information and privacy commission
new south wales

[redacted]

Mr Damien Tudehope, MP
Chair
Committee on the Independent Commission Against Corruption
Parliament House
Macquarie Street
SYDNEY NSW 2000

By email: ICACCommittee@parliament.nsw.gov.au

Dear Mr Tudehope

**Inquiry into protections for people who make voluntary disclosures to the ICAC**

I would like to take the opportunity to provide to the Committee a copy of the four NSW Civil and Administrative Tribunal cases and the Federal Court case I referred to during my appearance before the Committee at the public hearing held on 7 August 2017. As detailed in my evidence, in these cases the Courts have identified that the question of whether the concept of good faith embraces more than honesty will depend upon the statutory context. The cases are:

- *Mid Density Development Pty Ltd v Rockdale Municipal Council* (1993) 116 ALR 460;
- *Saggers v Environment Protection Authority* [2013] NSWADT 204;
- *O'Hara v North Sydney Council* [2005] NSWADT 100;
- *Zonnevylle v Department of Education and Communities* [2016] NSWCATAD 49; and
- *Zonnevylle v NSW Department of Finance and Services* [2016] NSWCATAD 47;

I also enclose for the Committee's information, a copy of the IPC fact sheet on the offence provisions under the *Government Information (Public Access) Act 2009*.

I trust these are of assistance to the Committee. Please do not hesitate to contact me if I can be of further assistance.

Yours sincerely

[redacted]

Elizabeth Tydd
**Information Commissioner**
**CEO, NSW IPC**
**NSW Open Data Advocate**

9 August 2017

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# Offences under the GIPA Act

**Fact sheet**
**June 2016**

The purpose of this fact sheet:

1. To raise awareness of *Government Information (Public Access) Act 2009* (GIPA Act) rights and responsibilities.
2. Highlight the offence provisions and the circumstances and evidence that may enliven consideration of these offence provisions.
3. Inform members of the public and agencies of the IPC's role and procedures in dealing with allegations that offences under the GIPA Act have been committed.

The object of the GIPA Act is to open government information to the public to maintain and advance a system of responsible and representative democratic government.

The GIPA Act places certain obligations on agencies within NSW for publication and release of the information that they create and hold. The GIPA Act also provides rights for persons to apply for access to government information.

The GIPA Act identifies five specific offences where a person may take actions, often in response to an access application, that are contrary to the object of the GIPA Act.

Each offence carries a maximum penalty of 100 penalty units, which as at May 2016 is equivalent to $11,000.

The Information Commissioner may receive allegations that an offence has occurred and may investigate the allegations. If the Information Commissioner is reasonably satisfied (*Briginshaw v Briginshaw* (1938) 60 CLR 336) that an offence may have occurred, she may refer the matter to the Director of Public Prosecutions (DPP) and inform the Attorney General.

Offences are prosecuted in the Local Court and the decision to prosecute is made by either the DPP or the Attorney General.

The NSW Civil and Administrative Tribunal has no power to investigate or prosecute offences.

## What are the offences?

The offences as provided by the GIPA Act are:

- Section 116 – offence of acting unlawfully.

  An officer of an agency must not make a reviewable decision in relation to an access application that the officer knows to be contrary to the requirements of the GIPA Act.

- Section 117 – offence of directing unlawful action. A person (known as the offender) must not:
  - Direct an officer of an agency who is required to make a decision in relation to an access application to make a reviewable decision that the offender knows is not a decision permitted or required to be made by the GIPA Act (section 117(a)).
  - Direct a person who is an officer of an agency involved in an access application to act in a manner that the offender knows is otherwise contrary to the requirements of the GIPA Act (section 117(b)).
- Section 118 – offence of improperly influencing decision on an access application. A person (known as the offender) who influences the making of a decision by an officer of an agency for the purpose of causing the officer to make a reviewable decision that the offender knows is not the decision permitted or required to be made by the GIPA Act is guilty of an offence.
- Section 119 – offence of unlawful access. A person who in connection with an access application knowingly misleads or deceives an officer of an agency for the purpose of obtaining access to government information is guilty of an offence.
- Section 120 – offence of concealing or destroying government information. A person who destroys, conceals or alters any record of government information for the purpose of preventing the disclosure of the information as authorised or required by or under the GIPA Act is guilty of an offence.

## What is required to substantiate each offence?

To substantiate an offence it is important to examine the elements of the offence and the evidence required.

Some of the elements of the offences include terms defined in the GIPA Act and these terms should be applied to the information, details or facts of the alleged offence.

### Section 116 offence of acting unlawfully

| Elements of the offence | Consideration |
|---|---|
| Officer of an agency. | **Officer of an agency:** both officer and agency are defined in the GIPA Act in section 4 and clause 9 of Schedule 4.<br>Is the person covered by the definitions? |
| Makes a reviewable decision. | **Reviewable decision** is defined in section 80 of the GIPA Act.<br>Is the decision covered by section 80? |
| In relation to an access application. | **Access application** is defined in section 4 of the GIPA Act.<br>The application must be covered by section 4. |
| Decision is contrary to requirements of GIPA Act. | Need to show that the decision was contrary to the GIPA Act. |
| Officer knows decision is contrary to the requirements of the GIPA Act. | Requires evidence of actual knowledge that the decision was contrary to the GIPA Act. |

### Section 117 (a) directing officer of agency required to make decision in an access application in unlawful action

| Elements of the offence | Consideration |
|---|---|
| Offender | Offender is defined as a person. Person is defined in clause 1 of Schedule 4 of the GIPA Act.<br>Is the person covered by the definitions? |
| Directs | Directions would need to be in the context of employment as an officer of the agency. |
| Officer of an agency requried to make a decision in relation to an access application. | Officer of an agency: both officer and agency are defined in the GIPA Act in section 4 and clause 9 of Schedule 4.<br>Is the person covered by the definitions?<br>Access application is defined in section 4 of the GIPA Act<br>The application must be covered by section 4. |
| To make a reviewable decision. | Reviewable decision is defined in section 80 of the GIPA Act.<br>Is the decision covered by section 80? |
| Decision is not permitted to be made by GIPA Act. | Need to show that the decision was not permitted by the GIPA Act |
| Offender knows decision is contrary to the requirements of the GIPA Act. | Requires evidence of actual knowledge that the decision was contrary to the GIPA Act. |

### Section 117 (b) directing officer of agency involved in an access application in unlawful action

| Elements of the offence | Consideration |
|---|---|
| Offender | Offender is defined as a person. **Person** is defined in clause 1 of Schedule 4 of the GIPA Act.<br>Is the person covered by the definitions? |
| Directs | Directions would need to be in the context of employment as an officer of the agency. |
| Officer of an agency | **Officer of an agency**: both officer and agency are defined in the GIPA Act in section 4 and clause 9 of Schedule 4.<br>Is the person covered by the definitions? |

| Elements of the offence | Consideration |
|---|---|
| Involved in access application. | **Access application** is defined in section 4 of the GIPA Act.<br>The application must be covered by section 4. |
| To act in manner otherwise contrary to requirements of GIPA Act. | Need to show that the decision was contrary to the GIPA Act. |
| Offender knows the conduct to be contrary to requirements of GIPA Act. | Requires evidence of actual knowledge that the decision was contrary to the GIPA Act |

### Section 118 improperly influencing a decision on an access application

| Elements of the offence | Consideration |
|---|---|
| Offender | Offender is defined as a person. **Person** is defined in clause 1 of Schedule 4 of the GIPA Act.<br>Is the person covered by the definitions? |
| Influences the making of a decsion. | What inducements were offered, and was a decision made? |
| By officer of an agency. | **Officer of an agency**: both officer and agency are defined in the GIPA Act in section 4 and clause 9 of Schedule 4.<br>Is the person covered by the definitions? |
| For the purposes of causing the officer to make a reviewable decision. | **Reviewable decision** is defined in section 80 of the GIPA Act.<br>Is the decision covered by section 80? |
| Decision is not permitted or required to be made by GIPA Act. | Need to show that the decision was contrary to the GIPA Act. |
| Offender knows decision is contrary to the requirements of the GIPA Act. | Requires evidence of actual knowledge that the decision was contrary to the GIPA Act. |

### Section 119 offence of unlawful access

| Elements of the offence | Consideration |
|---|---|
| Person in connection with access application. | **Person** is defined in clause 1 of Schedule 4 of the GIPA Act.<br>**Access application** is defined in section 4 of the GIPA Act.<br>The application must be covered by section 4.<br>Need to show the person has a connection to the access application. |
| Knowlingly misleads or deceives. | Need to show the person knows that what they are seeking is something they would not be able to access. |
| Officer of an agency. | **Officer of an agency**: both officer and agency are defined in the GIPA Act in section 4 and clause 9 of Schedule 4.<br>Is the person covered by the definitions? |
| For purpose of obtaining access to government information. | Need to show the person attempted to obtain access to government information. |

### Section 120 Offence of concealing or destroying government information

| Elements of the offence | Consideration |
|---|---|
| Person | **Person** is defined in clause 1 of Schedule 4 of the GIPA Act.<br>Is the person covered by the definitions? |
| Destroys conceals or alters. | Records are not available, have been amended or have been destroyed. |
| Any record | **Any record** is defined in clause 10 of Schedule 4 of the GIPA Act. |
| Of government information. | **Government information** is defined in section 4 of the GIPA Act. |
| Purpose of preventing disclosure of the information. | **Disclose** is defined in clause 1 of Schedule 4 of the GIPA Act.<br>Need to show purpose to prevent disclosure. |
| As authorised or required by GIPA Act. | Need to show government information was authorised to be disclosed under GIPA Act. |

## The IPC's role if a person alleges an offence occurred?

A person who alleges an offence has occurred may make a complaint to the Information Commissioner.

The Information Commissioner has, under the *Government Information (Information Commissioner) Act 2009* (GIIC Act), a distinct role when receiving complaints about the conduct of an agency in the exercise of functions under the GIPA Act.

The Information Commissioner may make preliminary inquiries including seeking further information from the complainant for the purposes of deciding how to deal with the complaint.

These inquiries may provide further evidence in relation to the allegation that an offence has occurred.

The Information Commissioner will assess the complaint and evidence to decide whether to deal with the complaint or decline to deal with the complaint.

The Information Commissioner may at any time, under section 33(2) of the GIIC Act, furnish any or all information obtained in relation to a complaint to another agency where the Information Commissioner is satisfied that the information concerned is relevant to the functions, policies, procedures or practices of that agency.

The information furnished to the agency in terms of section 33(2) of the GIIC Act must not disclose any personal information within the meaning of either the *Privacy and Personal Information Protection Act 1998* or the *Health Records and Information Privacy Act 2002*.

For example, if the alleged offence concerns the destruction of records under section 120 of the GIPA Act, it may also concern functions of State Records NSW under the *State Records Act 1998*. The Information Commissioner, in considering the complaint, may inform State Records NSW of the information obtained with respect to the complaint for their consideration under the State Records Act.

## Dealing with a complaint

The Information Commissioner may deal with the complaint in terms of section 18 of the GIIC Act, and deal with the complaint by taking appropriate measures to assist in resolving the complaint in terms of section 19 of the GIIC Act. The measures include:

- Providing information to the parties to the complaint
- Undertaking discussions with the parties to facilitate a resolution, including by conciliation.

If the complaint is not amendable to resolution, or if the resolution measures are not appropriate for the complaint, the Information Commissioner may investigate.

## IPC investigating

If the Information Commissioner decides to investigate the complaint in terms of section 22 of the GIIC Act then the process involves formal notification to both the complainant and the agency.

The Information Commissioner in conducting the investigation will give the parties an opportunity to make submissions on the subject matter of the investigation and may interview both the complainant and any other persons who may be able to inform the investigation.

It is also a requirement that if the Information Commissioner considers there are grounds for adverse comments in respect of any person that the person be informed of the substance of the comments and provided with an opportunity to make submissions on those comments.

If the Information Commissioner finds in an investigation that the conduct of an agency is conduct

of a kind that constitutes a failure to exercise its functions properly in accordance with any provision of an Information Act, the Information Commissioner must report the matter to:

- The Minister responsible for the agency, and
- The principal officer of the agency, and
- Where the conduct concerns the conduct of a public service employee, the Secretary of the Department of Premier and Cabinet.

The Information Commissioner may, following the investigation of a complaint, give a copy of the report to the complainant and the agency to whose conduct the report relates.

The agency on receiving a copy of the report may, but if requested by the Commissioner must, notify the Commissioner of any action taken or proposed in relation to the report.

Section 28(6) of the GIIC Act makes clear that the Information Commissioner cannot bring proceedings for an offence under the GIPA Act.

## Referral to the DPP or Attorney General

If the Information Commissioner has, following an investigation, formed a view that an offence may have been committed then the Information Commissioner would refer the matter to the DPP and notify the Attorney General.

The Information Commisioner would, in making that referrral, provide any evidence gathered that had lead her to drawing that conclusion to the DPP.

## Who makes the decision to prosecute an offence?

The DPP will consider the evidence and determine whether an offence is prosecutable.

The decision to prosecute an offence under the GIPA Act can only be made with the authority of the DPP or the Attorney General, as provided for by section 128(2) of the GIPA Act.

## Where is an offence prosecuted?

If the DPP or the Attorney General decide that an offence under the GIPA Act is to be prosecuted, the proceedings for an offence may be dealt with summarily before the Local Court as provided for by section 128(1) of the GIPA Act.

## 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

*NOTE: The information in this fact sheet is to be used as a guide only. Legal advice should be sought in relation to individual circumstances.*

JUDGMENT No. 590 / 93

C A T C H W O R D S

NEGLIGENCE - misstatement - municipal council - issue of certificates - reliance - statutory defence - "good faith".

Environmental Planning and Assessment Act 1979 (N.S.W.), s. 149

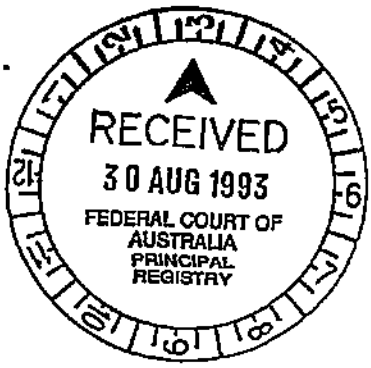
Local Government Act 1919 (N.S.W.), s. 582A

L. Shaddock & Associates Proprietary Limited v The Council of the City of Parramatta [No. 1] (1981) 150 C.L.R. 225

San Sebastian Proprietary Limited v Minister Administering The Environmental Planning and Assessment Act 1979 (1986) 162 C.L.R. 340

MID DENSITY DEVELOPMENTS PTY LIMITED v
ROCKDALE MUNICIPAL COUNCIL
No. G7 of 1993

JUDGES MAKING ORDERS: GUMMOW, HILL, DRUMMOND JJ.
PLACE: SYDNEY.
DATE: 27 AUGUST 1993.



IN THE FEDERAL COURT OF AUSTRALIA )
NEW SOUTH WALES DISTRICT REGISTRY ) No. G7 of 1993
GENERAL DIVISION )

On appeal from a Judge of the Federal Court of Australia.

BETWEEN: MID DENSITY DEVELOPMENTS PTY LIMITED
Appellant

AND: ROCKDALE MUNICIPAL COUNCIL
Respondent

CORAM: GUMMOW, HILL, DRUMMOND JJ.
PLACE: SYDNEY.
DATE: 27 AUGUST 1993.

MINUTE OF ORDERS

THE COURT ORDERS THAT:

The parties bring in Short Minutes of Order to give effect to the Reasons for Judgment delivered today.

Note: Settlement and entry of orders is dealt with by Order 36 of the Federal Court Rules.

IN THE FEDERAL COURT OF AUSTRALIA )
NEW SOUTH WALES DISTRICT REGISTRY ) No. G7 of 1993
GENERAL DIVISION )

On appeal from a Judge of the Federal Court of Australia.

BETWEEN: MID DENSITY DEVELOPMENTS PTY LIMITED
Appellant

AND: ROCKDALE MUNICIPAL COUNCIL
Respondent

CORAM: GUMMOW, HILL, DRUMMOND JJ.
PLACE: SYDNEY.
DATE: 27 AUGUST 1993.

REASONS FOR JUDGMENT

THE COURT:

The appellant carries on the business of property development. This includes the acquisition and refurbishment of existing buildings, with or without the construction of new buildings, subdivision and sale. On 19 October 1990, the appellant entered into a written agreement ("the Contract") with DHA Management Pty Ltd ("the vendor"). The Contract was for the purchase by the appellant for $2m. of a property known as 31-39 Henderson Street, Turrella, in the State of New South Wales ("the Land"). The Land is situated within the Municipality of Rockdale. The respondent, the Council of that

municipality, is, pursuant to s. 22 of the Local Government Act 1919 (N.S.W.) ("the Local Government Act"), a body corporate with all the powers of bodies corporate, for the purposes of and subject to the provisions of that Act.

The primary Judge dismissed the appellant's claims. His Honour's judgment is reported: (1992) 39 F.C.R. 579.

One of the issues on the present appeal to this Court is whether the respondent is a trading corporation so as to attract the operation of s. 52 of the Trade Practices Act 1974 ("the T.P. Act"). Another issue concerns the liability of the respondent to the appellant in negligence, for information supplied in circumstances outlined below.

We turn first to consider the claim in negligence.

At the time of entry into the Contract, there were buildings on the Land but these were generally in a poor state, save for a large building at the front of the parcel. This had good potential for refurbishment. The appellant proposed to subdivide and sell two smaller lots to adjoining owners to provide a cash flow for the consummation of its proposals for development of the balance of the Land. This involved the refurbishment of certain of the buildings and the construction of other buildings for sale or lease.

The Contract was settled on 20 December 1990. On 9 January 1991 the appellant submitted to the respondent an application pursuant to the Environmental Planning and Assessment Act 1979 (N.S.W.) ("the E.P.A. Act") for the development of the Land by the erection thereon of 11 additional factory units. On 24 April 1991 the respondent approved the development application, but subject to a large number of conditions. These included a requirement that the floor level of the proposed factory units be set at a minimum level of 3.35 metres above Australian Height Datum ("AHD").

This requirement conformed to a policy which was adopted by the Council on 24 April 1991 in respect of properties (including the Land) within the Wolli Creek catchment area downstream of the Henderson Street weir. Three elements of this flood plan management policy were (i) that the Council adopt a 1 in 50 year flood standard, (ii) that habitable floor levels be set at a minimum of 250mm above the standard flood level, and (iii) that a notation be made on certificates issued under s. 149 of the E.P.A. Act in respect of Henderson Street properties, and that the notation draw the attention of applicants "to the fact that the whole or part of their land is subject to the Council's Flood Management Policy". It will be necessary to refer further to s. 149 of the E.P.A. Act.

The terms in which the approval was given in April 1991, in particular that concerned with the floor level in compliance with the newly adopted flood management policy of

the respondent, were such that compliance therewith would have made the development unprofitable to the appellant.

At the trial it was agreed that, should liability be established, the damages to be awarded to the appellant would be $926,615 plus interest from 26 September 1991.

On 7 March 1990, the respondent had issued, on the application of the solicitors for the vendor, a certificate under s. 149 of the E.P.A. Act in respect of the Land. The certificate disclosed that the Land was zoned "Industrial 4 (b)" under the Rockdale Planning Scheme.

An annexure to the certificate commenced with the following:

> "Further to your application for information under Section 149 (5) of the Environmental Planning and Assessment Act, Rockdale Council has resolved to supply answers to the following questions. It is regretted that no further information can be supplied:-"

The 2nd, 3rd, 4th and 5th of these questions were concerned respectively with the susceptibility of the Land to slip or subsidence, and affectation by a Residential District proclamation, a Tree Preservation Order and Heritage listing.

The first question was:

> "Has the Council information which would indicate that the land is subject to the risk of flooding or tidal inundation?"

This was answered "No". The annexure was signed on behalf of the Town Clerk and immediately above the signature there appeared the sentence:

> "The above information has been taken from the Council's records but Council cannot accept any responsibility for any omission or inaccuracy."

The significance of this sentence was much debated on the appeal. It would seem that it has been used on certificates issued by other councils in addition to the respondent; see Lismore City Council v Stewart (1989) 18 N.S.W.L.R. 718 at 727. This case also is authority that despite the payment of the prescribed fee, no contract is formed between the council and the applicant for a s. 149 certificate: supra at 725-6 per Hope J.A.

On two occasions after exchange of the Contract and before completion, the solicitors for the purchaser, the appellant, themselves applied for and were issued a certificate under s. 149. One was issued on 26 October and the other on 27 November 1990. They related to different portions of the Land. Each contained an annexure which relevantly was in exactly the same terms as the certificate which had been issued to the vendor's solicitors 8 months before.

It will be apparent immediately, from what already has been said, that there was a fundamental shift in the position taken by the respondent in dealing with inquiries as to the risk of flooding or tidal inundation, in the period between completion of the contract in December 1990 and the adoption of the flood management policy in April 1991. That policy was implemented, with the result that in response to a further application in June 1991 by the solicitors for the appellant in respect of the Land, the respondent replied to the question whether it had information which would indicate that the Land was subject to the risk of flooding or tidal inundation by stating:

> "Council is in possession of the '1986 Wolli Creek and Bardwell Creek Flood Study' which indicates the land could be subject to flooding.
>
> Council is in possession of the '1985 Cooks River Flood Study' published by the NSW Public Works Department which indicates the land could be subject to flooding. Council makes no comment as to the validity of this document.
>
> Refer also to item 11 on the main certificate."

