



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

Applicant: Mr Tom Lonsdale  
Agency: University of Sydney  
Report date: 15 April 2015  
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an action for breach of confidence - reveal commercial in  
confidence provisions - prejudice business interests

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## Summary

1. Mr Tom Lonsdale (the Applicant) applied for information from the University of Sydney (the Agency) under the *Government Information (Public Access) Act 2009* (GIPA Act).
2. The Agency decided to provide access to some information and decided to refuse access to some other information.
3. The Information Commissioner is satisfied that the decision of the Agency is justified and makes no recommendations against the decision. We refer the Agency to our recommendation at paragraph 53, with respect to dealing with future applications in which third party consultation takes place.

## Background

4. On 29 September 2014 the Applicant applied under the GIPA Act to the Agency for access to the following information:
  - a. details of research funds, sponsorships, agreements and contracts between pet food companies and the University of Sydney, its staff and students; and
  - b. copies of correspondence, email messages and memoranda that relate to the arrangements entered into by individuals and the University.
5. In its decision issued on 11 November 2014, the Agency decided that some information was already available to the Applicant and refused to provide access to some other information because of an overriding public interest against its disclosure.
6. On 5 December 2014, the Applicant requested an internal review of the initial decision.
7. On 2 February 2015, the Agency made a decision under section 58(1)(a) to release some information that had not previously been released, and under section 58(1)(d) decided to refuse access to some other information because there is an overriding public interest against its disclosure.
8. In seeking a review of the decision by the Information Commissioner, the Applicant confirmed that he seeks full disclosure of the information which is the subject of his request.

## Decisions under review

9. The decision under review is the Agency's internal review decision to refuse access to some of the information sought.

## Conclusive presumption 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. Section 14(1) of the GIPA Act provides that government information described in Schedule 1 to the GIPA Act is to be conclusively presumed to give rise to an overriding public interest against disclosure. For information for which a conclusive presumption, such as legal professional privilege from clause 5 of

Schedule 1 is established, there is no requirement to apply the public interest test set out in section 13 of the GIPA Act.

### **Legal professional privilege – clause 5 of Schedule 1**

12. 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:
  - The existence of a client and lawyer relationship;
  - 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.
13. This is further explained in the IPC Fact Sheet - Legal Professional Privilege available at [www.ipc.nsw.gov.au](http://www.ipc.nsw.gov.au)
14. We have examined the information described at items 10-23 in the schedule of documents attached to the notice of decision. We confirm it contains the essential elements of legal professional privilege in circumstances in which the dominant purpose of the documents was either to enable the client to obtain or for the lawyer to provide legal advice or legal services to the Agency.
15. Under clause 5(2) of Schedule 1 to the GIPA Act, an Agency must consider whether it is appropriate to waive privilege before it decides to refuse access under clause 5(1).
16. On page 3 of the notice of decision, the Agency determined that it would not be appropriate to waive privilege in relation to the material. This is a decision available to the Agency to make and is not reviewable under the GIPA Act.
17. We conclude that the Agency's decision to refuse access to the information at items 10-23 on the basis of legal professional privilege is justified.

### **The public interest test**

18. Turning now to the balance of information in the schedule of documents, 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.
19. 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.
20. 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.
21. 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.
22. 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**

23. In its notice of decision, the Agency acknowledged the presumption in favour of disclosing government information at section 5 of the GIPA Act and relied upon the public interest considerations in favour of disclosure set out in part 4.1 of the initial decision.
24. These include the general public interest in favour of disclosure of government information provided at section 12(1) of the GIPA Act and the public interest in knowing about the University's relationships with commercial organisations.

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

25. 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.
26. 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.
27. 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. 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);
  - b. reveal commercial-in-confidence provisions of a government contract (clause 4(b) of the table to section 14 of the GIPA Act); and
  - c. prejudice legitimate business interests (clause 4(d) of the table to section 14 of the GIPA Act).
28. I will discuss each of these considerations in turn.

