



Government Information (Public Access) Act 2009

NOTICE OF DECISION

Applicant:	Mr. Warren Hudson
File Ref:	DNSW GA64
Decision-maker:	Neville D'Costa – Right to Information Officer
Date of decision:	8 March 2019

Table of Contents

Table of Contents	1
1. Summary of access application.....	2
2. Decision	2
3. Searches for information	3
4. The public interest test	3
4.1 Public interest considerations in favour of disclosure	4
4.2 Public interest considerations against disclosure	4
4.3 Consultation	8
4.4 Balancing the public interest test.....	8
4. Review rights.....	11
5. Further information.....	11

Government Information (Public Access) Act 2009

NOTICE OF DECISION

1. Summary of access application

On 11 February 2019, we received your access application under the *Government Information (Public Access) Act 2009* (GIPA Act) via a transferred application from Department of Premier and Cabinet. You asked the following:

1. *Is holding a Formula 1 race in Sydney still the plan or policy of the NSW Government under Premier Berejiklian?*
2. *Has the bid team reported back to the Government on the economics of hosting the race in Sydney?*
 - a) *If yes, I request a copy of that document*
3. *Have any other reports, updates or correspondence (including letters, email or any other method) relating to a Formula 1 race in Sydney been provided by the bid team to the NSW Government or the Premier?*
 - a) *If yes, I request a copy of those documents*
4. *Was a bid for a Formula 1 race in Sydney ever lodged?*
5. *Is the bid team still in place, or has the project been disbanded, is otherwise in active or shutdown?*
 - a) *If the team is no longer in place, when was it disbanded?*
6. *What is the budget of the bid team, for each year since its inception in 2015?*
7. *How many staff are in the bid team, and what are their job titles?*

Please provide all relevant documents for the date range of 12 March 2015 until the date that this application is received by the Office of the Premier.

2. Decision

I am authorised by the principal officer, for the purposes of section 9(3) of the GIPA Act, to decide your access application.

I have decided, under section 58(1)(d) of the GIPA Act, to refuse to provide access to some of the information because there is an overriding public interest against disclosure of the information and conclusive presumption of overriding public interest against disclosure.

In this Notice of Decision I will explain my reasons. To meet the requirements of section 61 of the GIPA Act, I need to tell you:

- (a) the reasons for my decision;
- (b) the findings on any important questions of fact underlying those reasons, together with a reference to the sources of information on which those findings are based; and

- (c) the general nature and format of the records containing the information you asked for, with reference to the relevant public interest considerations against disclosure.

You can ask for a review of this decision. For details about how to do so, see part 4 of this Notice.

3. Searches for information

Under the GIPA Act, we must conduct reasonable searches for the government information you asked for in your application. I have searched our records to find any information that falls within the scope of your application.

The searches also included instructing relevant staff to search their records (email systems and file drives) and searches on our document management system.

The searches as per your request for information resulted in the following documents:

1. House Folder Note – 9 April 2015
2. House Folder Note – 6 August 2015 – version 1
3. House Folder Note – 6 August 2015 – version 2
4. Email from Rod McGeoch to NSW Government and Destination NSW
5. Email from Rod McGeoch to NSW Government and Destination NSW/ Draft Report to Premier

This response is limited to the information available to Destination NSW at the time of receiving this request.

4. The public interest test

Under section 9(1) of the GIPA Act, you have a legally enforceable right to access the information you asked for, unless there is an overriding public interest against its disclosure.

Further, under section 5 of the GIPA Act, there is a presumption in favour of disclosing Government information unless there is an overriding public interest against its disclosure.

To decide whether or not there is an overriding public interest against disclosure of the information you asked for, I applied the public interest test, which is set out in section 13 of the GIPA Act.

I applied the public interest test by:

- (a) identifying any public interest considerations in favour of disclosure
- (b) identifying any relevant public interest considerations against disclosure, and
- (c) deciding where the balance between them lies.