Against item 11 of the main certificate, in answer to the question whether the respondent had by resolution adopted a policy to restrict the development of the subject land by reason of the likelihood of, inter alia, flooding or tidal inundation, the respondent replied:

> "The whole or part of this property is affected by council's Flood Management Policy. Council resolved on 24 April 1991 to adopt the 2% or 1

> in 50 year Flood Standard for this area. The habitable floor level of buildings is to be set a minimum of 250mm above the Standard Flood Level. For further details contact Council's Engineer's Department."

The 1986 study referred to above was described in the evidence as the "Wong Study" after its author, and the 1985 study was described as the "PWD Study".

The Wolli Creek is a subsidiary of the Cooks River, which enters Botany Bay. The Land dropped away from Henderson Street towards Wolli Creek, although it did not actually abut that creek. The primary Judge found that the Cooks River and the Wolli Creek can flood in storms. The Cooks River and its subsidiaries run through several municipalities. The bank of the Wolli Creek adjacent to the Land is in the respondent's municipality. The land on the other bank is in the Canterbury Municipality; this bank is about 1 metre below that on the Rockdale side. On this lower side, there is a "flood plain" which is a reserve. The Canterbury Municipal Council had, on 1 February 1990, adopted a flood management policy incorporating a 1 in 50 year flood standard for the Wolli Creek.

The question of flooding has been a concern of the municipalities in the area. In that regard, the primary Judge found as follows:

> "In 1983, a number of municipalities, including Rockdale, met to consider the

> question of flooding in Cooks River and its subsidiaries. A task force was established which has not yet come up with firm recommendations relating to the whole of the area. In 1985, however, the Public Works Department published a study of flood levels for Cooks River and its subsidiaries. That study [the PWD Study] laid down heights above AHD at which, throughout Cooks River and its subsidiaries, flooding might be expected. The flood levels were set out for one in 10 year floods, one in 50 year floods and one in 100 year floods. Of these, the storms expected once in 10 years are of least severity and those expected once in 100 years are the most severe. . . .
>
> From 1985, when the [PWD] Study was issued, it was always possible for an officer of Rockdale to compare the heights of land set out in maps and records held by Rockdale with the flood levels set out in the [PWD] Study and thereby to determine whether, in accordance with the [PWD] Study, there would be a risk of flooding. A contour plan with heights of the area in and around Henderson Street was available throughout 1990 . . ."

His Honour found that during 1989 and 1990 the PWD Study was used for determining the conditions to place upon several developments in the area of the Rockdale Municipality, towards the mouth of the Cooks River, which were thought to be at risk of flooding. His Honour also dealt with the Wong Study. This considered the Wolli Creek upstream from the end of Henderson Street, close to the subject land, to areas further south, but stopped short of the subject land. The primary Judge held that the Wong Study confirmed that "the means of establishing flooding risks were well understood, even within the Engineer's Department of Rockdale". The further finding was made:

> "In any event, in the middle of 1990, if an officer of Rockdale had compared the levels set out in diagrams in the [PWD] Study with the contour maps or other documents which disclosed heights in relation to the subject land which were in Rockdale's possession, the officer would have observed that the land was subject to a risk of flooding. However, no officer of Rockdale did so."

It is necessary now to turn to the New South Wales legislative framework, which had a vital impact on the outcome of the trial. We begin with s. 149 of the E.P.A. Act. This states:

> "149 (1) A person may, on payment of the prescribed fee, apply to a council for a certificate under this section with respect to any land within the area of the council.
>
> (2) On application made to it under subsection (1), the council shall, as soon as practicable, issue a certificate specifying such matters relating to the land to which the certificate relates as may be prescribed (whether arising under or connected with this or any other Act or otherwise).
>
> (3) . . .
>
> (4) The regulations may provide that information to be furnished in a certificate under subsection (2) shall be set out in the prescribed form and manner.
>
> (5) A council may, in a certificate under subsection (2), include advice on such other relevant matters affecting the land of which it may be aware.
>
> (6) A council shall not incur any liability in respect of any advice provided in good faith pursuant to subsection (5).
>
> (7) For the purpose of any proceedings for an offence against this Act or the regulations which may be taken against a

> person who has obtained a certificate under this section or who might reasonably be expected to rely on that certificate, that certificate shall, in favour of that person, be conclusively presumed to be true and correct."
> [Emphasis supplied]

Section 149 was enacted in the interval between the decision of the New South Wales Court of Appeal (favourable to the council) and the successful appeal, in L. Shaddock & Associates Proprietary Limited v The Council of the City of Parramatta [No. 1] (1981) 150 C.L.R. 225; see Lismore City Council v Stewart supra at 723.

Section 582A was inserted in the Local Government Act by the Local Government (Flood Liable Land) Amendment Act 1985 ("the 1985 Act"). It deals with the question of liability in a fashion which, it was not suggested in argument, was different in any relevant respect to that in the E.P.A. Act. The section states:

> "582A (1) A council shall not incur any liability in respect of -
>
> (a) any advice furnished in good faith by the council relating to the likelihood of any land being flooded or the nature or extent of any such flooding; or
>
> (b) anything done or omitted to be done in good faith by the council in so far as it relates to the likelihood of land being flooded or the nature or extent of any such flooding.

(2) Without limiting the generality of subsection (1), that subsection applies to -

(a) the preparation or making of an environmental planning instrument or development control plan, or the granting or refusal of consent to a development application, under the Environmental Planning and Assessment Act, 1979;

(b) the granting or refusal of an application for the erection of a building under Part XI or for the subdivision of land under Part XII;

(c) the imposition of any condition in relation to an application referred to in paragraph (a) or (b);

(d) advice furnished in a certificate under section 149 of the Environmental Planning and Assessment Act, 1979;

(e) the carrying out of flood mitigation works; and

(f) any other thing done or omitted to be done in the exercise of a council's powers, authorities, duties or functions under this or any other Act.

(3) Without limiting any other circumstances in which a council may have acted in good faith, a council shall, unless the contrary is proved, be deemed to have acted in good faith for the purposes of subsection (1) if the advice was furnished, or the thing was done or omitted to be done, substantially in accordance with the principles contained in the relevant manual published under subsection (4) at that time.

(4) For the purposes of this section, the Minister for Planning and Environment may, from time to time, publish in the Gazette a manual relating to the development of flood liable land.

(5) This section applies to and in respect of -

(a) the Crown, a statutory body representing the Crown and a public or local authority constituted by or under any Act;

(b) a member or servant of a council or of any such body or authority;

(c) a public servant; and

(d) a person acting under the direction of a council or of the Crown or any such body or authority;

in the same way as it applies to and in respect of a council.

(6) This section applies to and in respect of any advice furnished or thing done or omitted to be done before the commencement of this section, as well as to and in respect of any advice furnished or thing done or omitted to be done after the commencement of this section."
[Emphasis supplied]

No reliance was sought to be placed by the respondent upon the exculpatory provision of sub-s. 582A (3). It was not suggested that the advice was furnished substantially in accordance with any principles contained in any manual published under sub-s. 582A (4).

In the second reading speech in the Legislative Assembly on a parcel of 5 bills, one of which became the 1985 Act, the Minister for Planning and Environment said that one of the principal purposes of the bills was to indemnify councils and other public authorities and their staff "from liability from

decisions taken in respect of flood liable land, provided that such decisions are made in accordance with government policy at the time". The Minister continued (Hansard, 16 April 1985, p. 6025):

> "In bringing forward the indemnification provisions, the Government has accepted very strong representations by the local government and shires associations and a number of individual councils which claim that the existing law is inadequate to protect them from claims for damages arising from planning and development decisions and the issue of advice relating to flood liable land, even though they may have acted in accordance with the relevant government policy and in good faith. Because of these concerns and in the interests of protecting their ratepayers against possible costly litigation and damage payments, a number of councils adopt an unnecessarily conservative approach that sometimes leads to unnecessary refusal of development applications or the application of unnecessary and costly development and building conditions. This, of course, is unacceptable to the Government, which is committed to stimulating and encouraging economic development in the interests of job creation and the improvement of living standards.
>
> Nevertheless, the Government is aware of the need to protect the rights of individuals in such circumstances and, in addressing the indemnification issue, understands the importance of striking an appropriate balance between the rights of the individual on the one hand, and the problems being confronted by councils and other public authorities on the other. Accordingly, the proposed amendment to the Local Government Act has been drafted in a way that requires those protected to act in good faith, and a measure of this good faith will be that they have acted substantially in accordance with the Government's policy at the time, that is the measure of protection provided is limited by compliance with State

> requirements or, in other words, responsible actions will be protected and irresponsible actions will not be protected. . . ."

In 1990 the officer of the respondent who had the particular responsibility of completing s. 149 certificates in relation to flooding was Mr C.S. Mable. He had been employed by the respondent in various positions since about 1977. Mr Mable held the degree of Bachelor of Engineering (Civil). In 1987 he took up the particular duties to which we have referred. In his evidence Mr Mable said that he then made it his business to familiarise himself with information held by the Council which dealt with the risk of flooding within the Municipality. When asked what that information was, he replied:

> "It was based on some records Council had on flooding incidence that had occurred which mainly centred around the Sans Souci area, we had very little information apart from that area, that I was aware of."

From his own knowledge, Mr Mable was aware of flooding of Wolli Creek in 1978, 1983 and 1984. The flooding had been on the lower, or Canterbury, side of the creek. There had not been flooding on the Rockdale side. Mr Mable said that when he completed the answers to the certificates in question in this litigation, he referred to no files or other compendia of data. He relied upon his general knowledge. This led him to the firm conclusion that no property in Henderson Street was subject to flooding.

The primary Judge held:

> "How he could undertake this task without familiarising himself with every detail of the [PWD] Study and of the [Wong] Study is very difficult to comprehend. One would have expected a qualified professional to have read each of these studies with care. Mr Mable has the qualification of Bachelor of Engineering (Civil) and is also qualified as a Local Government Engineer. For such a person not to read and give close attention to the two flood studies, was, in my opinion, negligent, and the negligence ultimately led to the [appellant's] loss."

Earlier, his Honour had formulated the case of the appellant as one that "Mr Mable answered question (a) in the 1990 s. 149 certificates negligently and without due care as to whether they were true or false".

However, the appellant sued not the negligent servant but his employer, the appellant. Counsel for the appellant submitted that when dealing with the negligence issue his Honour focussed attention upon the inadequacies of Mr Mable in the performance by him of the tasks given him by the appellant, and that the primary Judge thereby was encouraged into error in his treatment of the statutory issue concerned with "good faith". It was on this point that the primary Judge decided the case adversely to the appellant.

His Honour found that the statutory concept of "good faith" in the performance of the functions in question, included two criteria. The first was that the act be done

bona fide and not maliciously or to achieve an ulterior purpose. The second was that there be "a genuine attempt to perform the function correctly, that is to say that the function should not be performed without caring whether or not it be properly performed". After considering a passage in the speech of Lord Sumner in Roberts v Hopwood [1925] A.C. 578 at 603-4, where his Lordship was considering what he described as "an implied qualification of good faith" in s. 62 of the Metropolis Management Act 1855 (U.K.) his Honour concluded:

> "In my opinion, Mr Mable completed the s. 149 certificates as he thought appropriate. He turned his conscious mind to the task and answered the questions as he thought proper. He was, however, negligent, in that he failed to give any proper attention to the [PWD] Study and the [Wong] Study. In these circumstances, it seems to me that the s. 149 certificates were given in good faith."
> [Emphasis supplied]

Counsel for the appellant emphasised that, on their face, the certificates were issued by the respondent under the hand of the Town Clerk, and that in response to the question whether the Council had information which would indicate that the Land was subject to the risk of flooding or tidal inundation, the Council, stating that the information had been taken from its records, replied "No". It was true that the statement also said that the respondent "cannot accept any responsibility for any omission or inaccuracy". Nevertheless, the issue of negligence and the applicability of the statutory exculpation were to be determined by looking at what the

respondent had done or failed to do. The question of "good faith" was not to be determined simply by an evaluation of the conduct of Mr Mable.

The appellant's submission was that the Council cannot have been acting in good faith in issuing a certificate under the signature of the Town Clerk said to be based on the records of the Council if the very records which would supply the relevant information had been consciously ignored. This did not involve a challenge to the primary Judge's finding that Mr Mable honestly believed that what he was doing was, for whatever reason, the right thing. Rather, the submission was that, as a matter of objective fact, if one put together several matters (viz. the knowledge of the Council that the records existed, the lack of any proper system of dealing with requests for information of the type in question, and, as a conscious decision, the execution of the certificates without reference to those records) the result was irresponsible conduct by the respondent and an absence of good faith in the statutory sense.

"Good faith" in some contexts identifies an actual state of mind, irrespective of the quality or character of its inducing causes; something will be done or omitted in good faith if the party was honest, albeit careless. See, for example, Smith v Morrison [1974] 1 W.L.R. 659. (Abstinence from inquiry which amounts to a wilful shutting of the eyes may be a circumstance from which dishonesty may be inferred:

Jones v Gordon (1877) 2 App. Cas. 616 at 625, The English and Scottish Mercantile Investment Company, Limited v Brunton [1892] 2 Q.B. 700 at 707-8, The Zamora No. 2 [1921] 1 A.C. 801 at 803, 812.) On the other hand, "good faith" may require that exercise of caution and diligence to be expected of an honest person of ordinary prudence. This, counsel urged, was what was required by the present statutory context. The appellant then submitted that there was a plain absence of good faith in this sense on the part of the respondent.

In Siano v Helvering 13 F. Supp. 776 at 780 (1936), Clark J. said that the words "good faith" or their Latin equivalent appear frequently in the law and are capable of, and have received, what he described as "two divergent meanings". The first was the broad or subjective view which defines them as describing an actual state of mind, irrespective of its producing causes. The other construed the words objectively by the introduction of such concepts as an absence of reasonable caution and diligence. In the instant case, the Court had under consideration a regulation promulgated by the Commissioner of Internal Revenue which used the expression "failure in good faith to observe and comply with the requirements of all Internal Revenue and other laws relating to any operations under his permit". The appellant asserted that he had never heard of a particular tax which he had failed to pay. The Court said (at 781):

> "The government could and perhaps for the completeness of the record should have

> introduced evidence of the fame (or notoriety, as we said before) of the tax. Even in the absence of such evidence, we think the permitee was under a duty to make inquiry. We place that upon two factors: The nature of taxes, and the lapse of time. Three years and a tax universal to his trade call, in our opinion, for some curiosity. No attempt to satisfy that curiosity smacks to us too much of the ostrich and proportionately too little of good faith."

See also Lucas v Dicker (1880) 6 Q.B.D. 84 at 88, In re Dalton (A Bankrupt) [1963] Ch. 336 at 354-5, and Rumsey v R. (1984) 5 W.W.R. 585 at 592-3. These cases illustrate that, in a particular statutory context, a criterion of "good faith" may go beyond personal honesty and the absence of malice, and may require some other quality of the state of mind or knowledge of the relevant actor. An example in this Court is Wilde v Spratt (1986) 13 F.C.R. 284 at 292, where para. 135 (4) (b) of the Bankruptcy Act 1966 was in issue; cf Official Trustee in Bankruptcy v Mitchell (1992) 38 F.C.R. 364 at 371.

The concept of "good faith" as understood in various fields of the general law provides further examples. For example, an administrative decision may involve an improper exercise of power on the footing that it is unreasonable in the Wednesbury sense, without there being mala fides. Likewise, the whole doctrine of constructive notice which was developed in equity as appendant to the bona fide purchaser principle, operates by reference to what would have come to the knowledge of the purchaser if he had conducted his activities in the ordinary way; see Consul Development Pty

Limited v DPC Estates Pty Limited (1975) 132 C.L.R. 373 at 412-3.

In the present case, it will be wrong to assume that when used in the relevant legislation the phrase "anything done or omitted to be done in good faith" (in sub-s. 582A (1) of the Local Government Act) and "in respect of any advice provided in good faith" (in sub-s. 149 (6) of the E.P.A. Act) operate to leave the respondent liable only in respect of dishonesty.

These provisions, on their face, are designed to strike a balance between (i) the interests of the authority which is funded by public not private funds and which, pursuant to statute, provides the information, and (ii) the interests of the recipient of the information and others reasonably acting upon it where, in the ordinary course, those persons may be expected to incur substantial liability on the faith of what is disclosed by the authority. Is the individual interest to yield to what might be called the wider public interest unless the conduct of the authority may be stigmatised as dishonest? In our view, the statutes do not bring about that result.

A council is reasonably to be expected to respond to an application for information of a character of the obvious significance of that sought here by recourse to its records. If the council represents that it has done so ("The above information has been taken from the Council's Records . . .") then it still may have been acting in "good faith" if a real

attempt has been made, even though an error was made in the inspection or the results of the inspection were inaccurately represented in the certificate which is issued. It is unnecessary to decide that question on the present appeal.

However, in our view, in the circumstances of the present case, a party in the position of the respondent cannot be said to be acting in good faith within the meaning of the E.P.A. Act and the 1985 Act, if it issues s. 149 certificates where no real attempt has been made to have recourse to the vital documentary information available to the council, and the council has no proper system to deal with requests for information of the type in question. Indeed, in the present case, as counsel for the appellant emphasised, the council officer whose responsibility it was to deal with the request for information consciously ignored the very records which would have supplied it.

The statutory concept of "good faith" with which the legislation in this case is concerned calls for more than honest ineptitude. There must be a real attempt by the authority to answer the request for information at least by recourse to the materials available to the authority. In this case there was a failure to meet that standard.

Accordingly, we would reach a different conclusion on this branch of the case to that of the primary Judge.

In addition to resisting the submissions for the appellant, counsel for the respondent, by notice of contention, submitted that the decision of the primary Judge should be affirmed on the footing that (i) there was no duty of care, or, alternatively, (ii) no reasonable reliance. In particular, he contended that, on the evidence, the sentence at the foot of the s. 149 certificates was understood by the appellant as an attempt by the respondent to disclaim liability for any inaccuracy or omission in the information furnished. Counsel submitted that from the words "but Council cannot accept any responsibility for any omission or inaccuracy" it was clear that the respondent was endeavouring to absolve itself of responsibility in relation to the information furnished in the certificate and was, accordingly, not assuming responsibility, within the meaning of the authorities.

Mr Mable approached his tasks in relation to the issue of s.149 certificates on the footing that they were all required for property transactions. In particular, he knew that purchasers would be likely to rely upon the answers given to the various questions in the certificates. His evidence was that he sought accordingly to make the answers accurate, with the intention that purchasers should rely on them as being accurate.

The relevant s. 149 certificate issued before entry by the appellant into the Contract on 19 October 1990, that is to

say the certificate issued on 7 March 1990, had been obtained from the respondent on application by the solicitors for the vendor. The two certificates issued between exchange and completion were sought by the solicitors for the purchaser.

But, in our view, even as regards the first certificate it is no answer to the submission that a duty of care to the appellant arose on the part of the respondent, that the certificate was not issued directly to the appellant. The relevant class of persons to be considered in the present situation included potential purchasers of the property the subject of the certificate. It is sufficient if the misstatement is made to members of a limited class of persons, including the plaintiff, with the intention that those persons should rely thereon in deciding whether to commit themselves financially; see San Sebastian Proprietary Limited v Minister Administering The Environmental Planning and Assessment Act 1979 (1986) 162 C.L.R. 340 at 357, per Gibbs C.J., Mason, Wilson, Dawson JJ.

Mr Heman is Managing Director of the appellant. He said in his affidavit that in completing the purchase of the Land his company relied on all three s. 149 certificates, examined by its solicitor. The appellant did so in forming the view that the Land could be developed according to its plans and without any risk of the respondent imposing any onerous building conditions because of a risk of flooding. Mr Heman said that the appellant would not have completed the purchase

had he and his fellow directors believed that the Land was prone to any risk of flooding. He was cross-examined. Counsel for the respondent put to him the concluding sentence which appeared immediately above the signature to the relevant annexure to the s. 149 certificates. Mr Heman said that he understood the meaning of the sentence, but that he did not think it "had effect". In the course of previous dealings which he had had with other councils Mr Heman had asked the appellant's solicitor whether such statements had any practical meaning. He had been told that generally "lots of bodies, statutory or otherwise, append that statement but that didn't exonerate them from any responsibility". He was later asked:

> "And if that were effective in law you would understand, would you not, when you read this document, that no reliance could be placed upon it by you? - If there was another source of obtaining the information I may not have relied on it but the only source of obtaining information is council, so one is forced to rely on it."

