including the Ombudsman, the Independent Commission Against Corruption and the Director of Public Prosecutions.