I did this in the way required by section 15 of the GIPA Act, which is:

- a) in a way that promotes the objects of the GIPA Act
- b) with regard to any relevant guidelines issued by the Information Commissioner
- c) without taking into account the fact that disclosure of information may cause embarrassment to, or a loss of confidence in, the Government (as that fact is irrelevant)

- d) without taking into account the fact that disclosure of information might be misinterpreted or misunderstood by any person (as that fact is irrelevant), and
- e) with regard to the fact that disclosure cannot be made subject to any conditions on the use or disclosure of information.

4.1 Public interest considerations in favour of disclosure

Under section 12(1) of the GIPA Act, there is a general public interest in favour of disclosing Government information. Section 12(2) of the GIPA Act sets out some examples of other public interest considerations in favour of disclosure. However, I am not limited to those considerations in deciding your application.

Before turning to the considerations in favour of disclosure relevant to your application, I set out below some background information on the functions and activities of Destination NSW:

The functions of Destination NSW

Destination NSW is a NSW Government Agency funded by the NSW Government and ultimately the taxpayer. Destination NSW is responsible for attracting and nurturing events, marketing and promoting NSW and implementing tourism strategies.

Destination NSW notes that all expenditure of taxpayer funds go through a due diligence process. Destination NSW when making an investment strives to maximise economic, marketing and community benefits for NSW.

All investments are made with the NSW Government's goal of doubling overnight visitor expenditure by 2020 and tripling overnight visitor expenditure by 2030 in mind.

Destination NSW informs the public of its operations via its Agency Publication Guide and annual report. Destination NSW also invites members of the public to comment on its functions and provide feedback via the process in the Destination NSW Agency Information Guide.

Public interest factors

Turning now to the relevant public interest factors, I find the following public interest factors in favour of disclosing the information apply:

1. disclosure of the information could reasonably be expected to promote open discussion of public affairs, enhance Government accountability and contribute to positive and informed debate on issues of public importance;
2. disclosure of the information could reasonably be expected to inform the public about the role of Destination NSW and its operations and policies; and
3. disclosure of the information could reasonably be expected to ensure effective oversight of the expenditure of public funds, by making the detail of the amount of NSW government spending transparent.

I will take these considerations into account when I apply the public interest test.

4.2 Public interest considerations against disclosure

When applying the public interest test, the only public interest considerations against disclosure that I can take into account are those set out in the table to section 14 of the GIPA Act. To show that they are relevant to the

information you asked for, I need to consider whether they could reasonably be expected to have the effect outlined in the table.

I have identified the following considerations against disclosure as being relevant to your application:

Schedule 1 GIPA Act – Conclusive Presumption of Overriding Public Interest against Disclosure – Cabinet Information

As per the GIPA Act,

(1) It is to be conclusively presumed that there is an overriding public interest against disclosure of information (referred to the GIPA Act as "**Cabinet information**") contained in any of the following documents:

(a) a document that contains an official record of Cabinet,

(b) a document prepared for the dominant purpose of its being submitted to Cabinet for Cabinet's consideration (whether or not the document is actually submitted to Cabinet),

(c) a document prepared for the purpose of its being submitted to Cabinet for Cabinet's approval for the document to be used for the dominant purpose for which it was prepared (whether or not the document is actually submitted to Cabinet and whether or not the approval is actually given),

(d) a document prepared after Cabinet's deliberation or decision on a matter that would reveal or tend to reveal information concerning any of those deliberations or decisions,

(e) a document prepared before or after Cabinet's deliberation or decision on a matter that reveals or tends to reveal the position that a particular Minister has taken, is taking, will take, is considering taking, or has been recommended to take, on the matter in Cabinet,

(f) a document that is a preliminary draft of, or a copy of or part of, or contains an extract from, a document referred to in paragraphs (a)-(e).

(2) Information contained in a document is not Cabinet information if:

(a) public disclosure of the document has been approved by the Premier or Cabinet, or

(b) 10 years have passed since the end of the calendar year in which the document came into existence.