Mr Heman was asked further questions as to his reliance upon the advice of his solicitor, Mr Andrews. There was the following exchange:

> "What I am putting to you is this; that if Mr Andrews had not advised you that the disclaimer at the bottom of the page was of no effect it would have been your understanding that you could not rely on what the council was saying in the certificate, that is correct, is it not? - Well, if I may be allowed to sort of

> enlarge; there is - in my long history of doing developments I have had to rely on what council - councils pass on as information and in general I have found them reliable. If we deny the information given to us by council we find ourselves in the dark most of the time and therefore we do have to rely on them seeing they're mainly the one and only source of information we can rely on."

The circumstance that the relevant information provider is in a better position than anyone else to know of the accuracy of the information provided may, as this evidence indicates, be significant in considering the question of reasonable reliance. In a case such as the present, it also is important in considering the anterior question of the existence of a duty of care; see Shaddock supra at 235-6, 242, 252-3, 256.

In our view, the appellant made out its case as to the existence of a duty of care and as to reasonable reliance.

Further, we would not accept the submission for the respondent that the sentence at the foot of the annexure operated as a disclaimer of liability or rendered the appellant's reliance on the certificates unreasonable. The statement "The above information has been taken from the Council's records but Council cannot accept any responsibility for any omission or inaccuracy", first identifies the system or procedure which has been followed in preparing the certificate. There is an assurance that the information set out has been taken from the records of the Council. The

second half of the sentence states a caution or reservation which is to be understood by reference to the first half of the sentence. The "omission or inaccuracy", in respect of which the respondent cannot accept any responsibility, is an omission or inaccuracy in the process involved in taking the above information from its records.

The complaint in the present case is that there was a complete failure to have regard to the most significant portion of the Council's records which bore upon the subject matter of the inquiry. The information supplied, simply, was not taken from the records of the Council. It was taken essentially from Mr Mable's folk memory of events at Wolli Creek. The misstatement in the certificates thus arose because the officer of the respondent charged by it with the task of answering the question asked by the applicants for the certificates, failed to follow the procedure, stated on the certificates, of taking the information from the records of the respondent. It follows, in our view, that the concluding portion of the sentence in question had no relevant operation adverse to the case put by the appellant.

For these reasons, the appellant should have succeeded below, and the appeal should be allowed. The respondent should pay the costs of the appeal and of the trial. Judgment should be entered for a sum which represents $926,615 plus interest from 26 September 1991. The appeal should be stood

over for a short time for the bringing in of short minutes to give effect to this result.

It will be apparent from the foregoing that it has been unnecessary to consider the alternative ground advanced by the appellant, seeking to found liability of the respondent in ss. 52 and 82 of the T.P. Act.

I certify that this and the preceding twenty six (26) pages are a true copy of the Reasons for Judgment of the Court.

Associate:

Date: 27 August 1993.

| | |
|---|---|
| Counsel and solicitors for the appellant: | Mr T.F. Bathurst Q.C. and Mr I.M. Jackman instructed by Dobes and Andrews. |
| Counsel and solicitors for the respondent: | Mr A.R. Emmett Q.C. and Mr M. McCulloch instructed by Phillips Fox. |
| Date of hearing: | 24 May 1993. |
| Date of judgment: | 27 August 1993. |

Administrative Decisions Tribunal
New South Wales

| | |
|---|---|
| **CITATION:** | **O'Hara v North Sydney Council [2005] NSWADT 100** |
| **DIVISION:** | General Division |
| **PARTIES:** | APPLICANT<br>Louise O'Hara<br>RESPONDENT<br>North Sydney Council |
| **FILE NUMBER:** | 033250 |
| **HEARING DATES:** | 21 October 2004, 8 December 2004, 28 January 2005, 16 March 2005 |
| **SUBMISSIONS CLOSED:** | 03/16/2005 |
| **DATE OF DECISION:** | 05/10/2005 |
| **BEFORE:** | Higgins S - Judicial Member |
| **APPLICATION:** | access to documents - adequacy of search - access to documents - legal professional privilege - Freedom of Information Act - access to documents - adequacy of search - Freedom of Information Act - access to documents - legal professional privilege |
| **MATTER FOR DECISION:** | Principal matter |
| **LEGISLATION CITED :** | Administrative Decisions Tribunal Act 1997<br>Freedom of Information Act 1989 |
| **CASES CITED:** | Abigroup Ltd v Akins (1997) 42 NSWLR 623<br>Attorney General (NT) v Maurice (1986) 161 CLR 475<br>Australian Competition & Consumer Commission v FFE Building Services Ltd [2003] FCA 1181 |

Australian Federal Police v Propend Finance Pty Ltd (1997) 188 CLR 501
Australian Rugby Union Ltd v Hospitality Group Pty Ltd and Ors [1999] FCA 1061
Baker v Campbell (1983) 153 CLR 52
Beesley v Commissioner of Police [2000] NSW ADT 52Cianfrano v Premier's Department [2004] NSWADT 225
Complete Technology Pty Ltd v Toshiba (Australia) Pty Ltd (1994) 53 FCR 125
Daniels Corp International Pty Limited v Australia Competition & Consumer Commissioner (2002) 213 CLR 543
DQ v Commissioner of Police, New South Wales Police Service [2002] NSW ADT 215
Esso Australia Resources Ltd v Commissioner of Taxation (1999) 201 CLR 49
Fagan v State of New South Wales [2004] NSWCA 182
Goldberg v Ng (1995) 185 CLR 83
Mann v Carnell (1999) 201 CLR 1
Murre (No. 2) v Commissioner of Police, New South Wales Police Service [2001] NSW ADT 175
O'Reilly v Commissioner of State Bank of Victoria (1982) 153 CLR 1
Shepherd and Department of Housing, Local Government and Planning [1994] 1 QAR 464
State Bank of South Australia v Smoothdale (No 2) Ltd (1995) 64 SASR 224
Trade Practices Commission v Sterling (1979) 36 FLR 244
Waterford v Commonwealth (1987) 163 CLR 54
Woollahra Municipal Council v Westpac Banking Corp (1994) 33 NSWLR 529

**REPRESENTATION:**

APPLICANT
In person
RESPONDENT
G Furness, barrister

**ORDERS:**

Tribunal orders; a) the decision of the Council to refuse the applicant access to the documents referred to in paragraph 52 of this decision is affirmed; b) the decision of the Council to refuse the applicant access to the documents referred to in paragraph 53 of this decision is set aside and in substitution thereof a decision that the applicant be granted access to these documents; c) in respect of those documents referred to in (a) above which are exempt in part, Council to provide the applicant with a copy of those documents with the exempt material deleted within 28 days of this decision and; d) Council to provide the applicant with a copy of the documents referred to in (b) within 28 days of this decision.

## REASONS FOR DECISION

### Introduction

1 This is an application by Ms O'Hara ("the applicant") seeking review of a decision of the North Sydney Council ("the Council") to refuse her access to documents that she had requested pursuant to the *Freedom of Information Act* 1989 ("the FOI Act"). That refusal related to documents that the Council claimed were exempt on the grounds that they were the subject of legal professional privilege: see cl. 10 Schedule 1 FOI Act. The applicant also contended that Council had failed to disclose other documents that it held and which came within her freedom of information request ("FOI request"). This contention related to the adequacy of the Council's search for documents that came within her FOI request together with concerns about the manner in which officers of the Council dealt with her request. The Council's position was that it did not hold any further documents that came within the applicant's FOI request and that it had acted appropriately at all times.

2 The applicant's FOI request was made in a letter dated 23 December 2002. That request was expressly stated to have been made pursuant to the FOI Act and requested "access to and copies of" the following documents:

> "1. All files, documents and information relating to my property and/or myself (including letters, memoranda, minutes, file notes, objections, photographs, etc) held by Council. This should include the file on Milsons Restaurant.
> 2. All details relating to consultants employed by and/or providing quotes or other services to Council in respect of my property or myself (including names, addresses, contact numbers, purpose of consultation, services performed, dates, payments, documentation, photographs, etc).
>
> 3. All details related to legal costs in respect of my property and/or myself (including names, addresses, contact numbers, purpose of consultation, services performed, dates, payments, documentation, etc).
>
> 4. Minutes including current matters of Legal Services Committee from 1996".

3 The applicant owns two properties within the jurisdiction of the Council. One of these properties was the subject of litigation between Council and the applicant in the Land and Environment Court. At the time of making her FOI request, the litigation had been determined with the exception of costs. The applicant had commenced the proceedings. They were an appeal against an order of the Council in relation to work that was required to the applicant's property. The litigation took some time and Council was successful in having its orders upheld. As a result, it sought an order that the applicant pay its costs. It is

my understanding that at the time the applicant made her FOI request an application for such orders had been made but not determined. The applicant contended that the officers of the Council, who had responded to her FOI request had deliberately sought to thwart and delay her gaining access to documents that she was entitled to have access to under the FOI Act.

**Issues**

4 As mentioned above, there are two main issues for determination in this application. These are:

> (a) whether Council had adequately searched for all documents which it held that came within the terms of the applicant's FOI request; and
> (b) whether the documents that came within the terms of the applicant's request and for which the Council had refused access, whether these documents were exempt on the grounds that they attracted legal professional privilege.

5 In respect of each of these issues the onus rests on the Council: see s. 61 FOI Act.
6 Related to these issues is whether officers of the Council had acted inappropriately in the exercise of their duties, on behalf of the Council, when responding to the applicant's FOI request. As I have explained below, although the officers of Council responsible for dealing with the applicant's FOI request failed to meet many of their obligations under of the FOI Act, in my opinion, there is no evidence to indicate that these officers "failed to exercise in good faith the functions conferred or imposed on" them; see s.58 FOI Act.

**Adequacy of Search**

**Relevant law**

7 The FOI Act makes provision for any person to make an application requesting access to documents held by a government agency or Minister ("the agency"): see s.16 and s.17, FOI Act. Where a person makes such a request the agency is required to determine whether access to the document(s) is to be given or refused: see s.24, FOI Act. That determination is to be made no later than 21 days after receipt of the application and a failure to do so within this prescribed time is deemed to be a refusal of access: see s.24(2) FOI Act. There are some exceptions to this deeming provision, however, they are not relevant to this application.

8 An agency is able to refuse access to a document only on specified grounds: see s.25, FOI Act. One of these grounds is that the document is "exempt" under Schedule 1 of the FOI Act (e.g. legal professional privilege, which is discussed more fully below).

9 Section 27 of the FOI Act sets out the form in which access can be given. This includes giving the person a reasonable opportunity to inspect the document or giving the person a copy of the document: see s.27(1)(a) & (b) FOI Act. Where the FOI applicant requests that access be given in a particular form the agency is required to provide access in that form unless the agency can establish one of the prescribed exceptions: see s.27(2) & (3) FOI Act. One of the exceptions is where the requested form of access would unreasonably divert the agency's resources away from their use by the agency in the exercise of its functions (.s27(3)(a) FOI Act). In such cases the agency is entitled to give access in another form.

10 It is well established that the Tribunal's power to make a determination as to whether access to a document requested pursuant to the FOI Act has been refused encompasses a refusal on the ground that a document or additional documents coming within the terms of the FOI request cannot be identified or located; see *DQ v Commissioner of Police, New South Wales Police Service* [2002] NSW ADT 215 at [7], *Murre (No. 2) v Commissioner of Police, New South Wales Police Service* [2001] NSW ADT 175 [at 16 and 17] and *Beesley v Commissioner of Police* [2000] NSW ADT 52.

11 In *DQ*, the President cited with approval at [9] the approach taken by the Queensland Information Commissioner in *Shepherd and Department of Housing, Local Government and Planning* [1994] 1 QAR 464, who said it involved the following considerations:

> "(a) whether there are reasonable grounds to believe that the requested documents exist and are documents of the agency (as that term is defined in s 7 of the *FOI Act* ): and if so,
> (b) whether the search efforts made by the agency to locate such documents have been reasonable in all the circumstances of a particular case."

12 However, in *DQ* , the President went on to say at [30] that the Tribunal's functions under the FOI Act do not extend to being an investigative agency in relation to this issue as this was a role more appropriately undertaken by the Ombudsman.
13 In my opinion, in this application, the issue of adequacy of search has primarily arisen as a result of the manner in which Council responded to the applicant's FOI request, in particular the way in which the applicant was initially given access to documents and the fact that Council had failed to fully inform the applicant of all the documents for which access was refused. Accordingly it is necessary to set out in some detail the manner in which Council dealt with the applicant's application.

**Evidence**

14 Kerry Anne Gilbert ("Ms Gilbert"), Director of Corporate Services of the Council, and Denise Kay Highton (Ms Highton"), the Document Management Services Manager of Council gave evidence on behalf of the Council. Ms Gilbert is responsible for overseeing the management of FOI applications received by Council and she gave evidence on how Council dealt with FOI requests generally and how the applicant's request was dealt with. Ms Highton gave evidence about the document management systems of Council and her involvement in giving the applicant access to documents held by Council.

15 In her evidence Ms Gilbert said that Council had an open access policy and under that policy: "... as a general rule, all Council files are accessible to the public, subject to Council's obligations under the *Privacy and Personal Information Protection Act 1998 (NSW)* and documents covered by legal professional privilege." As a result of this policy Council only received a few FOI requests in any one year. Where an FOI request is made and the applicant is not sure about which documents he/she requires, the usual practice is to invite the applicant to attend the offices of the Council to peruse all relevant files and to select those documents that the applicant wishes to have a copy of. The relevant files are identified by Document Management Services of the Council. These are identified, from the records of documents and files maintained by Council.

16 In her evidence, Ms Highton said that over the years, Council had three different types of document management systems. The first system was a manual system ("the manual system") and it applied prior to 1985. Under that system documents were kept in hard copy format and filed according to a particular property address and the subject of these files were recorded on a hard copy ledger. The second system was an electronic recording system that applied from late 1985 to 4 April 2001. Under that system an electronic record was made of the details of all incoming documentation and outgoing documentation ("the Genasys system"). This system, enabled searches of documents to be made on the basis of file titles and by property addresses. However, it was not a mandatory system. Under this system documents were stored in a combination of physical files and microfiche jackets. The current system, which has applied since 5 April 2001 is a fully digitised electronic system ("the DataWorks system"). It is mandatory system and all correspondence, emails, faxes, memos, file notes and reports are scanned and stored electronically within the DataWorks system. This system allows searches to be conducted for a particular document number, for documents relating to a particular property or to a particular person. The DataWorks system classifies certain documents as being restricted documents. They are classified as restricted on grounds of privilege or some other ground. Under the open access policy, members of the public are not given access to restricted documents. However, access is given to all other documents.

17 In the case of the applicant's FOI request, Ms Gilbert responded to the request in a letter dated 8 January 2003. In that response she sought clarification as to the nature of documents the applicant sought in respect of paragraphs 1 and 2 of her FOI request. She also advised that the documents referred to in paragraph 3 of the applicant's FOI request (i.e. documents relating to legal costs) were the subject of legal professional privilege and could therefore not be released. Finally, she advised that the documents requested in paragraph 4 (minutes of the Legal Services Committee) of the applicant's FOI request were publicly available and that the applicant could view these at no cost by contacting the Document Managing Services.

18 On 16 January 2003, the applicant replied to Ms Gilberts' letter. In that reply the applicant stated that she believed that paragraphs 1 and 2 of her FOI request were unambiguous in that she requested "all" documents. She also questioned the claim for legal professional privilege as these documents related to the costs Council was seeking to recover from her. In her letter she also requested that the documents she had requested be made available to her by 17 January 2003.

19 On 21 January 2003, Ms Gilbert prepared a further letter to the applicant. In that letter Ms Gilbert confirmed that access to documents relating to legal costs was refused on the grounds that they were subject to legal professional privilege. Ms Gilbert also advised that the applicant would be granted access to documents coming within paragraph 2 of her FOI request and that she would be presented with copies of those documents when she attended Council the following Tuesday, 28 January 2003. In respect of the applicant's request for "all" documents relating to her property, Ms Gilbert said the following:

> "... access to your files is available to you under Council's Access to Documents Policy . In accordance with the guidelines established by the NSW Ombudsman's Office, which recently merged with Community Relations Division, this should be your first avenue of access. In

addition, the Act and the guidelines indicate that the agency (Council) is to offer assistance to amend any application that may result in agency's resources being unreasonably diverted from its normal function. Your request for copies of "all" files is not considered reasonable . It is for this reason that I sought clarification from you as to the nature of the documents you were seeking." (emphasis added)

20 Ms Highton gave evidenced that on 21 January 2003, at the request of Ms Gilbert, she conducted a search of the ledger of the manual system, the Genasys system and the DataWorks system for documents and files that came within the terms of paragraphs 1, 2 and 4 of the applicant's FOI request. As a result of her searches Ms Highton created a computerised lists of relevant documents in the DataWorks system and a further computerised list of relevant files stored under the Genasys and manual systems. A search for documents that came within paragraph 3 of the applicant's FOI request was not undertaken as Ms Gilbert and the legal officer of the Council had instructed that these were not to be disclosed.

21 After obtaining the lists, Ms Highton extracted the relevant documents and files and identified those documents that she believed to be "privileged". She said "privileged" documents were: "(a) correspondence between Council's solicitors and the Council; and (b) confidential items included in the Legal Services Committee minutes." In respect of those documents stored in the DataWorks system, Ms Highton prepared an edited version of the initial list she had prepared with reference to any privileged document being removed. She was able to do this as the system identified those that were privileged.

22 In the case of those files listed in the Genasys and manual system, Ms Highton obtained the relevant files and extracted from these any document (including microfiche) that she believed to be "privileged". Having physically extracted these, Ms Highton, "kept them in a separate bundle and strapped to the outside of the files from which they were removed".

23 Ms Highton said that the documents she had extracted as being "privileged" came from files relating to the applicant's properties and the Legal Services Committee Minutes. Although Ms Highton did not keep a record of the details of the documents she had extracted, it would appear that they exceeded 170 in number: see the list of exempt documents prepared by Council in October 2004.

24 On 22 January 2003, the applicant hand delivered to Council a request for internal review on the basis that her FOI request had not been dealt with within the prescribed time. While handing over her request for internal review, Ms Gilbert gave the applicant a copy of her letter written 21 January 2003: see [19] above.

25 On 28 January 2003, in accordance with an arrangement she had made with Ms Highton, the applicant attended the offices of the Council to inspect documents that she had requested. Ms Highton gave the applicant access to those documents that she had previously identified as coming within the applicant's FOI request and which she had determined not to be "privileged". This meant that the applicant was given access to the list of relevant documents in the Council's DataWorks system and the hard copy of relevant documents in the relevant files and microfiche in the Genasys and manual system. In her affidavit, sworn on 24 August 2004, Ms Highton said that when giving the applicant access to these documents she said:

"Here are all the files that are relevant to your FOI application. Feel free

to peruse the files and pick out the documents you need. I have removed from the files any documents covered by legal professional privilege. There are also documents created by third parties held on the files. You can look at them, but if you need to have any of the documents copied, then we will need to consult with the authors of the documents before we can give them to you."

26 The applicant contended that she was not informed that documents had been removed from the files that she had been provided with.

27 In giving the applicant access to documents, Ms Highton gave the applicant the hard copies of the relevant files and microfiche held by Council under the Genaysis and manual system. She also gave the applicant access to a computer, from which the applicant could access those documents on the DataWorks system that Ms Highton had previously identified as being relevant and not privileged. In accordance with Council's open access policy, the applicant was left to her own devices to inspect the DataWorks documents, the files and microfiche that Ms Highton had provided. However, at no time was the applicant provided with the lists that Ms Highton had prepared on 21 January 2003. Nor did Ms Highton retain a copy of such a list. It was not until 28 June 2004 that Ms Highton sought to reproduce those lists, which were annexed to her affidavit. In her affidavit Ms Highton says that these lists would have been the same as those she had prepared in January 2003.

28 It is not disputed that on 28 January 2003, there were technical difficulties with the microfiche copying machine and the DataWorks system. However, the applicant had also arranged to conduct further inspections of the documents on 29 and 31 January 2003. She attended these days, but for a limited period. Ms Highton also endeavoured to have the microfiche machine attended to. In light of the technical difficulties being experienced by the applicant, Ms Highton offered the applicant additional dates to inspect the documents on 7 February 2003 and the following week. However, according to Ms Highton, the applicant did not take up this offer.

29 It is not disputed that at the time the applicant inspected the documents at the offices of the Council she pointed out to Ms Highton that documents were missing on the DataWorks system, which related to the Legal Services Committee. It would appear that these missing documents were identified on about 7 February 2003. Having identified these missing documents Adrian Panuccio, legal officer of the Council, assessed which of these were privileged. He then copied those that were not privileged and provided them to Ms Gilbert to forward to the applicant. They were forwarded on 10 March 2003, under the cover of a letter from Ms Holloway. That letter failed to state that there were other documents that had been identified as missing, to which access was being refused and the grounds for that refusal.

30 On 3 February 2003, Penny Holloway, General Manager of the Council, responded to the applicant's internal review request. In that letter Ms Holloway said the following:

"I have reviewed the matter fully and now state the following:

You received a letter on 21 January 2003 granting access to your files at North Sydney Council, so that you could make a selection of the documents you wished copied.

You viewed files at Council on 28, 29 and 31 January 2003.