### **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**

29. 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).*

30. 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.
31. In raising this public interest consideration against disclosure the Agency needs to ensure the information is in fact confidential.
32. Once satisfied that the information is confidential, 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.
33. In its notice of decision, the Agency states that:
  - details of its sponsorship arrangements with two pet food organisations are contained in Memoranda of Understanding, which were reached through private negotiation;
  - a majority of documents within the scope of the application contain sensitive information about the negotiations and were created on a basis of confidentiality;
  - the confidential nature of these communications and agreements is explicit in the terms of the Memoranda, which describe mutual obligations of confidentiality; and
  - to release details of the negotiations and final arrangements would be a breach of the confidentiality and trust that sponsors place in the Agency when participating in negotiations and entering into agreements.
34. In the course of this review, we examined the Memoranda and communications related to their negotiation and confirm that they contain confidentiality clauses, which in all likelihood would be breached should they be disclosed.
35. We are satisfied the elements of this consideration are met and that this is therefore a relevant consideration against disclosure of the information.

#### **Consideration 4(b) – reveal commercial-in-confidence provisions of a government contract**

36. Clause 4(b) 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 commercial-in-confidence provisions of a government contract.*
37. We refer to the Agency's points at paragraph 33 above with respect to the confidential nature of information which fall within the scope of this request.
38. Having inspected the material in question, we are satisfied that it is reasonably expectable that release of the information would reveal commercial in confidence provisions of a government contract.

#### **Consideration 4(d) – prejudice legitimate business interests**

39. 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.*

40. Person is defined in Schedule 4(1) to the GIPA Act as including an agency. It can also include a corporation, pursuant to section 21 of the *Interpretation Act 1987*.
41. For this consideration to apply, the Agency must:
  - a. identify the relevant legitimate interest; and
  - b. explain how the interest would be prejudiced if the information was disclosed.
42. Our view is that the relevant meaning of "legitimate" for the purposes of this consideration is its ordinary meaning, that is genuine and not spurious.<sup>1</sup>
43. The notice of decision states that:
  - disclosure of confidential communications with sponsors and commercially sensitive information would have an adverse effect on the capacity of the Agency to manage current sponsorships and negotiate future sponsorships, as the sponsors' commercial information would be revealed to other commercial entities, operating within the same competitive environment;
  - disclosure would most likely disadvantage sponsors by diminishing the value of the negotiated commercial arrangements; and
  - this would have the effect that current and potential future sponsors would most likely be disinclined to have sponsorship dealings with the Agency, which would adversely impact the Agency.
44. We are satisfied that if the information is disclosed that prejudicial consequences for both the sponsors' and the Agency's interests are reasonably expectable. We therefore find this is a relevant consideration against disclosure of the information in question.

### **Consultation with third parties**

45. Pursuant to section 54 of the GIPA Act, the Agency consulted with the companies whose business information is captured by the application.
46. The purpose of third party consultation under this section is to ascertain whether the person (or in this case, company) has an objection to disclosure of the information and the reasons for the objection. The Agency must take any third party objection into account in making its decision as to whether there is an overriding public interest against disclosure of government information.
47. During the course of this review, we inspected the consultation correspondence.
48. The notice of decision would benefit from including an explanation as to the reliance on the outcome of the consultation process in carrying out the public interest test.

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<sup>1</sup> Macquarie Dictionary 6<sup>th</sup> ed, October 2013

## Balancing the public interest

49. 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.
50. In weighing up considerations for and against disclosure, the Agency noted that the agreements with pet food companies are not of the kind to be made publicly available under the GIPA Act and that even if they were, commercial-in-confidence provisions of a contract are not required to be made publicly available.
51. We refer the Applicant to the IPC's Knowledge Update on Government Contracts for further information about the GIPA Act's requirements for certain contractual information to be made publicly available.

## Recommendations

52. The Information Commissioner is satisfied that the decision of the Agency is justified, pursuant to section 97 of the GIPA Act, and makes no recommendations against the decision.
53. Pursuant to section 92 of the GIPA Act, the Information Commissioner recommends that in dealing with future applications when the Agency consults with relevant third parties, it include the details of the consultation and any reliance on the outcome of such consultation in its notice of decision as required by section 61 of the GIPA Act.

## Review rights

54. 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.
55. The Applicant has the right to ask the NCAT to review the Agency's decision.
56. 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**

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

Elizabeth Tydd  
**Information Commissioner**