(3) Information is not Cabinet information merely because it is contained in a document attached to a document referred to in subclause (1).

(4) Information is not Cabinet information to the extent that it consists solely of factual material unless the information is contained in a document that, either entirely or in part, would:

(a) reveal or tend to reveal information concerning any Cabinet decision or determination, or

(b) reveal or tend to reveal the position that a particular Minister has taken, is taking or will take on a matter in Cabinet.

(5) In this clause, "**Cabinet**" includes a committee of Cabinet and a subcommittee of a committee of Cabinet.

The information contained in the following documents namely:

1. House Folder Note – 9 April 2015
2. House Folder Note – 6 August 2015 – version 1
3. House Folder Note – 6 August 2015 – version 2, are Cabinet Documents as they are marked “Cabinet-in Confidence”.

We further note, in *Tebbutt v Minister for Lands and Water [2015] NSWCATAD 95*, the Tribunal concluded that a House Folder Note falls within the terms of clause 4(c) of Schedule 1 to the GIPA Act. Clause 4(c) of Schedule 1 to the GIPA Act provides that it is to be conclusively presumed that there is an overriding public interest against disclosure of information the public disclosure of which would, but for any immunity of the Crown infringe the privilege of Parliament.

Section 14 GIPA Act, Table 1 (g)

Section 14 of the GIPA Act, Table item 1 (g) provides that,

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 (whether in a particular case or generally):

(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,

The application requests certain information that is held by the agency in various documentary records being two emails and one draft report.

A legal obligation of confidence is a substantive obligation. If a person is subject to an obligation of confidence in respect of particular information, that person is obliged to keep that information confidential wherever it appears, including in secondary sources and derivative records. For that reason, if information is subject to an obligation of confidence then the person cannot disclose that same information via a new record or in a different record not containing a confidentiality provision; to do so would breach the person’s obligation of confidence and expose it to legal action and potentially injunctive relief to restrain the breach.

Consideration 1(g) has two limbs. The first limb relates to the effect of disclosure founding an action against an agency for breach of confidence. The second limb relates to disclosure of information provided to the agency in confidence.

The first and second limbs are relevant to this determination and are considered below.

The documents numbered four and five above, provides that information is confidential information as per a footer noting the following: “In summary: this email and attachments may be confidential and subject to copyright or legal professional privilege. If you received this email in error, please inform the sender immediately, delete it and do not use, copy or disclose it”.

Destination NSW may have a claim against it for disclosing information that is confidential including that the information was provided in confidence as per the above footer.

Also it would be expected that the information was provided in confidence as per normal customs and business dealings.

Consultation

The documents four and five do not permit disclosure of confidential information without consent of the other party. Destination NSW has consulted with Mr. Rod McGeoch.

Mr. Rod McGeoch was consulted and did not provide consent to disclose the information requested by the application. As outlined by Mr. Rod McGeoch, his dealings were commercial in confidence.

Disclosure of the information requested in the application would therefore require Destination NSW to breach its confidentiality obligations.

In these circumstances I find that disclosure of the requested information would entitle the other party to bring an action against the agency for breach of confidence possibly in court.

The confidentiality provisions are substantive provisions, any breach of which would constitute a breach of the law. The NSW Government and its agencies must act in accordance with the law.

If Destination NSW chose to breach these confidentiality provisions it would undermine the confidence the private sector has in the NSW Government and prejudice the ability of the agency to do business in the future.

Section 14 GIPA Act, Table 4 (a)

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,*

Destination NSW operates in a competitive global market for major events acquisition.

We note the nature of the GIPA application specifically relates to the potential Sydney bid of securing a Formula 1 race. This entails the competitive nature of securing an event. We believe only one Formula 1 race occurs in each territory.

Destination NSW competes with other Australian and overseas government and non-government bodies for the rights to attract, create, promote and retain attractive major events. It competes for events through the payment of direct funding, event sponsorship, the provision of benefits in kind from itself and other parts of government, and the provision of research, logistical support and expertise to event organisers. Event organisers would have access to this information for their events if they propose.