> Copies are being made for you of all the information you have requested with the exception of the information about legal costs.
>
> Your request to obtain details relating to legal costs remains refused as it falls within the definition of legal professional privilege."

31 On 14 March 2003, the applicant lodged a complaint about the manner in which her FOI request had been handled with the Ombudsman's Office. The complaint was investigated and the applicant and Council were advised about the outcome of that investigation on 17 July 2003. In his letter, the Ombudsman expressed the view that the documents relating to the Council's legal cost in its litigation involving the applicant's property, was not subject to legal professional privilege. On 28 October 2003, three months after the Ombudsman's determination, Ms Holloway forwarded to the applicant a copy of the documents relating to Council's legal costs in the litigation involving the applicant's property.

32 In August 2003, Ms Gilbert re-examined the documents extracted by Ms Highton in January 2003 on the basis that they were privileged and for which access was refused. In her re-examination, she determined that 10 of these documents were not the subject of legal professional privilege. Copies of these 10 documents were forwarded to the applicant on 20 August 2003. It would appear that these documents were forwarded without any explanation as to why access to these had not been provided previously.

33 On 22 December 2003, Ms Gilbert and Ms Highton, when considering the applicants written submissions to the Tribunal, realised that they did not recall seeing any invoices that had been requested by the applicant. They also realised that such invoices were not held on the DataWorks system. They were held by the Finance Department. The relevant documents (3 in number) were then obtained from the Finance Department and Ms Gilbert said that she intended to provide a copy of these to the applicant at the planning meeting that had been scheduled for 13 February 2004. As the applicant did not attend this planning meeting and the following planning meeting, due to illness, Ms Gilbert forwarded these to the applicant on 22 July 2004. Again these documents appear to have been forwarded without any explanation.

34 On 25 October 2004, in accordance with directions of the Tribunal, the Council filed and served a list of documents that it held and which came within the applicant's FOI request, and for which the exemption of legal professional privilege was claimed. This was the first time that the applicant had been provided with details of the documents, other than those relating to legal costs, for which Council had refused access on the grounds of legal professional privilege.

**Conclusions**

35 I found Ms Gilbert and Ms Highton to have given truthful and frank evidence.

36 I also find that on 21 January 2003, Ms Highton searched for documents held by Council that came within paragraph 1, 2 and 4 of the applicant's FOI request. However, in my opinion, that search was primarily conducted in accordance with Council's open access policy. This is consistent with the contents of the letter sent by Ms Gilbert on 8 January 2003 and the letter she prepared on 21 January 2003 as well as the letter sent by Ms

Holloway on 3 February 2003. The effect of this was that at no time was the applicant given details of those additional documents that also came within her request which the DataWorks system had identified as being restricted and those Ms Highton had determined were privileged. In this regard I accept the evidence of Ms Highton as to what she said to the applicant on 28 January 2003 about not being given access to privileged documents. However, I find that her comments were of a general nature and that in light of the contents of Ms Gilbert's letters and that of Ms Holloway the applicant could only have understood her comment to confirm previous advice that the documents she had been given access to did not include those documents relating to Council's legal costs, which Council had claimed to be privileged. That is, Ms Highton's comment was not sufficiently clear for the applicant, or any other person not privy to how Ms Highton had identified the documents that the applicant was to be given access to, to understand that Council held documents, in addition to the legal costs documents, for which access was also refused on the grounds of legal professional privilege. Had Ms Highton given the applicant copies of the lists she had prepared on 21 January 2003, which listed all the files and documents that Ms Highton had identified as containing documents or being documents that came within the applicants FOI request and explained what these lists meant as well as identifying from those lists the files from which she had extracted documents, there would have been limited opportunity for the applicant to raise her concern about adequacy of search. Instead, the applicant on examining the files and documents that she was given access to was left with the overwhelming impression that there were documents missing, which was correct. What she did not know was that these missing documents had in fact been identified as coming within her FOI request, but access was refused on the grounds of legal professional privilege. Nor was she advised of this fact in Ms Holloway's internal review determination of 3 February 2003. Furthermore, over time, the applicant's impression was confirmed when she received, without any explanation, copies of further documents.

37 In making these findings I wish to make it clear that there is no evidence before the Tribunal that Ms Gilbert or Ms Highton acted in bad faith. I accept that they believed that the Council's open access policy was more favourable to the applicant, which it may have been in some aspects. However, as explained below that policy did not over-ride their duties and obligations under the FOI Act.

38 Notwithstanding the failures of Ms Highton, Ms Gilbert and Ms Holloway I am satisfied, on the material before the Tribunal that Council has adequately searched for all documents it holds and which come within the terms of the applicant's FOI request. I find that, with the exception of a few documents held within the finance department of the Council, all documents relevant to the applicant's FOI request were identified in January 2003.

**Legal Professional Privilege**

**Relevant law**

39 As mentioned above, an agency is able to refuse access to a document only on specified grounds: see s.25, FOI Act. One such ground is that the document is an "exempt document": see s.25(1)(a), FOI Act.

40 An "exempt document" includes a document referred to in one or more of the provisions in Schedule 1 of the FOI Act (see s.6 FOI Act). In this application, the relevant exemption in Schedule 1 is as follows:

> "10 Documents subject to legal professional privilege
>
> (1) A document is an exempt document if it contains matter that would be privileged from production in legal proceedings on the ground of legal professional privilege.
> (2) A document is not an exempt document by virtue of this clause merely because it contains matter that appears in an agency's policy document."

41 Subsection 25(4) of the FOI Act provides that an agency shall not refuse access to an exempt document where it is practicable to give access to a copy of the document from which the exempt matter is deleted and the FOI applicant wishes to be given such a copy.
42 The principles in relation to legal professional privilege under the common law and under the *Evidence Act 1995 (NSW)* are well established following the High Court decision in *Esso Australia Resources Ltd v Commissioner of Taxation* (1999) 201 CLR 49, which was affirmed in *Daniels Corp International Pty Limited v Australia Competition & Consumer Commissioner* (2002) 213 CLR 543.

43 I recently dealt with these principles in *Cianfrano v Premier's Department* [2004] NSWADT 225. In summary, these principles include the following:

> (a) legal professional privilege arises from a lawyer/client relationship and is the privilege of the client;
> (b) the privilege applies to "confidential communications" between the lawyer (as legal advisor) and the client where the dominant purpose of the communication is either:
>
> > (i) to enable the legal advisor to give or the client to receive legal advice; or
> > (ii) to be used in pending or contemplated proceedings. In such cases, confidential communications with third parties (non-agent third party) may also be privileged if they are for use in such proceedings (see *Hynes* supra at [37] and *Law Society of NSW* supra at [27]).
>
> (c) the privilege also applies to confidential communications between government agencies and their salaried legal officers which were undertaken for the dominant purpose of obtaining or giving legal advice or for pending or contemplated litigation (see *Waterford v Commonwealth* (1987) 163 CLR 54 at 62 and 73);
> (d) the privilege extends to advice which is of a non-legal character where that non-legal advice is connected to the giving of legal advice or for contemplated or pending litigation (see *Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501 at 550; *Waterford* (supra) at 66; *Trade Practices Commission v Sterling* (1979) 36 FLR 244 at 245-246);

(e) the privilege extends to copies of documents that are not privileged where the copy is made for the dominant purpose of obtaining legal advice or for use in pending or contemplated litigation (see *Australian Federal Police* (supra) at 509 and 597).

(f) the privilege does not attach to documents that evidence transactions such as contracts, conveyances, declarations of trust, etc, even if they are delivered to a solicitor or counsel for advice or use in litigation (see *Baker v Campbell* (1983) 153 CLR 52 at 86, 112 and 122-123);

(g) any extension of the scope of the privilege must not go beyond the rationale for the privilege (see *Law Society of New South Wales* (supra) at [33-35] and the authorities cited therein). That rationale being "the furtherance of the administration of justice through the fostering of trust and candour in the relationship between lawyer and client" (see *Fagan v State of New South Wales* [2004] NSWCA 182 at [71];

(h) the privilege is waived if the confidential communication is disclosed to a third party, either expressly or inadvertently (see *Mann v Carnell* (1999) 201 CLR 1; *Goldberg v Ng* (1995) 185 CLR 83 and *Attorney General (NT) v Maurice* (1986) 161 CLR 475).

44 The authorities constantly emphasise that for a document to attract the privilege it must be established that it came into existence for and was prepared for the obtaining or giving of legal advice or for use in pending in contemplated litigation (see *O'Reilly v Commissioner of State Bank of Victoria* (1982) 153 CLR 1 at 22). As mentioned above, following the decision in *Esso* (supra), this need not be the sole purpose for which the document came into existence but it must be the dominant purpose.

45 Where a solicitor forwards to his client a copy of a letter received from the solicitor of the opposing party and the letter is forwarded for the dominant purpose of receiving instructions and giving legal advice the communication of the letter is privileged. However, if the letter is forwarded for information only or another purpose it does not attract the privilege. That is, it is not connected with a confidential communication that is privileged. The same would apply to draft agreements prepared by the solicitor, on instructions from the client, and forwarded to the client in confidence for the dominant purpose of giving legal advice and/or seeking further instructions for the provision of legal advice (see *Australian Competition & Consumer Commission v FFE Building Services Ltd* [2003] FCA 1181 and *Australian Rugby Union Ltd v Hospitality Group Pty Ltd and Ors* [1999] FCA 1061).

46 It is also well established that a disclosure of a privileged communication to a third party does not always result in a waiver of a privilege. This is particularly so where the disclosure is for a limited purpose (see *Australian Rugby Union Ltd* supra, *Abigroup Ltd v Akins (1997)* 42 NSWLR 623, *State Bank of South Australia v Smoothdale (No 2) Ltd* (1995) 64 SASR 224 and *Woollahra Municipal Council v Westpac Banking Corp* (1994) 33 NSWLR 529; c.f. *Complete Technology Pty Ltd v Toshiba (Australia) Pty Ltd* (1994) 53 FCR 125). This means, for example, where a solicitor 's communication (e.g. a letter) with an opponent's solicitor, discloses the contents of a privileged confidential communication between the solicitor and the client, and it is established that the circumstances were such

that this disclosure was limited and that the opponent's solicitor was bound to retain the confidentiality of that communication, then the privilege has not been waived in respect of a disclosure at large.

**The evidence**

47 The Council provided the Tribunal with a copy of the exempt documents on a confidential basis. These documents were contained in three leaver arch folders marked Volume 1, 2 and 3. In accordance with s.55 of the FOI Act, on 28 January 2005, the Tribunal heard submissions, in confidence, from the Council in respect of each of the exempt documents. During the in confidence hearing, having regard to the contents of the document in question, I indicated, subject to any submissions received from the applicant, those documents which in my opinion were privileged. As a result of that hearing the Council; a) granted the applicant access to some of the documents listed on the list of exempt documents prepared by Council in October 2004, b) granted the applicant access to numerous documents that were attached to the listed exempt documents and c) provided the applicant and the Tribunal with a revised list of documents for which the exemption legal professional privilege had been claimed and another list of the documents for which access had been granted.

48 Following the final day of hearing on 16 March 2003, I re-examined and re-considered the documents for which an exemption on the grounds of legal professional privilege has been claimed. The overwhelming majority of these documents consist of correspondence (letters, emails and faxes) between an officer of the Council and the Councils' solicitors Mallesons Stephen Jaques together with file notes of conversations between officers of the Council and Council's solicitors. There are also internal memoranda between officers of the Council which I am satisfied were prepared for the dominant purpose of obtaining legal advice from Council's solicitor (e.g. Volume 1 document No 20) and are privileged.

49 The documents contained in Volume 3 of the exempt documents contain copies of a list of litigation matters that the Council was involved in at the time the list was prepared. That list is entitled "Current Matters List" and was prepared by the solicitors of the Council for the purpose of informing members of the Council and the Legal Services Committee of the Council of the status of these proceedings. An edited version of this list is available to the public and these were made available to the applicant for inspection when she attended the offices of the Council in January 2003. However, Council refused access to the whole document on the grounds that they were privileged. During the hearing of the matter the Council altered its position and only pressed their claim of exemption for those matters that related to prospects of success. In this regard I am satisfied that Council has made out its claim in respect of these details and I note that Council has agreed to give the applicant a copy of these Lists with the exempt material deleted.

50 Accordingly, I am satisfied that the documents listed in paragraph 51 below were brought into existence for the dominant purpose of legal advice or for use in contemplated or pending litigation and are therefore exempt under cl.10 of Schedule 1 of the FOI Act.

51 However, Council has failed to produce evidence to the Tribunal that establishes that the following documents were brought into existence for the dominant purpose of legal advice or for use in contemplated or pending litigation:

Volume 2

document 83 This is handwritten document described in the Council's list as being "Meeting Notes" of Mr Raneri. On its face the document is a record of a meeting that Mr Raneri attended and it was not a meeting with the Council's solicitors. The notes do not contain any indication that they were for the purpose of legal advice or for use in the litigation. Accordingly, on the material before the Tribunal, in my opinion this particular document is not privileged.

document 84 This document is a facsimile from Mr Ranerie to Ms Jagot of Mallesons Stephen Jaques, which evidences an agreement. As mentioned above, such a communication is not privileged and in my opinion it does not become privileged by sending it to the Council's solicitors. Had the agreement been sent for the purpose of receiving legal advice then the position would have been different. In this case the document does not state that it was sent for that purpose.

document 96 This document is a draft affidavit for which the Council is only seeking exemption is paragraph 14. In my opinion, having regard to the content of that paragraph the communication recorded therein merely records what was said on a particular day by another person and it was not communicated for the purpose of obtaining legal advice or for use in pending litigation.

Volume 3

documents 9, 10, 11 and 12 These documents all relate to the same subject matter and their content does not give rise to an inference that they came into existence for the purpose of legal advice or for use in pending litigation. The fact that the correspondence emanated from the Council's solicitors does not make the communication in that correspondence privileged. As there is no other evidence before the Tribunal and no other claim for exemption is made, I am not satisfied that these documents are exempt.

document 28 Attached to this particular Current Matters List is a PDS legal costs summary and I have understood the comments of Council in its revised list of exempt documents to mean that privilege is not claimed in respect of this document. In the event my understanding is incorrect I find that this document is not privileged.

document 36 & 37 These documents are briefs to the Legal Services Committee from the Property and Administration Officer of the Council. The contents of these documents do not give rise to an inference that they came into existence for the purpose of legal advice or for use in pending litigation. As there is no other evidence before the Tribunal and no other claim for exemption is made, I am not satisfied that these documents are exempt.

**Conclusions**

52 Accordingly, I find that the Council's decision in respect of the following documents listed in the Council's revised list of exempt documents is the correct and preferred decision:

**Volume 1** : Document No 1 (covering letter only), 2, 3, 4, 5 (covering letter only), 6 (3rd letter only), 9, 10, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21 (covering letter and draft letter attached only), 22 (covering letter and draft letter attached only), 23, 24 (covering letter and attached file note only), 27 (covering letter and draft letter attached only), 28, 29, 30 (covering letter only), 31 (covering letter only), 32, 33, 34 (covering letter only), 36 (covering letter only), 37 (covering letter only), 39, 43, 44, 45, 46 (covering letter only), 47, 48, 49 (covering letter only), 51 (covering letter only), 52, 55 (covering letter only), 56, 57, 59 (covering letter only), 60, 62 (covering letter only), 64 (covering letter only), 66 (covering letter only), 67 (covering letter only), 68 (covering letter and letter attached only), 69 (covering letter and letter attached only), 70, 73, 74, 77 (covering letter only), 78 (covering letter only), 79 (covering letter only) and 80 (covering letter only)

**Volume 2**: Document No 81 (covering letter and file note attached only), 85, 87 (covering letter only), 89 (covering letter only), 92, 96, 98 (covering letter and draft letter attached only), 102 (covering letter only), 103, 104 (covering letter only), 106, 107, 108, 109 (covering letter only), 110 (covering letter only), 111, 112 (all three documents), 113, 114 (covering letter only), 115, 116, 117, 118 (covering letter only), 119 (covering letter only), 120 (covering letter and the first letter attached only), 121 (covering letter and the first letter attached only), 122, 123 (covering letter only), 125 (covering letter and attached draft affidavits),126 (covering letter only), 127, 128 (covering letter only), 131, 132, 133

**Volume 3**: Document No 1 (covering letter and attachment thereto), 2 (covering letter only), 3 (covering letter and attachment thereto), 4, 5 (covering letter only), 6, 7 (covering letter and letter attached only), 8 (covering letter and letter attached), 13 (covering letter and letters and notes attached), 16 (details, to the extent that they relate to prospects of success, in the columns headed "description" and "results" of the Current Matters List, email from McIntosch to Raneri dated 10 October 2001, email from Raneri to Kaposi dated 12 October 2001 and note by Kaposi dated 12 October 2001 only), 17, 19, 20, 21 (covering letter only), 22 (covering letter, memorandum, file notes and photographs only), 24 (details, to the extent that they relate to prospects of success, in the columns headed "description" and "results" of the Current Matters List only), 25 (details in the columns headed "Status/Advice on prospects " of the Current Matters List only), 26 (details in the columns headed "Status/Advice on prospects " of the Current Matters List only), 27 (details in the columns headed "Status/Advice on prospects " of the Current Matters List only), 28 (Memorandum of Adrian Panuccio dated 18 September 2002, Register of Appeals & Court Action Matters and

the details in the columns headed "Status/Advice on prospects " of the Current Matters List only), 29 (details in the columns headed "Status/Advice on prospects " of the Current Matters List only), 30, 31, 32 (Memorandum of Adrian Panucccio dated 25 March 2003, Draft tender for legal services and details in the columns headed "Status/Advice on prospects " of the Current Matters List only), 33 (details in the columns headed "Status/Advice on prospects " of the Current Matters List only), 34 (Memorandum of Adrian Panuccio dated 5 November 2003, Register of Appeals & Court Action Matters and the details in the columns headed "Status/Advice on prospects " of the Current Matters List only), 35, and 38.

53 I also find that the Councils decision in respect of the following documents is not the correct and preferred decision:

**Volume 2** : 83, 84 and 96
**Volume 3**: 9, 10, 11 12, 28, 36 and 37

**Conduct of the Council**

54 S.58 of the FOI Act enables the Tribunal to report "improper conduct" by an officer of an agency to the relevant Minister. "Improper conduct" is described in the section to occur when an officer of an agency fails "to exercise in good faith a function conferred or imposed on the officer by or under the Act."

55 As I mentioned in paragraph 6 above, in my opinion there is no evidence of improper conduct, as defined in s.58 of the FOI Act by any officer of the Council. However, in my opinion, the Council needs to re-examine its procedures for dealing with an FOI request, in particular its procedures in respect to what is required in the written notification of its determination, initially and on an internal review where access to documents is to be refused. As explained below, in my opinion, the Council failed to fully comply with these requirements: see s.28(2) of the FOI Act.

56 As mentioned in paragraph 7 above, within 21 days of receipt of an FOI request, an agency is required to identify documents that it holds, which come within the terms of the request and make a determination as to whether the applicant is to be granted access to the documents identified or whether access is to be refused. Furthermore, under s. 28 of the FOI Act, an agency is required to give the FOI applicant written notification of its determination. In that written notification an agency is required to disclose the name of the officer who made the determination, the date it was made and where it had been determined to refuse access to documents, the reason for refusal and the findings of fact underlying those reasons: see 28(2)(a), (e), and (g) FOI Act. The written notification must also advise the FOI applicant of his/her appeal rights: see s.28(2)(g)(ii) FOI Act. These appeal rights are an important feature of the FOI Act in that an FOI applicant is able to seek internal review of the original determination where an agency has refused access to documents as well as an external review if dissatisfied with the internal review determination. No such right exists under the Council's open access policy.

57 In my opinion, the object of the written notification requirements in the FOI Act is two fold, first to ensure that agencies have met the requirements of the FOI Act in respect of access to documents and second to provide the FOI applicant with sufficient information about the documents for which access is refused so that that the FOI applicant can make an

informed decision on whether or not to seek review of a determination by the agency. The extent of the information provided will depend on the circumstances. However, I note that in many cases agencies prepare a list of documents for which an exemption is claimed. That list usually provides details of the date of the document, the nature of the document (i.e. letter, file note etc.), its author, the recipient and the exemption relied on. No such list is provided in respect of documents for which access is granted and in my opinion this is consistent with the provisions of the FOI Act.

58 In this application it was not disputed that Council received the applicant's FOI request on 27 December 2002. On receiving the request Council was entitled to request an advanced deposit for the costs of dealing with the applicant's FOI request if it was of the view that the application fee was not sufficient to cover its costs: see s.21 FOI Act. Where such a deposit is requested, Council is entitled to refuse to continue to deal with the applicant's request until such a deposit is paid: see s.22 FOI Act. In this application, no advance deposit was requested. Accordingly, the Council was required to make a determination by 17 January 2003. I note that Ms Gilbert had formed the view that the 21 days was 21 working days, which was conceded to be incorrect.

59 In my opinion, for the reasons I have already indicated, Ms Gilbert's letter of 8 January 2003 was not intended to be a written notification of a determination that she had made pursuant to s.24 of the FOI Act even though she indicated that access would be granted to certain documents and refused for others. It is noted that enclosed with that letter was a pro-forma FOI application form prepared by Council, which the applicant was requested to complete. There is no such requirement under the FOI Act and the applicant's letter of 23 December 2002 was all that was required in order for her to make a request under the Act.