If the requested information is disclosed, it could undermine the current position of Destination NSW in the events market. Destination NSW would be placed at a competitive disadvantage in any market as the requested information relates to the negotiation process, meetings, advice and terms. The information was provided to Mr. Rod McGeoch by Formula 1.

Sporting events usually undertake a bidding process. This was evidenced by the newspaper article - <https://www.dailytelegraph.com.au/news/nsw/sydney-to-steal-melbourne-grand-prix-under-180-million-plan-by-premier-mike-baird/news-story/033ce21ab7282461b29fb6f4a3f82480>.

This would enable other entities including the current contracting entity being the State of Victoria to view the terms of the negotiation and then match and/or better them to re-acquire the event. This would result in Sydney not acquiring the event.

Section 14 GIPA Act, Table 4 (c)

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:

(b) Diminish the commercial value of any information to any person,

Destination NSW operates in a competitive market.

Destination NSW competes with other Australian and overseas government and non-government bodies for the rights to attract, create, promote and retain attractive major events. It competes for events through the payment of direct funding, event sponsorship, the provision of benefits in kind from itself and other parts of government, and the provision of research, logistical support and expertise to event organisers. Event organisers would have access to this information for their events if they propose.

If the requested information is disclosed, it could undermine the current position of Destination NSW in the events market. The requested information relates to the negotiation process, meetings, advice and terms. The nature of the information is commercial. It relates to the acquisition of any event. The information was provided to Mr. Rod McGeoch by Formula 1.

4.3 Consultation

The information that you asked for includes information that relates to the business, commercial, professional or financial interests of a third party. I was therefore required, under section 54 of the GIPA Act, to consult with that third party in making this decision.

Destination NSW consulted with the following:

1. Mr. Rod McGeoch, and
2. Department of Premier and Cabinet, and informed them that access to certain information had been requested under the GIPA Act.

Destination NSW specified to the third party the information requested.

Mr. Rod McGeoch and Department of Premier and Cabinet were consulted and did not provide consent to disclose the information requested by the application.

This non consent does not mean that I can release the information. However, I must take this item into account when making my decision. I have therefore considered them when applying and balancing the public interest test. Furthermore, each of the above parties has rights at law to protect their position of non release of information.

4.4 Balancing the public interest test

I have considered the relevant public interest considerations in favour of disclosure and against disclosure of the information you have requested. I have also considered the objections raised by the third party.

I have found that there are public interest considerations both in favour of disclosure and against disclosure. The public interest considerations against disclosure are to be weighed against the public interest considerations in favour of disclosure.

I have identified in section 4.1 above the public interest considerations in favour of disclosing the requested information. In particular:

1. Disclosure of the information could reasonably be expected to promote open discussion of public affairs, enhance Government accountability or contribute to positive and informed debate on issues of public importance.
2. Disclosure of the information could reasonably be expected to inform the public about the operations of agencies and in particular their policies and practices for dealing with members of the public.
3. Disclosure of the information could reasonably be expected to ensure effective oversight of the expenditure of public funds.

In terms of the above, we afford moderate weight to consideration one and two above namely:

1. Disclosure of the information could reasonably be expected to promote open discussion of public affairs, enhance Government accountability or contribute to positive and informed debate on issues of public importance however the announcement of the bid was already public and debate could have occurred since this announcement date in 2015.
2. Disclosure of the information could reasonably be expected to inform the public about the operations of agencies and in particular their policies and practices for dealing with members of the public however information on Destination NSW's operations and plans are readily available on destinationnsw.com.au. In particular, we direct your attention to Destination NSW's Annual Reports.

In relation to consideration three, Destination NSW has undertaken a specific request to the finance unit of Destination NSW and the budget allocated to the bid will be disclosed – see below.