60 In my opinion, Ms Gilbert's letter of 21 January 2003 was also not intended to be a written notification of a determination that she made pursuant to s.24 of the FOI Act. As I have indicated above, at all times Ms Gilbert appears to have operated under the Council's open access policy. However, I do find that on 21 January 2003, Ms Highton made a determination as to what documents held by Council came within the terms of paragraphs 1, 2 and 4 of the applicant's FOI request and which of these the applicant would be given access to and those for which access was to be refused on the grounds of legal professional privilege. It was notification of the details of this determination (i.e. details of all the documents for which access was refused and not only those relating to costs) that the applicant should have been advised of in accordance with s.28(2) of the FOI Act. Although this determination was made outside the 21 day period, it was made shortly thereafter and in the circumstances was not deliberately delayed. The failure may have arisen because Ms Highton, was given responsibility for determining what documents were privileged and for which the applicant was to be refused access, but she had no responsibility in respect of notifying the applicant of her determination. This was the responsibility of Ms Gilbert.

61 As mentioned above, as the applicant had not received notification of the Council's determination by 17 January 2003, she made an application for internal review pursuant to ss. 24(1) & 34 of the FOI Act. Where an application is made for internal review s.34(4) of the FOI Act requires an agency to determine the internal review within 14 days and to provide the applicant with written notification of the determination in accordance with s.28(2) of the FOI Act: see s.34(4) FOI Act. The purpose of an internal review is to have another person within the agency to consider the FOI request a fresh. That person is not to

have had any involvement with the original determination. In this case, Ms Holloway, the General Manager of the Council made the internal review determination. Although Ms Holloway's determination was made within the requisite time, the written notification of her determination as set out in her letter of 3 February 2003 failed to give any details about the documents that had been extracted by Ms Highton on 21 January 2003. Nor did the letter make any reference to the applicant's appeal rights. Accordingly, this notification of the internal review application also failed to comply with the requirements of s.28(2) of the FOI Act. The Tribunal did not receive any evidence from Ms Holloway as to what information she was provided with when making her determination. At the same time there is no evidence to indicate that she acted in other than good faith when making her determination. However, in light of the evidence before the Tribunal, I am left with the impression that she too was either unfamiliar with the notification requirements of the FOI Act, or she believed that these did not need to be followed as the Council's open access policy proved the applicant with greater access to documents held by Council that provided under the FOI Act.

62 As a result of this belief Ms Holloway and Ms Gilbert, who were responsible for responding to the applicant's FOI request failed to meet the obligations of Council under the FOI Act. The FOI Act does not prohibit the Council from giving effect to the open access policy when responding to an FOI request. This policy can be incorporated into Council's procedures for responding to FOI requests as refusal to access to documents is discretionary: see s.25(1) of the FOI Act. That is, even though there is a basis, as prescribed under the Act, for Council to refuse access to a particular document, Council may give access to that document. However, if a determination is made to refuse access to any document, this refusal must be on grounds set out in the FOI Act and Council must comply with the requirements of the written notification provisions of the FOI Act, which includes informing the FOI applicant of the existence of these documents.

63 The applicant also raised concerns about the manner in which she was given access. In her FOI request the applicant had requested both access to and copies of documents. Accordingly, by providing the applicant with an opportunity to examine all the relevant documents to which Council had determined she could have access to in the DataWorks system and the relevant microfiche and hard copy files from the other two systems was appropriate. The question is whether the applicant should also have been given copies of each of these. There was no evidence about the number of documents that were required to be copied, however, it is noted that in her letter of 21 January 2003, Ms Gilbert advised the applicant that her request for copies of all files was considered unreasonable (see paragraph 19 above). Ms Gilbert did not give any evidence as to why she considered the request for copies as being unreasonable. As mentioned above, a ground on which copies could have been refused was the fact that in making copies available would result in unreasonably diverting the Council's resources (see paragraph 9 above and s.27(3)(a) of the FOI Act). In my opinion this was not the basis on which Ms Gilbert formed the view that the applicant's request for copies was unreasonable. Again the basis of the unreasonableness would appear to arise from what Ms Gilbert considered to be a reasonable form of access, as provided in the Council's open access policy. That is, the applicant was given the opportunity to examine all the relevant documents so that she could identify which documents she required a copy of. I find that the applicant consented to this approach in that she did in fact attend the offices of the Council and she flagged copies of those documents she

required a copy of. It was regrettable that she experienced difficulties with the DataWorks system and the microfiche machine. These difficulties were attended to by Ms Highton and she was at all times willing to allow the applicant further access to examine the documents and to request copies of those she wanted to have copies of. However, the applicant chose to no longer avail herself of this opportunity.

64 Although this may not necessarily have relieved the Council from its obligations under s.28(2) of the FOI Act to provide copies of all documents as requested, in my opinion, it is unnecessary to decide this issue as it would appear that at the time of the hearing the applicant had obtained copies of those documents she had indicated and continued to indicate that she required. Where, as in this case, an FOI applicant seeks copies of all documents that are described in a broad and general class of documents and the agency has numerous documents that come within that general description a practical approach as adopted by the Council in this case would appear to be desirable. This would avoid unnecessary costs to both the applicant and the agency concerned.

65 The final matter raised by the applicant was the Council's delay in providing the applicant with the documents relating to legal costs following the decision of the Ombudsman in July 2003. As mentioned above, these documents were provided, without deletions, to the applicant on 28 October 2003. It is difficult to understand how the Council came to the view that the documents were privileged. However, on the material before the Tribunal, it would appear that this view, even though it was incorrect, was genuinely held. In this regard I note that the Council sought further legal advice, which it was entitled to do, following the decision of the Ombudsman. Although the position of the Council was misconceived, and there was a further delay in obtaining legal advice, in my opinion, there is no basis to make adverse findings against any officer of the Council in this regard.

**Orders**

66 The Tribunal orders

> (a) the decision of the Council to refuse the applicant access to the documents referred to in paragraph 52 of this decision is affirmed:
> (b) the decision of the Council to refuse the applicant access to the documents referred to in paragraph 53 of this decision is set aside and in substitution thereof a decision that the applicant be granted access to these documents;
>
> (c) in respect of those documents referred to in (a) above which are exempt in part, Council to provide the applicant with a copy of those documents with the exempt material deleted within 28 days of this decision; and
>
> (d) Council to provide the applicant with a copy of the documents referred to in (b) within 28 days of this decision.

# Administrative Decisions Tribunal

## New South Wales

| | |
|---|---|
| **Medium Neutral Citation:** | **Saggers v Environment Protection Authority [2013] NSWADT 204** |
| **Hearing dates:** | On the papers |
| **Decision date:** | 16 September 2013 |
| **Jurisdiction:** | General Division |
| **Before:** | S Montgomery, Judicial Member |
| **Decision:** | 1. The decision under review is affirmed.<br><br>2. The application for a referral pursuant to section 112 of the Government Information (Public Access) Act 2009 is refused |
| **Catchwords:** | Access to government information - access application - reasonable searches - bad faith - section 112 referral |
| **Legislation Cited:** | Administrative Decisions Tribunal Act 1997<br>Government Information (Public Access) Act 2009<br>Freedom Of Information Act 1989 |
| **Cases Cited:** | Camilleri v Commissioner of Police, NSW Police Force [2012] NSWADT 5<br>Drake v Minister for Immigration and Ethnic Affairs [1979] AATA 179; (1979) 46 FLR 409<br>Mid Density Developments Pty Ltd v Rockdale Municipal Council (1993) 116 ALR 460<br>O'Hara v North Sydney Council [2005] NSWADT 100 |
| **Texts Cited:** | Statutory immunities: when is good faith honest ineptitude? M. Henry; Australian Journal of Emergency Management; 2000 pages 10 -15. |
| **Category:** | Principal judgment |
| **Parties:** | Colin Saggers (Applicant)<br>Environment Protection Authority (Respondent) |
| **Representation:** | R Fox, Office of Environment and Planning (Respondent) |
| **File Number(s):** | 123289 |

# REASONS FOR DECISION

1 GENERAL DIVISION (S MONTGOMERY, (JUDICIAL MEMBER)): This is an application for review of a determination by the Respondent, the Environment Protection Authority, in regard to an application by the Applicant, Mr Saggers, seeking access to information held by the Respondent ("the access application"). In his access application under the *Government Information (Public Access) Act* 2009 ("the GIPA Act") the Applicant sought:

> "All of the documentation in the possession of the agency that will have been created by said agency to process GIPA Informal Application No 10 commencing with the attached letter from Mr Rob Hogan dated 15 June 2012 up to and till the recept of this application."

2 The Respondent received the access application on 4 September 2012. The Respondent's GIPA/Privacy Officer, Dr Racho Donef, determined the access application on 14 September 2012.

3 The Informal request for documents referred to as 'GIPA Informal Application No 10' was in the following terms:

> Those documents held by the agency that would constitute the review made under the *Protection of the Environment Operations Act* (the Act) to license No 11483. The date would be some time in the years 2003/4/5. It will be the 5 year review period prior to the review commenced 18th June 2009.

4 Dr Donef identified a number of documents as falling within the scope of the access application and he determined to release the documents in full. Other documents that were identified were withheld as not falling within the scope of the access application.

5 The Applicant subsequently advised Dr Donef that he had not received attachments to one of the released documents. Those attachments were subsequently released.

6 The withheld documents were also subsequently released notwithstanding the view that that they did not fall within the scope of the access application.

7 It seems that Dr Donef had also dealt with the GIPA Informal Application No 10 and that he had identified eight documents as falling within the scope of that application. He determined that four of the documents were to be released to the Applicant. The remaining four documents were withheld from the Applicant on the basis that there was a public interest consideration against disclosure of information because disclosure of the information could reasonably be expected to prejudice a person's legitimate business, commercial, professional or financial interests and that the information included personal information about a person of a kind that required consultation: clause 4(d) of the table to section 14 of the GIPA Act and section 54(2)(a) of the GIPA Act.

8 The documents requested in the GIPA Informal Application No 10 were subsequently released to the Applicant.

9 In his application to the Tribunal the Applicant raised as an issue for determination as to whether a reasonable search was taken for the purposes of section 53(2) of the GIPA Act. He subsequently clarified his application in the following terms:

> There are two main issues for determination in this application. These are
>
> (a) Whether the Determining Officer adequately searched for all documents held that came within the terms of the applicant's Formal GIPA Request: and
>
> (b) Whether the documents that came within the terms of the applicant's request and for which the Determining Officer had refused access ... were exempt on the grounds of
>
> (i) having already been supplied during an Informal Request and
>
> (ii) were exempt on the grounds that they fell within Sect 14 Public Interest Considerations
>
> ...
>
> Related to these issues is whether the Determining officer of the EPA had acted inappropriately in the exercise of his duties on behalf of the EPA and that the Determining Officer responsible for dealing with the applicant's GIPA request failed to meet their obligations under the GIPA Act and that they failed to exercise in good faith the functions conferred and imposed on them: see s.112 GIPA Act 2009

10 The parties agree that the matter should be determined on the papers without the need for a hearing. I agreed with that position.

11 Pursuant to section 104 of the GIPA Act, the Information Commissioner has a right to appear and be heard in proceedings before the Tribunal. A representative of the Information Commissioner attended planning meetings but subsequently elected to not make submissions in relation to the issues to be determined.

## Applicable legislation

12 The objects of the GIPA Act are set out in section 3(1) -

> In order to maintain and advance a system of responsible and representative democratic Government that is open, accountable, fair and effective, the object of this Act is to open government information to the public by:
>
> (a) authorising and encouraging the proactive public release of government information by agencies, and
>
> (b) giving members of the public an enforceable right to access government information, and
>
> (c) providing that access to government information is restricted only when there is an overriding public interest against disclosure.

13 'Government information' is given a wide meaning (section 4) being 'information contained in a record held by an agency.' 'Agency' is also defined in section 4. It includes "(c) a public authority." Public authority is in turn defined in Clause 2 of Schedule 4 to mean, among other things, "a body (whether incorporated or unincorporated) established or continued for a public purpose by or under the provisions of a legislative instrument". The Respondent is an agency to which the GIPA Act applies.

14 The Act establishes a presumption in favour of the disclosure of government information unless there is an overriding public interest against disclosure (section 5). Applicants for access to government information have a legally enforceable right to be provided with

access to that information, unless there is an overriding public interest against disclosure (section 9). The GIPA Act overrides other statutory provisions that prohibit disclosure, apart from the 'overriding secrecy laws' that are set out in Schedule 1 (section 11). Schedule 1 sets out information concerning which it is conclusively presumed that there is an overriding public interest against disclosure (section 14(1)).

15 With respect to other government information, the Act establishes a principle that there is pubic interest in favour of disclosure (section 12(1)). Section 12(2) says that public interest considerations in favour of disclosure are not limited.

16 There will only be an overriding public interest against disclosure when the public interest test in section 13 is satisfied. It provides -

> There is an ***overriding public interest against disclosure*** of government information for the purposes of this Act if (and only if) there are public interest considerations against disclosure and, on balance, those considerations outweigh the public interest considerations in favour of disclosure.

17 In considering whether there is an overriding public interest against disclosure section 16 provides that the following principles apply -

> (a) Agencies must exercise their functions so as to promote the object of this Act.
>
> (b) Agencies must have regard to any relevant guidelines issued by the Information Commissioner.
>
> (c) The fact that disclosure of information might cause embarrassment to, or a loss of confidence in, the Government is irrelevant and must not be taken into account.
>
> (d) The fact that disclosure of information might be misinterpreted or misunderstood by any person is irrelevant and must not be taken into account.
>
> (e) In the case of disclosure in response to an access application, it is relevant to consider that disclosure cannot be made subject to any conditions on the use or disclosure of information.

18 The public interest considerations against disclosure are limited to those set out in the Table to section 14. Section 14(2) provides that -

> The public interest considerations listed in the Table to this section are the only other considerations that may be taken into account under this Act as public interest considerations against disclosure for the purpose of determining whether there is an overriding public interest against disclosure of government information.

19 Section 53 of the GIPA Act provides:

> 53 Searches for information held by agency
>
> (1) The obligation of an agency to provide access to government information in response to an access application is limited to information held by the agency when the application is received.
>
> (2) An agency must undertake such 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 to the agency.
>
> (3) The obligation of an agency to undertake reasonable searches extends to searches using any resources reasonably available to the agency including resources that facilitate the retrieval of information stored electronically.

(4) An agency is not required to search for information in records held by the agency in an electronic backup system unless a record containing the information has been lost to the agency as a result of having been destroyed, transferred, or otherwise dealt with, in contravention of the State Records Act 1998 or contrary to the agency's established record management procedures.

(5) An agency is not required to undertake any search for information that would require an unreasonable and substantial diversion of the agency's resources.

20 Section 112 of the GIPA Act provides:

112 Report on improper conduct

If the ADT is of the opinion as a result of an ADT review that an officer of an agency has failed to exercise in good faith a function conferred on the officer by or under this Act, the ADT may bring the matter to the attention of the Minister who appears to the ADT to have responsibility for the agency.

Part 6 Protections and offences

21 Section 113 of the GIPA Act provides:

113 Protection in respect of actions for defamation or breach of confidence

(1) If government information is disclosed pursuant to a decision under this Act, and the person by whom the decision is made believes in good faith, when making the decision, that this Act permits or requires the decision to be made:

(a) no action for defamation or breach of confidence lies against the Crown, an agency or an officer of an agency by reason of the making of the decision or the disclosure of information, and

(b) no action for defamation or breach of confidence in respect of any publication involved in, or resulting from, the disclosure of information lies against the author of a record containing the information or any other person by reason of the author or other person having supplied the record to an agency.

(2) Neither the giving of access to information pursuant to a decision under this Act nor the making of such a decision constitutes, for the purposes of the law relating to defamation or breach of confidence, an authorisation or approval of the publication of a record containing the information or its contents by the person to whom the information is disclosed.

22 Section 114 of the GIPA Act provides:

114 Protection in respect of certain criminal actions

If government information is disclosed pursuant to a decision under this Act, and the person by whom the decision is made believes in good faith, when making the decision, that this Act permits or requires the decision to be made, neither the person by whom the decision is made nor any other person concerned in disclosing the information is guilty of an offence merely because of the making of the decision or the disclosing of information.

23 Section 115 of the GIPA Act provides:

115 Personal liability

No matter or thing done by an agency or officer of an agency, or by any person acting under the direction of an agency or officer of an agency, if the matter or thing was done in good faith for the purposes of executing this Act, subjects the officer or person so acting, personally to any action, liability, claim or demand.

24 Persons aggrieved by reviewable decisions have a number of options available to press their access applications. First, they may ask the agency to conduct an internal review. A decision made on internal review is a reviewable decision. A person aggrieved may seek a review by the Tribunal (section 100). When this provision is read with section 38 of the *Administrative Decisions Tribunal Act* 1997, they confer jurisdiction on the Tribunal to review reviewable decisions under the GIPA Act.

25 The Tribunal's function on review under section 63 of the *Administrative Decisions Tribunal Act 1997* is to make the correct and preferable decisions having regard to the material before it, and any applicable written or unwritten law. It is well established that in considering an application for review the Tribunal is not constrained to have regard only to the material that was before the agency, but may have regard to any relevant material before it at the time of the review: *Drake v Minister for Immigration and Ethnic Affairs* [1979] AATA 179; (1979) 46 FLR 409.

26 In any review of a reviewable decision section 105 places the burden of justifying the decision on the agency concerned. In this particular matter, the Applicant has raised the issue of the sufficiency of the search undertaken by the Respondent. It is for the Respondent to show what steps were taken in the search for information falling within the scope of the access application and to satisfy the Tribunal that those steps were sufficient.

27 However, section 112 of the GIPA Act does not concern the review of a reviewable decision. The Applicant has raised the issue of whether an officer of the Respondent acted inappropriately in the exercise of his duties, failed to meet his obligations under the GIPA Act and failed to exercise in good faith the functions conferred and imposed on them.

28 The Applicant has requested referral of the matter pursuant to section 112. Such a referral requires that the Tribunal form the opinion that an officer of an agency has failed to exercise in good faith a function conferred or imposed on the officer by or under the GIPA Act. In my view, the Applicant has taken on a role comparable to that of prosecutor. He therefore bears the burden of establishing the facts upon which he seeks to rely for the purposes of section 112.

## The Applicant's Case

29 The Applicant has provided written submissions in support of his application. He submitted:

> Some time around the 14th July 2012 Dr Racho Donef PhD Senior Project Officer EPA GIPA/Privacy liaised with Ms Ruth Claydon of the EPA Waste Section as to how documents located for the Informal Request known as (GIPA No 10) should be assessed. It was agreed that eight documents would be disclosed as existing, four of the documents would be classified as documents to be released to the applicant and four would be withheld from the applicant under GIPA Section 14 Table 4 (d) or as GIPA Section 54 (2) (a) concerns the person's business, commercial, professional or financial interests.
>
> Subsequent release of those documents has demonstrated that those four documents classed as to be withheld from the applicant were not of the class GIPA Sect 54(2)(a) but were in fact normal agency working documents as set out in GIPA Section 7 (1) and should have been classified as to be released under the NSW Governments policy of authorised proactive release of government information.

For reasons not disclosed the agency did not release any documents from Informal request GIPA No 10 to the applicant until pressed during ADT Hearing No 123289 when four documents were released on the 30th October 2012 by Dr Donef's colleague Ms Sylvia Lowe.

On the 14th September 2012 Dr Racho Donef became the Determining Officer to EPA Formal Application GIPA No 214.

This application was a request for all of those documents pertaining to the acknowledged, but at that time unreleased Informal Application GIPA No 10, the thrust to the request being for all of those documents that constituted the PEOA Act 1997 [the *Protection of the Environment Operations Act* 1997] - Sect 78 Five Year Review into EPA License No 11283 on the 6th October 2004.

On receiving the request and without any form of consultation with the applicant Dr Donef manipulated the application to have the exclusive meaning as to it being a request only for the initial processing of the GIPA Informal Application No 10 with that being at the exclusion of any of those documents known to Dr Donef that had been captured under Informal request GIPA No 10.

On the 14th September 2012 Dr Donef released 6 documents in accordance with his gerrymandered version of the application and made claim to the applicant to have determined the application in full.

By letter dated the 18th September 2012 a request was made by the applicant to Dr Donef under GIPA Section No 58 How applications are decided, 58 (3) "If an agency finds that information or additional information is held by the agency after deciding an access application, the agency can make a further decision that replaces or supplements the original decision" and requested to have a supplementary decision to the one made on the 14th September 2012

On the 25th September 2012 Dr Donef made the decision to refuse the applicant's Sec 58 (3) request outright, citing as his reasons (a) the documents requested were outside of his version of the application and that (b) documents requested were documents that had already been supplied and therefore.were already available to the applicant and (c) that others of the documents requested were documents concerning a persons business, commercial, professional or financial interests and subject to GIPA Sect 54.

Following this 25th September 2012 refusal by Dr Donef, the applicant wrote once more on the 28th September 2012 to Dr Donef, followed up by a second sending on the 3rd of October 2012 with regard to his application. Those communications remain as correspondences not acknowledged by Dr Donef.

Under the pending scrutiny of an ADT Review Dr Donef conceded and on the 11th December 2012 released all of the known relevant documentation.

In doing so Dr Donef chose to disregard the applicant's previous request of 18th September 2012 for the very same documents under Section GIPA 58(3) "How applications are decided" and for reasons known only to him chose GIPA Section 76 "Providing access to information not applied for", a determination which in point of fact was not true as those documents would have previously been captured in the original application of 14th September 2012 and had been applied for by the applicant on the 18th September 2012 with that request made by the applicant being refused by Dr Donef.

The release of those documents on the 11th December 2012 confirmed they were not documents that could reasonably be classified by the agency as GIPA Section 54 (2) (b) "documents concerning a person's business, commercial, professional or financial interests" as Dr Donef had for the previous six months continuously claimed them to be.

30 In reply to the submissions provided on behalf of the Respondent, the Applicant submitted:

...

What the ADT is charged to review under GIPA Act 2009 Sect 112 is a concern made by an Applicant of an objective bad faith, not malfeasance in public office, which is a subjective bad faith.

> The Applicant submits that the facts to be reviewed arise from documents that are readily available to the agency in-house lawyer and are set out in the Applicant's submission in support of his Application to the Tribunal. The issue of concern to the Applicant is that the application was not regularly and properly done and that the determining officer did not demonstrate a scrupulous approach in the performance of his duties under the Act.
>
> It is to be noted that the Defendant solicitors do not disagree with the substance of the Applicant's submission. The only objection made by the Defendant solicitor to those facts and sequences as set out by the Applicant by way of a history of events being the Applicant's use of a single word, a word which was used to be seen only in a descriptive way i.e. to gerrymander or to make a decision so as to reach an undue conclusion.
>
> Whether the decision made was intentional is not something that can be concluded by the Applicant and as such was not intentionally made by the Applicant in his submission to the Tribunal.
>
> The Respondent's solicitors state that bad faith can only be heard by the ADT if there is what they call a prima facie case of subjective bad faith. I would point to [*O'Hara v North Sydney Council* [2005] NSWADT 100] - a case which the Respondent solicitors are well familiar. A case where a similar concern of officers acting inappropriately in the exercise of their duties on behalf of the agency was made out and argued with a Tribunal decision given by Higgins S (see NSWADT 100).
>
> The Defendants solicitors have provided a statement from the determining officer which on its face sets out to establish that all was done in accordance with normal acceptable procedures or at worst it is simply a case of honest ineptitude.
>
> On this the Applicant disagrees and wishes the Tribunal to use its powers to reach a decision as to whether the various actions of the determining officer in the handling of Application No GIPA 214 was made in either good or bad faith.

31 The Applicant has also referred to an article by Mark Henry titled *Statutory immunities: when is good faith honest ineptitude?* Australian Journal of Emergency Management; 2000; pages 10 -15. The article discusses the Federal Court decision in *Mid Density Developments Pty Ltd v Rockdale Municipal Council* (1993) 116 ALR 460 and other matters in which the concept of good faith was considered. The discussion considers objective bad faith and subjective bad faith. As noted above, the Applicant's submitted that for the purposes of section 112 of the GIPA Act, objective bad faith is the applicable standard.

32 In *Mid Density Developments Pty Ltd v Rockdale Municipal Council* the Federal Court found that the statute under consideration called for something more than 'honest ineptitude'. The court also stated that there must have been a real attempt by the statutory authority to answer the request for information at least by recourse to the materials available to it.

33 The Court held that the question of whether or not the concept of good faith embraces more than honesty will depend upon the statutory context. In certain circumstances, the test of whether actions are bona fide or in good faith will be based on the exercise of caution and diligence to be expected of an honest person of ordinary prudence. There would need to be a genuine attempt to perform the function correctly and an attempt to fulfil the duty of care.

34 In *Mid Density Developments Pty Ltd v Rockdale Municipal Council* the interests of the recipient of the information and others who incurred substantial liability on the faith of what was disclosed by the public authority were key considerations in determining the

broader meaning of `good faith'. Where a public authority alone is in a position to provide information and to act, a failure to do so would evidence a failure in the exercise of the ordinary prudence and diligence expected of an honest person. This would mean that no good faith immunity would apply.

35 The Court also considered the public policy reasons for the immunities, including that the provisions were designed to strike a balance between the interests of the authority and the recipient and in what circumstances the individual interest should yield to the wider public interest. The public policy considerations relevant to the application of the immunity will have to be assessed on the facts of each case.

## The Respondent's Case

36 The Respondent relies on the statement of Dr Donef and written submissions by its solicitor, Mr Fox.

37 Mr Donef provided a history of the matter and an outline of the steps he took in relation to the Applicant's access application. He stated (paragraph numbering and references to attachments deleted):

> I processed the application in good faith.
>
> As the request related to Mr Saggers' previous requests for information to the EPA and he had referred to Rob Hogan in the scope of the request, I issued a "search email" on 5 September 2012 to Belinda Lake, Jacqueline Ingham (Head Waste Compliance (Sydney Transfer Stations) and Ron Hogan (Manager Waste Operations, Waste Operations Unit). ...
>
> On 5 September 2012, Belinda Lake informed that she no longer worked within the transfer team and had no involvement with Mr Saggers' GIPAs.
>
> I am aware that a TRIM records search was conducted by Jacqueline Ingham to identify and locate Mr Saggers Informal GIPA request 10. Jacqueline Ingham handed me a copy of TRIM records search dated 7 September 2012. This search identified the location of the files in relation to GIPA Informal request 10. This indicated to me that she had completed a reasonable search for the files that might contain any relevant documents.
>
> Documents were subsequently provided to me by Sydney Transfer Stations Unit. I numbered and examined the six documents being mindful that under section 5 of the Act, there is a presumption in favour of the disclosure of government information unless there is an overriding public interest against disclosure. I found no factors overriding public interest against disclosure.
>
> On 13 September 2012 a cheque backdated to 30/08/12, correctly addressed to the Office of Environment and Heritage was received by OEH.
>
> I sent my notice of decision on 14 September 2012, one day after the cheque was received and eight working days after the application was received. In good faith, I released all documents provided to me by the EPA and I decided not to request any processing charges.
>
> Mr Saggers wrote to me on 18 September 2012 informing me that document numbered #2, a briefing note written by Ruth Clayden on 13 July 2012, had three attachments missing.
>
> On 19 September 2012 I forwarded Mr Saggers communiqué to the EPA and received a response on the same day, to the effect that:
>
> > I understood that the GIPA related to all documentation created by the said agency to process Informal GIPA No. 10 from the letter from Rob Hogan dated 15 June 2012 to the receipt of the application on the 28 August 2012. The attachments were not included, as they were not created by the agency during the said period.

> Mr Saggers was provided the associated documents listed under Attachment 1 in this formal GIPA. He has also been provided documents listed under Attachment 2 in Informal GIPA 10.
>
> In the event that Mr Saggers would like to obtain the documents listed under Attachment 3, I would suggest that formalise his Informal GIPA 10, excluding the 4 documents he already obtained under Informal GIPA 10, namely:
>
> "those documents held by the agency that would constitute the review made under the POEO Act to licence no. 11483. The date would be some time in the years 2003/415. It will be the 5 year review period prior to the review commenced 18 June 2009".
>
> We will then be able to consult with the third parties involved in the production of the 4 remaining documents under Attachment 3. ...

Based on this email, I understood that Mr Saggers had already been provided with Attachments 1 and 2 to Ruth Clayden's briefing note (document #2) in the EPA's response to Informal GIPA No 10.

On 25 September 2012, I wrote to Mr Saggers informing him that he had already received them ...

I then went on annual leave.

When I returned from annual leave, I was told that due to an administrative error, when responding to the informal request No 10 the EPA had not posted to Mr Saggers the attachments 1 and 2 to Ruth Clayden's briefing note. I understand that those documents were sent to Mr Saggers on 11/10/12, while I was on leave.

Mr Saggers wrote to the EPA again on 26 September 2012 requesting the four documents "referred to under Saggers GIPA No 10 as being documents refused as they would reveal information that concerns a third party business" while an ADT case was already in progress. This request was made under section 76 of the GIPA Act. Section 76 of the GIPA Act concerns additional documents, not in scope of the request and therefore constitutes a new request.

Nevertheless, exercising my discretion and having consulted the third party, I released the additional documents on 11 December 2012, within 11 working days of the additional documents request. I did this in order to assist resolving the matter, noting my view the documents fell outside the scope of the original request.

At all times I acted in good faith.

38 In relation to the Applicant's allegations regarding Mr Donef's conduct, Mr Fox submitted:

> 1. The Applicant has made serious allegations in his submissions about the conduct of Mr Donef without providing any evidentiary basis to support those submissions. This is despite the Tribunal specifically ordering him to serve the evidence on which he relies.
>
> 2. In the absence of evidence, the allegation that Mr Donef acted in bad faith to intentionally "gerrymander" the response to the application is vexatious and unsubstantiated. The Applicant has been unable to provide any documentary evidence that supports this assertion. Even on the face of the documents to which the Applicant refers in his submissions, there is no evidence of an intention to subvert the handling of the subject application in bad faith.
>
> 3. This case can be distinguished from a hypothetical case in which a document, or series of documents, discloses bad faith on the part of an officer of an agency. It can also be distinguished from a case in which evidence of bad faith arises during the course of evidence given by an officer.
>
> 4. The only evidence is that of Mr Donef; to the effect that he acted in good faith. The GIPA Act (ss 113, 114 and 115) contain presumptions that give specific protections to officers such as Mr Donef. These protections are designed to ensure a fair and effective system as set out in the objects of the GIPA Act (s3). These objects would be undermined by allowing the Applicant to press his allegations without at least a prima facie case. As a precedent, it may slow decision making as officers of agencies handling applications seek detailed legal advice on whether they will be exposed to personal sanction and inquisition.

5. In our view, a solicitor acting for Mr Saggers would be prohibited from making the allegations, given the absence of any proper evidentiary basis, by the ethical duties set out in the *Solicitors Rules*, Rule A.35. Further, the Applicant's submission may in fact be defamatory if published outside of legal proceedings.

6. It would be contrary to the objects of the ADT Act and the interests of justice for the Applicant to be allowed a forum to air the allegations against Mr Donef without evidence. We seek an order to that effect prior to the matter proceeding to hearing.

# Discussion

39 In *Camilleri v Commissioner of Police, NSW Police Force* [2012] NSWADT 5, Judicial Member Isenberg discussed the approach to be taken in determining whether the search undertaken by an agency is sufficient. In doing so she referred to a number of authorities that considered that issue for the purposes of the now repealed *Freedom Of Information Act* 1989 ("the FOI Act"). She stated:

> 10 In deciding whether a sufficient search has been carried out, the ultimate issue for the Tribunal is whether the agency's conclusion, that it does not hold the documents sought by the applicant, is sound.
>
> 11 What constitutes a sufficient search has been considered by the Tribunal in a number of cases. In *Hemeon v Commissioner of Police, New South Wales Police Service* [2002] NSWADT 201 at [18], the President said that the approach of the Information Commissioner of Queensland in *Shepherd and Department of Housing, Local Government and Planning* (1994) 1 QAR 464, should be adopted in addressing sufficiency of search issues. In Shepherd the Information Commissioner said at [19] that there were two questions for consideration were:
>
> > '(a) whether there are reasonable grounds to believe that the requested documents exist and are documents of the agency; and if so,
> >
> > (b) whether the search efforts made by the agency to locate such documents have been reasonable in all the circumstances of a particular case.'
>
> 12 This approach has been followed by the Tribunal in a number of cases such as *DQ v Commissioner of Police, New South Wales Police Service* [2002] NSWADT 215; *Patsalis v Commissioner of Police, New South Wales Police Service* [2003] NSWADT 213 (*Patsalis*); *Chapman v Commissioner of Police, New South Wales Police* [2004] NSWADT 35; *O'Hara v North Sydney Council* [2005] NSWADT 100 (O'Hara); and, *Curtin v Vice-Chancellor, University of New South Wales (No 2)* [2006] NSWADT 56.
>
> 13 It is not enough for the applicant to merely assert non-compliance on the basis of a general distrust of the agency: *Cianfrano v Director General Department of Commerce and anor (No 2)* [2006] NSWADT 195 at [69].
>
> 14 With regard to the second part of the test set out in *Shepherd*, President O'Connor considered the key factors in assessing whether a sufficient search had been carried out in *Miriani v Commissioner of New South Wales Police* [2005] NSWADT 187 at [30]. These factors included, relevantly, the ability to retrieve any documents that are the subject of the request. What constitutes a sufficient search will vary with the circumstances.
>
> 15 In *Patsalis* at [63], President O'Connor said that the standard of search which an agency is obliged to conduct is simply whether reasonable searches have occurred. The fact that there may be weaknesses in an agency's searches, or that there may be failures in its recordkeeping processes, did not necessarily lead to the conclusion that the search had not been reasonable, or sufficient, or adequate: see also *O'Hara*. In *Patsalis*, the documents to which the applicant sought access had existed but were subsequently lost. Numerous searches were conducted but failed to find them and, ultimately, his Honour concluded at [59] that 'it would be a waste of time to ask the agency to do any more searches'.

40 Dr Donef's evidence set out clearly the endeavours he undertook, on behalf of the Respondent, to retrieve the information that was within the scope of the Applicant's access application.

41 His evidence has not been challenged and I accept it. In my view there are no reasonable grounds to believe that there is any other information that falls within the scope of the Applicant's access application. In the circumstances, I am satisfied that Dr Donef's search efforts were reasonable in all the circumstances of a particular case.

42 Therefore, the decision under review should be affirmed.

43 In relation to the Applicant's allegations regarding Mr Donef's conduct, the Applicant relies on the decision of Judicial Member Higgins in *O'Hara v North Sydney Council* [2005] NSWADT 100. In that matter, Judicial Member Higgins considered the conduct of the North Sydney Council for the purposes of section 58 of the FOI Act. Section 58 provided:

> 58 Tribunal may report improper conduct
>
> If, as a result of a review application, the Tribunal is of the opinion that an officer of an agency has failed to exercise in good faith a function conferred or imposed on the officer by or under this Act, the Tribunal may take such measures as it considers appropriate to bring the matter to the attention of the responsible Minister for the agency.

44 Judicial Member Higgins discussed the conduct of the council's officers in dealing with the request for documents under the FOI Act and the operation of section 58. She was critical of the conduct but concluded:

> ... in my opinion there is no evidence of improper conduct, as defined in s.58 of the FOI Act by any officer of the Council. However, in my opinion, the Council needs to re-examine its procedures for dealing with an FOI request, in particular its procedures in respect to what is required in the written notification of its determination, initially and on an internal review where access to documents is to be refused. ... in my opinion, the Council failed to fully comply with these requirements: see s.28(2) of the FOI Act.

45 At paragraph [68] of the decision the Judicial Member stated:

> 68 The final matter raised by the applicant was the Council's delay in providing the applicant with the documents relating to legal costs following the decision of the Ombudsman in July 2003. As mentioned above, these documents were provided, without deletions, to the applicant on 28 October 2003. It is difficult to understand how the Council came to the view that the documents were privileged. However, on the material before the Tribunal, it would appear that this view, even though it was incorrect, was genuinely held. In this regard I note that the Council sought further legal advice, which it was entitled to do, following the decision of the Ombudsman. Although the position of the Council was misconceived, and there was a further delay in obtaining legal advice, in my opinion, there is no basis to make adverse findings against any officer of the Council in this regard.

46 It appears from paragraph [68] that the Judicial Member was adopting a subjective bad faith standard in that she considered it significant that while the officer's view was incorrect, it was genuinely held. In my view this is the applicable standard for section 112 of the GIPA Act. This is apparent from the statutory context as referred to by Mr Fox. However, if I am wrong in that regard, it does not affect my decision in this matter. For the reasons set out below, neither standard is met in the circumstances of this matter.

47 In the present matter, the Applicant's allegation appears to be related to Dr Donef's interpretation of the access application. As Mr Fox has noted, the only evidence that is before me is that provided by Dr Donef. That evidence is not challenged. Dr Donef's

makes it clear that he held a genuine belief in regard to the scope of the request and a genuine belief that the Applicant had been given attachments when in fact that was not the case.

48 Despite his belief that documents did not fall within the scope of the access request, Dr Donef nevertheless determined to release them.

49 On the subjective bad faith standard, there is no evidence of improper conduct. There is no basis for the view that Dr Donef has failed to exercise in good faith a function conferred on him by or under this Act.

50 In my view, the circumstances of this matter can be distinguished from those considered by the Court in the *Mid Density Developments Pty Ltd v Rockdale Municipal Council* case. This is not a case in which the Applicant has relied to his detriment on information provided by the Respondent. In any event, if objective bad faith is the applicable standard the unchallenged evidence suggests that Dr Donef made a real attempt to answer the request for information. His actions showed a genuine attempt to perform the function correctly and an attempt to fulfil the duty of care.

51 There is no evidence to suggest that the documents had been deliberately withheld. Even if that were the case, there is no reason to believe that Dr Donef was responsible for withholding them.

52 In my view, there is some merit in the Applicant's case to the extent that a narrow approach was taken to his access application and minimal attempt was made to clarify the scope. Further, a significant period of time passed between the initial request for information and the time at which it was ultimately provided. However, I do not agree that this demonstrates bad faith on the part of Dr Donef at either the subjective or objective standard. While it is far from the model of conduct that can be expected under the GIPA Act, it compares favourably with that discussed in O'Hara.

53 If, in fact, an officer of the Respondent has failed to exercise in good faith a function conferred on them by or under this Act, Dr Donef was not the relevant officer.

54 It follows, in my view, that the requested referral of the matter pursuant to section 112 of the GIPA Act should not be made.

# Order

1. The decision under review is affirmed.

2. The application for a referral pursuant to section 112 of the *Government Information (Public Access) Act* 2009 is refused

**********

Decision last updated: 16 September 2013

# Civil and Administrative Tribunal
## New South Wales

| | |
|---|---|
| **Medium Neutral Citation:** | **Zonnevylle v Department of Education and Communities [2016] NSWCATAD 49** |
| **Hearing dates:** | 25 August 2015 |
| **Date of orders:** | 11 March 2016 |
| **Decision date:** | 11 March 2016 |
| **Jurisdiction:** | Administrative and Equal Opportunity Division |
| **Before:** | S Montgomery, Senior Member |
| **Decision:** | 1. The Respondent's decision in matter No. 141329 is affirmed.<br>2. The Respondent's decision in matter No. 141330 is affirmed.<br>3. The application for a referral pursuant to section 112 of the Government Information (Public Access) Act 2009 is refused. |
| **Catchwords:** | ADMINISTRATIVE REVIEW - government information - unreasonable and substantial diversion of resources - whether searches undertaken were sufficient - jurisdiction - failed to exercise in good faith - function conferred on officer - the approach to be taken to section 112 issues |
| **Legislation Cited:** | Government Information (Public Access) Act 2009 |
| **Cases Cited:** | Camilleri v Commissioner of Police NSW Police Force [2012] NSWADT 5<br>Cianfrano v Premier's Department [2006] NSWADT 137<br>Colefax v Department of Education and Communities (NSW) (No 1) [2013] NSWADT 42<br>Colefax v Department of Education and Communities (NSW) No 2 [2013] NSWADT 130<br>Hemeon v Commissioner of Police, New South Wales Police Service [2002] NSWADT 201<br>Patsalis v Commissioner of Police, New South Wales Police Service [2003] NSWADT 213<br>Shepherd and Department of Housing, Local Government and Planning [1994] QICmr 7; (1994) 1 QAR 464<br>Zonnevylle v Department of Education and Communities [2015] NSWCATAD 10 |

| | |
|---|---|
| | Zonnevylle v NSW Department of Finance & Services [2016] NSWCATAD 47 |
| **Category:** | Principal judgment |
| **Parties:** | Peter Zonnevylle (Applicant)<br>Department of Education and Communities (Respondent) |
| **Representation:** | Solicitors:<br>P Zonnevylle (Applicant in person)<br>Crown Solicitor's Office (Respondent) |
| **File Number(s):** | 1410329; 1410330; 1410331; |

## JUDGMENT

1 The Applicant has sought review of several decisions by the Respondent in relation to access applications brought under the *Government Information (Public Access) Act* 2009 ("the GIPA Act") These proceedings are interrelated. They were considered to some extent in my decision in *Zonnevylle v Department of Education and Communities* [2015] NSWCATAD 10 in which I affirmed the Respondent's decision that was the subject of proceedings 1410331.

2 Matter numbers 1410329 and 1410330 remain outstanding. Matter number 1510515 appears to be merely a request for a referral under section 112 of the GIPA Act rather than separate applications for review of a decision by the Respondent.

### Background

3 The Respondent has provided this background to the matters. It appears to be accurate and I adopt it for the purposes of this decision.