I have identified the following public interest considerations against disclosure:

1. Schedule 1 GIPA Act – Conclusive Presumption of Overriding Public Interest against Disclosure – Cabinet Information

Also, disclosure of the information could reasonably be expected to have the following effects:

- 1(g) found an action against an agency for breach of confidence. I have accorded this consideration substantial weight, for the reasons set out above;
- 4(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. I have accorded this consideration substantial weight, for the reasons set out above;
- 4(c) Diminish the commercial value of any information to any person. I have accorded this consideration moderate weight, for the reasons set out above.

I have taken into account the consideration that an agency of the NSW Government must not act contrary to its legal obligations by breaching a legal obligation of confidence. My assessment of the strength of this consideration was reinforced by the fact that the objection from the third party consulted by Destination NSW was made on the basis of the confidentiality of the requested information.

I have taken into account the other public interest factors pointing against disclosure I have outlined above, including the views of the consulted third party. In so doing I have considered both the risks posed by disclosure described above and the magnitude of the consequences of that disclosure on the NSW economy having regard to the particular event in question and the benefits it brings. I accord those factors significant weight. I also find the objections raised by the consulted third party to be persuasive.

I have balanced the considerations against disclosure against the factors in favour of disclosure of the particular requested information. In my view the statutory presumption in favour of disclosure and the considerations in favour of disclosure are outweighed by the considerations against disclosure, such that there is an overriding public interest against disclosure of the requested information. Accordingly, I determine that the requested information should not be disclosed.

However, we wish to note the following in relation to your questions:

1. *Is holding a Formula 1 race in Sydney still the plan or policy of the NSW Government under Premier Berejiklian?*
This would be a question for Department of Premier and Cabinet.
2. *Has the bid team reported back to the Government on the economics of hosting the race in Sydney?*
f) *If yes, I request a copy of that document*
As per this Notice of Decision, there is a draft report present. We are unaware of a final report being made to Government and NSW Premier.
3. *Have any other reports, updates or correspondence (including letters, email or any other method) relating to a Formula 1 race in Sydney been provided by the bid team to the NSW Government or the Premier?*
a) *If yes, I request a copy of those documents*
Yes but not disclosed as per this Notice of Decision.
4. *Was a bid for a Formula 1 race in Sydney ever lodged?*
Unknown.
5. *Is the bid team still in place, or has the project been disbanded, is otherwise in active or shutdown?*
a) *If the team is no longer in place, when was it disbanded?*
Unknown
6. *What is the budget of the bid team, for each year since its inception in 2015?*
The budget was as follows:
Nil budget for FY 14-15. \$25,000 for FY 15-16 and \$30,000 for FY 16-17 onwards. Please note these figures were the result of a specific request to the finance unit of Destination NSW. The above figures were not part of a document.
7. *How many staff are in the bid team, and what are their job titles?*
As per article two (2) staff was in the bid team assisted by Destination NSW. The staff was Mr. Rod McGeoch and Mr. John Hartigan. There is various information on their works in the public domain. If you wish us to collate, we are suitable to undertake this.

Please provide all relevant documents for the date range of 12 March 2015 until the date that this application is received by the Office of the Premier.

4. Review rights

If you disagree with any of the decisions in this notice that are reviewable, you may seek a review under Part 5 of the GIPA Act. Before you do so, I encourage you to contact me to discuss your concerns. My contact details are set out below.

You have three review options:

- internal review by another officer of this agency, who is no less senior than me
- external review by the Information Commissioner, or
- external review by the Administrative Decisions Tribunal (ADT).

You have 20 working days from the date of this Notice to apply for an internal review. If you would prefer to have the decision reviewed externally, you have 40 working days from the date of this Notice to apply for a review by the Information Commissioner or the ADT.

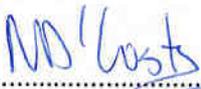
To assist you, I have enclosed a fact sheet published by the Information and Privacy Commission (IPC), entitled *Your review rights under the GIPA Act*. You will also find some useful information and frequently asked questions on the IPC's website: www.ipc.nsw.gov.au.