4 In matter 1410331, the Applicant sought the following categories of documents:

1. DEC Policy document regarding use and management of DEC servers...

2. Any related document to the above which details the circumstances, procedures, guidelines, processes whereby DEC or their representatives may take action such that a party may be filtered/blocked from corresponding with det.nsw.edu.au

3. Code of conduct policy for use and management of DEC IT systems and complaints handling & processes including the details of the unit who is charged with handling complaints

4. Documents relating to the blocking of all emails related to or associated with a) Peter Zonnevylle and/or Maxine Zonnevylle....

5. Documents detailing who in authority were either consulted with the blocking/filtering of the above person/company/keywords/websites/emails and authorised the blocking/filtering of the above person/company/keywords/websites/emails.

6. Full list of all emails blocked/filtered

5

The Respondent was unable to identify any documents falling within categories 1 and 2. A document was found in relation to category 3, however, the decision maker determined that this document was publicly available, on the Department's website, and declined to provide a copy to the Applicant under section 59(1)(a) of the GIPA Act. The Respondent provided a copy of the link at which the documents could be accessed.

6 In relation to categories 4-6, the Respondent located 307 pages of documentation, most of which it decided to release in full. However, it decided to redact some material on the basis of legal professional privilege and public interest consideration 3(f) of the table in section 14. The Respondent, however, determined that processing fees applied and determined, pursuant to section 64(4) of the GIPA Act to make access to the documents conditional on the payment of the processing charge. As the Applicant had not paid the processing charge, she was not provided with any of the material.

7 I affirmed the Respondent's decision in these respects in my decision in relation to matter 1410331: *Zonnevylle v Department of Education and Communities* [2015] NSWCATAD 10. However, the Applicant in this matter, acting as agent for the Applicant in matter 1410331, has requested that the Tribunal take action under section 112 of the GIPA Act in regard to matter 1410331. I will address that issue later in these reasons.

8 Also before the Tribunal are the issues arising in matters 1410329 and 1410330. Both of these matters overlap with matter 1410331.

9 Matter 1410331 corresponds with the Respondent's departmental application number 13-252. Matter 1410329 corresponds with the Respondent's departmental application number 14-046 and Matter 1410330 corresponds with the Respondent's departmental application number 14-107. In each matter the parties have used the Tribunal file number and the Respondent's departmental application number interchangeably. I will also adopt that approach in these reasons.

**Matter 1410329/14-046**

10 The access application in Matter 1410329/14-046 sought access to the following information:

> "1. Documentation relating to where DEC senior staff authorized/directed the DEC IT department/server managers (or other body) to block; all emails from any/all of the following:
>
> a. Industrial & Scientific Supply Co. Pty Ltd (isscosyd@bigpond.com)
>
> b. ISSCO (www.issco.com.au; sales@issco.com.au; support@issco.com.au)
>
> c. ISSCOED (www.isscoed.com.au; sales@isscoed.com.au; support@isscoed.com.au)
>
> d. ScienceSupplies (www.sciencesupplies.com; sales@sciencesupplies.com.au, support@sciencesupplies.com.au)
>
> e. ScienceLabSupplies (www.sciencelabsupplies.com; sales@sciencelabsupplies.com.au; support@sciencelabsupplies.com.au)

f Peter Zonnevylle (iind1791@bigpond.net.au; pzgipa@yahoo.com.au; peterzgipa@yahoo.com.au)

g. and any other associated websites, email addresses that DEC searched for in connection to any/all of the above to any/all NSW state schools or any/all other NSW educational institution (TAFEs, colleges, etc.)

Documentation to include names of those authorizing/consulting/advising on this action, (for consultants/advisors, Gov. Id numbers will suffice to prevent personal privacy concerns). Documentation to include any associated reports produced by DEC relating to any of the above entities.

2. All referencing documentation (legislation, acts, codes, statutes, etc.) DEC staff used to determine/justify the above action/authorization to block the emails

3. Documentation detailing when each email address (a. to g.) was blocked

4. All referencing documentation (legislation, acts, codes, statutes, etc.) DEC staff used to determine/justify the action/authorization to block all emails from NSW state schools or any other NSW educational institution going to those emails detail in item 1. (a. to g.)

5. Documentation detailing searches done by DEC in order to identify any websites, emails associated with any of entities a. to g. (and by whom the searches were made by)

6. Any directives/memos/etc sent by DEC to NSW state schools or other NSW educational institutions relatingto any of the identities in 1".

11 I note that the Applicant subsequently purported to reduce the scope of this request and re-scope the access application. Notwithstanding that attempt, the scope of the request does not appear to have been narrowed to any significant extent and in some respects it purported to expand the scope by requesting information held by the Respondent up until July 2015 – the original access application was lodged with the Respondent in March 2014.

12 In the circumstances, I do not consider that the Applicant's attempt to re-scope his access application is valid. I therefore base my consideration on the original access application received by the Respondent and which was the subject of the Respondent's determination.

13 The Respondent's R/Deputy Secretary Education and Communities decided to refuse to deal with the Applicant's access application. The Applicant was advised that the reasons for the refusal were that:

- "the Department has decided a previous request for substantially the same information, made by a person who was acting in concert with you in connection with that application and there is no reason to believe that the Department would make a different decision on the new application (s.60 (1)(b));and
- in respect of any additional information you have requested, it would be an unreasonable and substantial diversion of resources to process (s.60 (1)(a))."

14 The decision maker formed the view that categories 1 - 4 and 6 of the access application requested information that fell within the scope of what had been sought in matter 1410331/13-252 and, accordingly, refused to deal with the application under section 60(1)(a) of the GIPA Act (unreasonable and substantial diversion of resources) and section 60(1)(b) ("the agency has already decided a previous application for the information concerned (or information that is substantially the same as that information ... and there are no reasonable grounds for believing that the agency would make a

different decision on the application"). The Respondent also submits that it would have been open to it to refuse to deal with category 5 on the basis of section 60(1)(a)of the GIPA Act. The question arises as to whether that is correct.

15 The decision maker accepted that category 5 could encompass documents that fall outside the scope of application 1410331/13-252 and, accordingly, performed additional searches for that information. These searches located no additional documentation.

16 The question arises therefore as to whether the searches undertaken were sufficient.

17 The Respondent submits that they were reasonable and sufficient. It further submits, however, that it would have also been open to the Respondent to refuse to deal with category 5 on the basis of section 60(1)(a).

*Section 60(3) of the GIPA Act*

18 Section 60(3) of the GIPA Act provides:

> (3) In deciding whether dealing with an application would require an unreasonable and substantial diversion of an agency's resources, the agency is entitled to consider 2 or more applications (including any previous application) as the one application if the agency determines that the applications are related and are made by the same applicant or by persons who are acting in concert in connection with those applications.

19 The question arises as to whether matter 1410331/13-252 and matter 1410329/14-046 are related for the purposes of section 60(3) of the GIPA Act.

20 The Respondent submits that matter 1410329/14-046 is an attempt to expand on what had already been requested in matter 1410331/13-252. The Respondent contends that it would be wrong for the Tribunal to treat the two applications as separate.

21 The Respondent further submits that it is not possible to excise category 5 of matter 1410329/14-046 from the remainder of that application, on the assumption that it goes beyond the scope of 1410331/13-252. To do so in order to avoid the request being interpreted as voluminous would be contrary to the objects of section 60(3) of the GIPA Act.

*Are Applications 1410331/13-252 and 1410329/14-046 related for the purposes of section 60(3)*

22 Judicial Member Molony considered section 60(3) in *Colefax v Department of Education and Communities (NSW) (No 1)* [2013] NSWADT 42 ("Colefax No 1"). He relevantly stated:

> 25. I do not accept that the number of previous applications submitted by Ms Colefax alone, or the resources previously allocated to dealing with them, are relevant factors that the Agency can take into account when refusing to deal with an application on the basis that request will require an unreasonable and substantial diversion of the agency's resources. While previous applications relating to substantially the same information having been determined is such a ground, previous applications that do not relate to the same information is not. ...
>
> ...
>
> 37. ... In contrast with the provisions of s 25(1a) of the repealed Freedom of Information Act 1989, s 60(3) of the GIPA Act expressly provides that an agency is entitled to

consider previous applications, " if the agency determines that the applications are related and are made by the same applicant."

38. The real issue, in my opinion, is whether the four applications are related. There is no doubt that they are made by the same applicant.

39. The Macquarie Dictionary Online defines related thus -

adjective 1. associated; connected.

2. allied by nature, origin, kinship, marriage, etc.

3. ....

40. Whether or not access applications made by the same applicant are related is a question of degree, with the assessment to be made in the light of the circumstances of each case, having regard to the purposes of s 60(1)(a) and (3). That purpose is to prevent a drain on departmental resources created by voluminous requests, and to prevent the splitting of access applications into two or more, whether at the same time or not, in an attempt to avoid them being categorised as voluminous. As *Secretary, Department of Treasury and Finance v Kelly* demonstrates the inquiry is concerned with common subject matter that connects the applications. The fact that they are made to separate Departments or Agencies will not necessarily prevent multiple inquiries relating to a common subject matter from being aggregated.

23 The Respondent submits that there are a number of reasons why the Tribunal should conclude that the two applications are related:

24 First, although application 1410331/13-252 was made by Ms Zonnevylle and 1410329/14-046 by Mr Zonnevylle, the material before the Tribunal quite clearly demonstrates that Mr and Ms Zonnevylle were, to some degree, acting in concert and had similar, if not identical, interests in receiving the information.

25 Secondly, from the date of the first planning meeting in matter 1410331/13-252 on 5 August 2014, Mr Zonnevylle represented that he had the standing to seek a review of the decision in matter 1410331/13-252 notwithstanding that he was not the person who had applied for review in that case. Further, Mr Zonnevylle has admitted that the applications are all interconnect.

26 Thirdly, there is an overlap between what has been requested in the two applications. The Respondent contends that categories 1 - 4 and 6 of 1410329/14-046 fall within the scope of what was requested in 1410331/13-252.

27 I understand that the Applicant has conceded that the matters are related. Nevertheless, on the basis of the information before me I am satisfied that Applications 1410331/13-252 and 1410329/14-046 are related for the purposes of section 60(3) of the GIPA Act.

*Would dealing with access application 14-046 represent a substantial and unreasonable diversion of resources?*

28 The Respondent submits that given the time already spent processing 1410331/13-252, searching for additional materials in 1410329/14-046 would represent an unreasonable and substantial diversion of resources for the purposes of section 60(1)(a).

29

In *Cianfrano v Premier's Department* [2006] NSWADT 137 at paragraphs [62] – [63] O'Connor DCJ identified considerations relevant to the assessment of that would represent an unreasonable and substantial diversion of resources for the purposes of the *Freedom of Information Act* 1989. He stated:

> 62 As I see it, the factors that are relevant to an assessment of the kind required by this case, include:
>
> (a) the terms of the request, especially whether it is of a global kind or generally expressed request; and in that regard do the terms of the request offer a 'sufficiently precise description to permit an agency, as a practical matter, to locate the documents sought within a reasonable time and with the exercise of reasonable effort' (see Rowlands P in Re Borthwick at 35)
>
> (b) the demonstrable importance of the document or documents to the applicant may be a factor in determining what in the particular case is a reasonable time and a reasonable effort (see further Rowlands P in Re Borthwick)
>
> (c) more generally whether the request is a reasonably manageable one giving due, but not conclusive, regard to the size of the agency and the extent of its resources usually available for dealing with FOI applications
>
> (d) the agency estimate as the number of documents affected by the request, and by extension the number of pages and the amount of officer time, and the salary cost
>
> (e) the reasonableness or otherwise of the agency's initial assessment and whether the applicant has taken a co-operative approach in redrawing the boundaries of the application
>
> (f) the time lines binding on the agency (in New South Wales as compared to other jurisdictions they are quite tight, for example, 21 days to respond to a request, 14 days to respond to an internal review request, as compared to 45 days and 14 days respectively in Victoria)
>
> (g) the indication that is found in the Annual Report reporting requirements suggesting that requests involving more than 40 hours' work are seen as lying at the upper end of the range; suggesting at least that the view of government administrators is that a processing time that goes well beyond 40 hours may properly raise concerns
>
> (h) regard needs to be had to the degree of certainty that can be attached to the estimate that is made as to documents affected and hours to be consumed; and in that regard, importantly whether there is a real possibility that processing time may exceed to some degree the estimate first made
>
> (i) possibly, the extent to which the applicant is a repeat applicant to the agency in respect of applications of the same kind, or a repeat applicant across government in respect of applications of the same kind, and the extent to which the present application may have been adequately met by those previous applications.
>
> 63 This is, of course, not intended, in any way, to be an exhaustive list of possible considerations.

30 In *Colefax v Department of Education and Communities (NSW) No 2* [2013] NSWADT 130, the Tribunal confirmed that the considerations identified in *Cianfrano* remained relevant to the assessment to be performed under section 60(1)(a).

31 The Respondent contends that what is sought in categories 1-4 and 6 of application 1410329/14-046 is co-extensive with what had been sought in application 1410331/13-252 and that neither application is expressed in particularly narrow or confined terms.

32 Ms Pendergast gave the evidence that it took 46 hours and 30 minutes to process access application 13-252. Given my view that the applications are "substantially the same" for the purposes of section 60(1)(b), Ms Pendergast's evidence gives an

indication of the time that it might take to process application the access application 14-046.

33 In Colefax No 1 at paragraph [40], the Tribunal found that an applicant should not be permitted to split a request between multiple applications to avoid the operation of section 60(3). I agree with that view. Therefore, the Applicant should not be permitted to excise category 5 of 1410329/14-046 from the remainder of that application to avoid the request being interpreted as voluminous. To do so would be contrary to the objects of section 60(3) as identified by Colefax No 1.

34 In the circumstances, I am satisfied that dealing with access application 14-046 would represent a substantial and unreasonable diversion of resources. Therefore, the Respondent was entitled to refuse to deal with the access application.

35 In any event, the Respondent conducted searches for further material.

36 Even if I am wrong in regard to my view that dealing with access application 14-046 would represent a substantial and unreasonable diversion of resources, the Respondent has already decided a previous application for the information concerned (or information that is substantially the same as that information ... and there are no reasonable grounds for believing that the agency would make a different decision on the application. Accordingly, section 60(1)(b) relevantly provides that the Respondent may refuse to deal with the access application.

37 In *Camilleri v Commissioner of Police NSW Police Force* [2012] NSWADT 5 at [11] Judicial Member Isenberg applied the approach to sufficiency of search as had been applied under the *Freedom of Information Act*. In doing so, she applied the decision of *Hemeon v Commissioner of Police, New South Wales Police Service* [2002] NSWADT 201. At paragraph [18] of *Hemeon*, O'Connor DCJ, in turn, adopted the approach of the Information Commissioner of Queensland in *Shepherd and Department of Housing, Local Government and Planning* [1994] QICmr 7; (1994) 1 QAR 464, which identified two questions for consideration:

(a) whether there are reasonable grounds to believe that the requested documents exist and are documents of the agency; and if so,

(b) whether the search efforts made by the agency to locate such documents have been reasonable in all the circumstances of a particular case.

38 In relation to the first question, it is not enough for the Applicant to merely assert non-compliance on the basis of a general distrust of the agency: *Camilleri* at paragraph [13], *Cianfrano v Director General Department of Commerce and Anor (No 2)* [2006] NSWADT 195 at paragraph [69]). In *Patsalis v Commissioner of Police, New South Wales Police Service* [2003] NSWADT 213 at paragraph [63], O'Connor DCJ held that it was only necessary that reasonable searches have occurred. The fact that there may be weaknesses in an agency's searches, or that there may be failures in its recordkeeping processes, did not necessarily lead to the conclusion that the search had not been reasonable, or sufficient, or adequate (*Camilleri* at paragraph [15]).

39

In the present circumstances, I am satisfied that the Respondent performed sufficient searches for the documents requested and that there are no reasonable grounds for the Tribunal to believe that further documents exist.

40 That being the case, the Respondent's decision should be affirmed.

**Matter 1410330/14-107**

41 The access application in Matter 1410330/14-107 sought access to the following information:

> Item 1. Documentation relating to where DEC senior staff authorized/directed the DEC IT department/server managers (or other body) to block all emails from any/all of the following:
>
> a. Peter Zonnevylle; peterzgipa@yahoo.com.au; pzgipa@yahoo.com.au
>
> a. Industrial & Scientific Supply Co. Pty Ltd (isscisyd@bigpond.com; iind1791@bigpond.net.au)
>
> b. sales@issco.com.au; support@issco.com.au
>
> c. sales@isscoed.com; support@isscoed.com; sales@isscoed.com.au; support@isscoed.com.au
>
> d. sales@sciencesupplies.com.au; support@sciencesupplies.com.au sales@sciencelabsupplies.com.au;support@sciencelabsupplies.com.au
>
> e. and any other associated websites, email addresses that DEC has on record for any/all of the above to/from NSW state schools or any other NSW educational institution (TAFEs, colleges, etc) Documentation to include names of those authorizing/contributing to this action. Documentation to include dates from when each email address was blocked (to and from)
>
> Item 2. All referencing documentation (legislation, acts, codes, statutes, etc) DEC staff used to determine/justify the above action/authorization to block the emails
>
> Item 3. Copies of all emails blocked by DEC (unredacted) sent by NSW schools or TAFEs or other institutions to any of the above emails in Item 1.
>
> Item 4. All referencing documentation (legal statutes, legislation, acts, codes, statutes, etc) DEC staff used to determine/justify the action/authorization to block emails from any NSW state schools or other NSW educational institution sent to those emails detail in item 1.
>
> Item 5. Any directives/memos/etc sent by DEC to NSW state schools or other NSW educational institutions relating to any of the identities in 1.
>
> **Re GIPA-13-252 Notice of Decision**
>
> Item 6. Documentation proving/showing the most efficient means reasonably available to the department to search for the government information applied for in GIPA-13-252 was used.
>
> Item 7. Documents clearly showing who is
>
> the client and.
>
> the legal adviser (re page 5 of 9)
>
> to establish legal privilege exists.
>
> Item 8. Proof that legal professional privilege applies to excluded pages/information
>
> Item 9. Documents showing what legal proceedings were anticipated by DEC with respect to GIPA-13-252
>
> Item 10. Documents/proof of Riordan's statement:

"harassed by receiving unsolicited facsimiles messages on a daily basis as currently occurs with some senior officers of the department"

Detailing names of specific senior officer who are specifically being harassed.

Item 11. Documents re "disclosing the names and telephone-numbers of these staff members has no bearing" showing where "telephone numbers were requested" (pg7 of 9)

Item 12. Documents/proof of extra processing time, the period of time over which the "large volume of material" refers to,

"Due to the large volume of material that Mr Peter Zonnevylle has sent the Dept ... an extra 10 hours"

Item 13. (Documents/proof of processing time to review and redact over 1300 names & contact numbers from records.

Documents showing breakdown of whether redacted names & contact numbers were

a. DEC head office staff

b. NSW state school employees (using any of the emails in Item 1.)

Item 14. Documents/proof sent by DEC to OIC for proof requested by OIC during review of GIPA-13-252

In particular information proving that "he (Peter Zonnevylle) regularly sends facsimile messages to the Department alleging misconduct and naming officers who he believes are responsible for misconduct". (Documents/proof where DEC staff members fear that if their names are not redacted they will be harassed by Peter Zonnevylle by receiving unsolicited facsimile messages on a daily basis, as currently occurs with some senior officers of DEC).

Item 15. Proof that Peter Zonnevylle is harassing senior DEC staff daily.

Documents showing complaints lodged within DEC re Peter Zonnevylle's daily harassment/other harassment of DEC staff.

Documents/copies of complaints sent by DEC to Peter Zonnevylle to stop the harassment.

Detailing names of those people who have formally lodged/sent such complaints and copies of theircomplaints.

Item 16. Legal action taken by DEC staff/DEC to stop alleged harassment and legal basis to take action.

Item 17. Documents/memos/etc sent by any DEC staff referring to Peter Zonnevylle or GIPA-13-252 to OIC.

Item 18. Documents received by DEC from OIC relating to the review of GIPA-13-252

Item 19. Statutes/directives/etc used by DEC'S administrative decision to refuse the request in GIPA-13-252

(and all other correspondence) from Peter Zonnevylle to send DEC correspondence by email to minimize delays

Item 20. Documents provided by DEC to ICAC and documents sent by ICAC to DEC regarding DEC tender DETPR-35-11

Item 21. Copy of statutory declaration or similar signed by Bruniges or Riordan guaranteeing DEC procurement is free of corruption (requested in my previous correspondence relating to the Public Interest Factor relating to GIPA-13-252)

Item 22. Documents/memos/directives within DEC relating to DEC staff handling of correspondence/contact/GIPA enquiries from Peter Zonnevylle or related entities (Item 1)

Item 23. Documents showing where DEC has allowed a public interest factor reduction in processing charges in relation to a formal GIPA enquiry (showing GIPA reference numbers), between 2012 and May 12014

> Item 24. Documents between DEC and the NSW Ombudsman and/or ICAC relating to any complaints concerning DEC senior staff between 2010 and May 12014
>
> Item 25. Documents showing total income DEC made from NSW schools (from commissions, management fees, building related fees and any other income generating mechanism not clearly listed in the Annual Reports excluding school student fees)
>
> For the periods 2009-2010,2010-2011, 2011-2012,2012-1013,2013-2014 (to May 1,2014)
>
> We request that DEC GIPA make all efforts to assist us to make this a valid GIPA
>
> Enquiry ...