You can also contact the IPC on freecall 1800 IPC NSW (1800 472 679).

5. Further information

As per our previous correspondence, Destination NSW processing fees for this request total \$270 which is now payable by cheque or money order.

If you have any questions about this notice or would like any further information, please contact me on 02 9931 1111.



.....
Neville D'Costa

Right to Information Officer



information
and privacy
commission
new south wales

Your review rights under the GIPA Act

Fact sheet

June 2014

The right to information system in NSW aims to foster responsible and representative government that is open, fair and effective.

You have the right to request a review of certain decisions made by government agencies about the release of information under the *Government Information (Public Access) Act 2009* (GIPA Act):

- a) a decision that an application is not a valid access application
- b) a decision to transfer an access application to another agency, as an agency-initiated transfer
- c) a decision to refuse to deal with an access application (including such a decision that is deemed to have been made)
- d) a decision to provide access or to refuse to provide access to information in response to an access application
- e) a decision that government information is not held by the agency
- f) a decision that information applied for is already available to the applicant
- g) a decision to refuse to confirm or deny that information is held by the agency
- h) a decision to defer the provision of access to information in response to an access application
- i) a decision to provide access to information in a particular way in response to an access application (or a decision not to provide access in the way requested by the applicant)
- j) a decision to impose a processing charge or to require an advance deposit,
- k) a decision to refuse a reduction in a processing charge
- l) a decision to refuse to deal further with an access application because an applicant has failed to pay an advance deposit within the time required for payment
- m) a decision to include information in a disclosure log despite an objection by the authorised objector (or a decision that the authorised objector was not entitled to object).

You generally have three review options.

1. Internal review

You have **20 working days** after the notice of a decision has been posted to you to ask for an internal review by the agency that made the decision.

If a Minister or their personal staff, or the principal officer of an agency made the decision, you cannot ask for an internal review, but you can ask for an external review (see below).

The review must be carried out by an officer who is no less senior than the person who made the original decision. The review decision must be made as if it was a fresh application.

There is a \$40 fee for an internal review application. No fee applies for an internal review if the decision is a 'deemed refusal' because the agency did not process your application in time or the internal review is conducted because the Information Commissioner has recommended the agency reconsider its decision under section 93 of the GIPA Act. In this case, you cannot be charged any review fee.

The agency must acknowledge your application within **five** working days of receiving it. The agency must decide the internal review within **15** working days (this can be extended by **10** working days if the agency has to consult with a third party, or by agreement with you).

2. External review by the Information Commissioner

If you disagree with any of the decisions listed above, you can ask for a review by the Information Commissioner.

If you are the person applying for access to information, you do **not** have to have an internal review of the decision before asking the Information Commissioner to review it.

If you are not the access applicant, you must seek an internal review before applying for review by the Information Commissioner. However, if an internal review cannot be sought (if a Minister or their personal staff, or the principal officer of an agency made the decision), you can seek a review by the Information Commissioner.

You have **40 working days** from being notified of the decision to ask for a review by the Information Commissioner.

On reviewing the decision, the Information Commissioner can make recommendations about the decision to the agency.

Note: You cannot ask the Information Commissioner to review a decision that has already been reviewed by the NSW Civil and Administrative Tribunal (NCAT).

3. External review by the NSW Civil and Administrative Tribunal (NCAT)

If you disagree with any of the decisions listed above, you can ask for a review by NCAT. You do not have to have the decision reviewed internally, or by the Information Commissioner before applying for review by NCAT.

You have **40 working days** from being notified of the decision to apply to NCAT for review. However, if you have applied for review by the Information Commissioner, you have **20 working days** from being notified of the Information Commissioner's review outcome to apply to NCAT.

For more information

Contact the Information and Privacy Commission NSW (IPC):

Freecall: 1800 472 679
Email: ipcinfo@ipc.nsw.gov.au
Website: www.ipc.nsw.gov.au