42 I note that the Applicant subsequently also purported to reduce the scope of this request and re-scope the application. Notwithstanding that attempt, the scope of the request does not appear to have been narrowed to any significant extent and to a large extent it purported to expand the scope by requesting information held by the Respondent up until July 2015 – the original access application was lodged with the Respondent in May 2014.

43 In the circumstances, I do not consider that the Applicant's attempt to re-scope his access application is valid. I therefore base my consideration on the original access application that was received by the Respondent and which was the subject of its determination.

44 The Respondent's R/Senior Information Access Officer, Ms Jenni Pendergast, decided to refuse to deal with the access application. She wrote to the Applicant and advised:

> Your application is invalid because you have not provided enough detail to enable the Department to identify the information you are seeking (section 41(1)(e) of the GIPA Act). I cannot identify the multitude of information you seek which includes proof of legal action, proof of harassing emails and facsimiles that you have sent to the Department, statutory declarations from the Secretary and information from the ICAC.

45 She requested that he reduce the scope of his access application and provided some guidance as to how this could be done.

46 Ms Pendergast also advised that she was refusing to deal with the application because some of the items (Items 1 – 5) had been decided previously and there were no reasonable grounds for believing that the agency would make a different decision in this application: section 60(1)(b) of the GIPA Act; or because the items (Items 6 – 25) represented a substantial and unreasonable diversion of resources and the Respondent was entitled to refuse to deal with the application pursuant to section 60(I)(a)of the GIPA Act.

47 The Respondent contends that Items 1 - 4 of the access application in matter 1410330/14-107 are worded identically to categories 1 - 4 of the access application in matter 1410329/14-046. Similarly, Item 5 of application 1410330/14-107 is worded identically to category 6 of 1410329/14-046. Further, it says that those items of the access application in matter 1410330/14-107 seek the same information that was the subject of application 1410331/13-252.

48

It submits that it follows that it was correct to refuse to deal with these parts of the application on the basis of section 60(1)(b). Alternatively, the Respondent submits that it would amount to an "unreasonable and substantial diversion" of resources to require it to search for this material.

49 I am satisfied that categories 1-5 of 1410330/14-107 seek information that was the subject of application to 1410331/13-252. For the same reasons that I consider that Applications 1410331/13-252 and 1410329/14-046 are related for the purposes of section 60(3) of the GIPA Act I also consider that Applications 1410331/13-252 and 1410330/14-107 are related for the purposes of section 60(3) of the GIPA Act.

*Would dealing with access application 14-107 represent a substantial and unreasonable diversion of resources?*

50 It is not in dispute that categories 6 - 25 of the access application in matter 1410330/14-107 fall outside the scope of what was decided in 1410331/13-252. However, the Respondent contends that it was nevertheless correct to refuse to deal with this application as the processing of categories 6-25 of the application would amount to a substantial and unreasonable and substantial diversion of resources.

51 Categories 6-25 of 1410330/14-107 request a further 19 categories of documents. The breadth of this request suggests that a considerable degree of resources would be required to process the application. This is even more strongly suggested by the fact that it is difficult to comprehend what is being sought by many of the categories. Ms Pendergast's evidence is that it is difficult to provide an accurate estimate as to how long it would take to process the access application. However, she expresses the view that it would take more than 40 hours to respond to the request.

52 The Respondent submits that there is a real risk that the processing time will, in fact, exceed this estimate.

53 Further, the Respondent submits that dealing with several of these categories would require the Respondent to create new documentation contrary to section 75(2) of the GIPA Act.

54 Further, several of these categories request proof of certain matters that were raised in relation to access application 13-252. For example, that the processing fees had appropriately been charged; that certain documents were privileged; that alleged harassment had occurred. The Respondent submits that these categories are invalid pursuant to section 41(1)(e) of the GIPA Act which provides that an application is invalid unless it "include[s] such information as is reasonably necessary to enable the government information applied for to be identified".

55 The Respondent submits that these categories are inherently subjective. This makes it difficult for any officer of the Respondent to locate information which answers the requests. What the searching officer might regard as "proof" may not necessarily be regarded as such by the Applicant, or by this Tribunal.

56

The Respondent further submits that through this request the Applicant is effectively attempting to have the decision of the Respondent reviewed. That is, the Applicant appears to be requesting that the Respondent prove the correctness of its decision. I agree with the Respondent that this is not provided for by the GIPA Act. The appropriate mechanism for review of an agency's determination is by way of an application for review by this Tribunal, and not by way of an access application under the GIPA Act.

57 In my view, the Respondent was entitled to refuse to deal with the access application. I am satisfied that dealing with the access application would represent a substantial and unreasonable diversion of resources. I am also satisfied that large parts of the access application are invalid as it is not possible to ascertain what information is sought. The access application did not include the information that is reasonably necessary to enable the information applied for to be identified. Further, many of the categories require the Respondent to create new documentation. The Respondent was correct to refuse to deal with the access application.

58 That being the case, the Respondent's decision should be affirmed

**Further issues**

59 The Applicant has expressed concern and raised numerous issues in relation to the Respondent's conduct in processing his various access applications. He requested that the Tribunal take action pursuant to section 112 of the GIPA Act. This request is in relation to each of the matters 1410329/14-046, 1410330/14-107 and 1410331/13-252.

60 I have recently considered the Tribunal's powers in relation to section 112 in my decision in *Zonnevylle v NSW Department of Finance & Services*[ 2016] NSWCATAD 47. I will not reconsider that here.

61 Section 112 provides:

> "If NCAT is of the opinion as a result of an NCAT administrative review that an officer of an agency has failed to exercise in good faith a function conferred on the officer by or under this Act, NCAT may bring the matter to the attention of the Minister who appears to NCAT to have responsibility for the agency."

62 It is apparent from the section that the Tribunal's opinion must be formed "as a result of an NCAT administrative review". The materials supporting this opinion must have arisen in the course of the Tribunal reviewing a reviewable decision. In my view the Tribunal does not have the power to conduct a satellite hearing to determine the issue. It is also my view that the Tribunal does not have the power to issue a summons or require attendance for cross-examination or production of documents in order to form an opinion for the purposes of section 112.

63 Any referral under section 112 must be made in relation to an "officer of an agency", not against the agency generally; and the conduct complained about must be a failure "to exercise in good faith a function conferred on the officer by or under the GIPA Act'.

64

The relevant test is a subjective one; however there are some objective components as well. For example, consideration as to whether there had been a real attempt to answer the request for information at least by recourse to the available materials.

65 The mere fact that the Tribunal accepts that an aspect of the agency's decision is wrong is insufficient to bring the matter within the scope of section 112: see discussion in *Zonnevylle v NSW Department of Finance & Services*[ 2016] NSWCATAD 47.

**The Applicant's contentions**

66 The Applicant lodged several volumes of material in support of his request. In his submission he stated:

> "The Applicant alleges that the following staff were "lacking good faith" with regards to the Applicant's GIPA applications related to File No.s 01410331, 01410330, 01410329
>
> Joanne Bailey, CPO Peter Riordan
>
> Jenny Pendergast Peter Johnson
>
> The Applicant also includes: Elisse Stathis (IA Unit Manager);
>
> Michele Bruniges. DG
>
> However it is possible that further parties are associated with alleged misconduct & lack of good faith of whom the Applicant has been prevented from identifying.
>
> ...
>
> [T]he Applicant will allege that there are credible indications that Ms Bailey or other DEC staff have interfered with the lawful processing & decision making of the Applicant's GIPA applications.
>
> The Applicant has absolutely NO FAITH in the conduct of the Respondent."

67 The Applicant requested that the Tribunal make orders requiring the Respondent and various officers of the Respondent to file material which he contends will support his allegations that conduct by officers of the Respondent indicate a lack of good faith.

68 As I have noted above, it is my view that the Tribunal does not have the power to require production of documents for the purposes of determining a request for a referral under section 112. In my view the Tribunal does not have the power to make the orders for filing of material that the Applicant has requested.

69 The Applicant expressed what he referred to as "Grave Concerns" in regard to how the Tribunal might determine his request. I do not propose to address those matters. He also expressed what he referred to as "Grave Concerns" in regard to alleged conduct by the Respondent. He stated in part 9 of his submissions:

> **9b. Grave Concerns: The Respondent**
>
> The Applicant has absolutely no confidence in the integrity of the Respondent.
>
> The Respondent is alleged to be:
>
> i. complicit in the exploitation of NSW State Schools for its own interests
>
> ii. complicit in the exploitation of NSW State Schools for another agencies interests
>
> iii. complicit in the exploitation of NSW State Schools by commercial interests
>
> iv. (as revealed in the DFS GIPA#13 documentation File No.140273)

v. complicit in allowing it's staff subject to serious misconduct complaints to block formal GIPA applications

vi. Misleading the Information Commissioner (also possibly ICAC)

The Applicant also cites the complaints of breaches of codes of conduct, public interest & other regulations which the Respondent & it's representatives are compelled & obliged to abide by.

The Applicant is of the opinion that the Respondent has compromised the integrity of any decisions made for and in association with the Applicant's GIPA applications

70 As I have noted above, it is clear from the terms of section 112 that any referral under section 112 must be made in relation to an "officer of an agency", not against the agency generally. In my opinion, the Applicant's allegations in regard to agency are not relevant to the issue of whether or not a referral under section 112 should be made.

71 The Applicant made a number of allegations in regard to Ms Bailey. He stated:

"...The Applicant will assert that the Respondent's / Ms Bailey's actions cannot be disassociated from the GIPA applications

DETAILS: The BLOCKING OF UNSOLICITED EMAILS BY THE RESPONDENT

- UNSOLICITED emails requesting goods & services

- sent voluntarily from NSW State Schools customers of the Applicant

which PREJUDICES THE APPLICANT'S LEGITIMATE BUSINESS & COMMERCIAL INTERESTS

occurred during the period of the Applicant's GIPA enquiries AND IS STILL OCCURRING.

i. Ms Bailey is clearly a participant in the Applicant's GIPA enquiries,

ii. Ms Bailey has a "stake" in the release of the information sought.

Document: Cease & Desist Notice to Michele Bruniges May 3, 2013

The Respondent clearly condones Ms Bailey's misconduct against the Applicant at the highest levels (no response from Ms Bruniges)

The Tribunal cannot underestimate the seriousness of this factor.

The Applicant will repeat & assert that

- Ms Bailey's activities are clearly not: "open, accountable, fair & effective"

- Ms Bailey has breached the Code of Conduct and other guidelines, etc

FURTHERMORE:

- Ms Bailey benefits from the redacted information

- Ms Bailey and her depart. are the clear beneficiaries of the blocking of the Applicant's complaints

- Ms Bailey is clearly influential in the Department:

The Applicant cites Ms Bailey's ability to block the Applicant's emails to the WHOLE OF DEC It is not unreasonable to assume Ms Bailey can influence any section of DEC including the IA UNIT. Especially in view of her alleged Abuse of Power (alleged to be Criminal Conduct)

Ms Bailey and her Procurement department:

- DEC Procurement were accessories in the Workplace Supplies Tender maladministration

- DEC Procurement is alleged to have attempted to fix Tender DETPR-35-11 for an incumbent supplier of the Workplace Supplies Tender

- The head of DEC Procurement is blocking legitimate business between the Applicant & NSW State School customers

- The Applicant is a competitor to DEC Procurement for the supply of scientific products

- DEC Procurement makes money from its tendering activities

- DEC Procurement is alleged to have acted dishonestly in advice given to NSW State Schools regarding compulsory purchasing of products from tenders

- The former head of DEC Procurement (Ms Bailey's colleague) blocked a GIPA application

(Re Notice of Decision date April 16, 2012 GIPA-12-021) seeking info, relating to DEC procurement

- GIPA-12-021 NoD "internally reviewed" & re-affirmed by Ms Bailey

The Applicant questions the appropriateness of the Respondent to allow senior staff members with "stakes"/specific interests in the GIPA application material to be associated with its invalidation."

72 I note the Applicant's allegations with respect to Ms Bailey. With the exception of the allegation that Ms Bailey "internally reviewed" & re-affirmed GIPA-12-021, the issues that the Applicant has raised do not involve the exercise of 'a function conferred on the officer by or under' the GIPA Act. It is therefore not conduct that could be considered in relation to a request for a referral under section 112.

73 GIPA-12-021 is not the subject of any of these applications to the Tribunal. In my view it cannot be taken into account for the purposes of this request for a referral under section 112.

Allegations in relation to 1410331/13-252

74 The Applicant's allegations in relation to 1410331/13-252 are contained at Part 10.a of his submissions. That part of the submissions itemises sections of the Respondent's determination of access application 13-252. He appears to be challenging that determination. He stated:

"The Applicant will assert that

- the Respondent has spending the stated 8-9 hours redacting information from documentation received from the Applicant

- the Respondent redacting information identifying the Applicant's customers (NSW Schools) is an act of dishonesty honestly and clearly lacking in good faith

There is no reasonable purpose for the Respondent to undertake these redactions nor CHARGE the Applicant redaction of this information

c. The Applicant will assert that this action is contrary to Sect. 60 and in itself an:

(a) unreasonable and substantial diversion of the agency's resources,

d. Besides breaches of the Respondent's Code of Conduct, the Applicant asserts that the Respondent has breached the Ombudsman's guidlines:

...

The Applicant asserts that the Respondent has an Improper or Ulterior motive

- to cause the Applicant a detriment

- over servicing / overcharging denying the Applicant the lowest reasonable cost access to requested government information

...

The Applicant will assert that the extra processing charges are:

- Unwarranted, unreasonable & without merit (there is no overriding considerations against disclosure especially if the Applicant provided the Respondent with this information)

- clearly a waste of the Respondent's resources Particularly in the context that:

a. there is NO REQUIREMENT for the Respondent to charge the Applicant for a process that is clearly without purpose (other than to impose a detriment on the Applicant?)

b. the Applicant is seeking information relating to the Respondent's alleged IMPROPER CONDUCT"

75 In relation to Mr Riordan he wrote:

The Respondent conferred on Mr Riordan the task of determining the Notice of Decision for File. 1410331 (GIPA 13-252)

1. Mr Riordan was & is aware of the Applicant's complaints

"I am aware that Mr Peter Zonnevylle has made many complaints over a two year period about alleged corrupt conduct by senior officers of the Department, particular, officers working in the Procurement Solutions Directorate.."

" He sends fascimilie messages on a regular basis alleging misconduct"

Page 6 of 9 Notice of Decision

2. Mr Riordan has reviewed the information contained in the Applicants GIPA 13-252application:

"On my examination of the records relevant to your access application." Page 6 of 9

i. Mr Riordan knew that the Applicant incorporates commercial entities

ii. Mr Riordan was aware that emails sent voluntarily from NSW State Schools to the Applicant had been blocked.

iii. Mr Riordan is familiar with Sect.14 (4) of the GIPA Act

...

iv. Mr Riordan would be aware that the blocked emails from NSW State Schools, which he reviewed in the procedure of producing the GIPA 13-252 Notice of Decision included product enquiries, were likely to have included:

a. Product enquiries sent to the Applicant

b. Orders placed by NSW State Schools to the Applicant

c. Product / Technical support requests from NSW State Schools to the Applicant

v. Consequently Mr Riordan was aware of the detriment being caused to the Applicant

3. According to the obligations (but not limited to) in the previous page

Good Conduct and Administrative Practice

Mr Riordan was obliged to report the Abuse of Power / Misconduct to the appropriate body.

i. Mr Riordan failed in his duty.

ii. Mr Riordan breached public trust & public interest determinations

iii. Clearly this is a lack of good faith in the function conferred on him by the GIPA Act.

iv. Clearly this is a lack of good faith towards the Applicant

The Applicant will assert that Mr Riordan is complicit in this misconduct / alleged criminal conduct

4. The Applicant has previously alleged that Mr Riordan has made false & misleading statements in the GIPA 13-252 Notice of Decision (which is alleged to have resulted in false& misleading statements made by the Information Commissioner in her review)

Furthermore:

5. Mr Riordan, Deputy Director General of DEC (DEC the Respondent) has allowed this Misconduct / Abuse of Power to continue.

6. Mr Riordan stated in the GIPA 13-252 Notice of Decision (page 5 of 9):

"Access refused to names of some staff members

> The information captured by your application contains the names of a large number of staff members. The names of the senior officers who made various decisions about blocking or filtering email addresses mentioned at point 4 of your application are released under this decision".

In the Statement of Joanne Bailey, Ms Bailey claims to be the sole person responsible authorizing the blocking the Applicant email addresses.

Mr Riordan has indicated that there are more than one person.

Mr Riordan also states:

"However I have decided to refuse access to the names of other staff members who were not involved in those decisions"

Clearly this includes the redactions of names for the emails sent voluntarily from NSW State Schools to the Applicant.

This has not been disputed by the Respondent

The Applicant will assert that the intent of Mr Riordan is clear.

The Respondent is steadfast in ensuring a detriment is caused to the Applicant

7. Mr Riordan's failure to execute his obligations regarding the Abuse of Power by the Respondent clearly provides a benefit to Ms Bailey

i. Ms Bailey is being protected by the Respondent

ii. Ms Bailey's "reputation" is preserved (despite her abuse of power)

iii. Ms Bailey's department, Procurement Directorate gains from reduced competition through alleged criminal conduct

8. The Applicant will also assert that Mr Riordan's knowledge of the Abuse of Power /detriment unjustly caused to the Applicant, fulfils the Special Public Benefit evidence requirements to justify the Applicant's request for a reduction in the processing charges;

Mr Riordan / the Respondent clearly exhibits a conflict of interest.

Disregarding evidence supporting the allegations of Abuse of Power / Misconduct / Criminal Conduct which is clearly in the public interest.

The Applicant asserts that the Tribunal must uphold a Sect. 112 Improper Conduct complaint against Mr Peter Riordan, Deputy Director General of DEC.

Mr Riordan has clearly had a function conferred on him by or under the GIPA Act and acted with a lack of good faith

Riordan's objectivity related to Public Interest Determinations cannot be trusted.It is clearly impaired by Riordan's/the Respondent's alleged serious misconduct/criminal conduct

76 The Applicant has made similar allegations in regard to Ms Bailey, Mr Johnson, the IT Manager, Ms Pendergast and Ms Stathis.

77 The Tribunal has ruled on all the issues raised in regard to the Respondent's determination and affirmed the Respondent's decision. It appears that the Applicant is dissatisfied with the Tribunal's decision and is seeking to revisit this issue. The

Applicant's material in relation to 1410331/13-252 is essentially submissions as to why the Tribunal incorrectly decided the matter. These assertions are inappropriately made, given the absence of any attempt by the Applicant to appeal that decision. In the circumstances I do not consider that there is any basis for finding that these officers failed to act in good faith.

78 The Applicant alleges that Ms Pendergast failed to act in good faith by asserting that the processing charge in 1410331/13-252 remained outstanding. At the time Ms Pendergast made that comment, it was an accurate statement. I agree with the Respondent that this does not demonstrate lack of good faith.

79 Issues concerning the refusal to deal with an informal request and the blocking of the Applicant's emails do not relate to matters before the Tribunal and so have not arisen "in the course of administrative review". Therefore, the Tribunal lacks the jurisdiction to deal with these matters. In regard to the wider allegations against officers of the Respondent, it is clear that the conduct does not concern the exercise of a function under the GIPA Act. The fact that an officer may have a delegation to perform a function under the GIPA Act does not mean that every function exercised by that officer is subject to a referral under section 112 of the GIPA Act. In the circumstances of this matter I am not satisfied that any of the alleged conduct of Mr Riordan, Ms Bailey, Mr Johnson, the IT Manager, Ms Pendergast or Ms Stathis falls within the scope of section 112.

Allegations in relation to 1410329/14-046

80 The Applicant's allegations in relation to 1410329/14-046 are contained at Part 10.b of his submissions. This part of the submissions itemises sections of the Respondent's determination of access application 14-046. Again, the Applicant appears to be challenging the determination. In regard to Ms Pendergast he wrote:

> "The Respondent's representative Ms Pendergast is required by Sect.16 to provide advice & assistance for the purpose to access information.
>
> - Ms Pendergast was involved with the processing of GIPA-13-252 (File No.0140331)
>
> - Ms Pendergast was aware that Peter Zonnevylle was authorized to correspond on matters of GIPA-13-252
>
> - Ms Pendergast was aware by virtue of the associated emails that GIPA-14-046 and GIPA-13-252 were from associated parties
>
> - Ms Pendergast is alleged that she:
>
>  - Did not provide reasonable advice & assistance to access government information.
>
>  In particular Sections 2 & 3 of the Applicant's GIPA application"

81 It seems that the Applicant's allegation is that Ms Pendergast failed to provide him with appropriate assistance before refusing to deal with the access application, thereby falling short of the obligations under section 16 of the GIPA Act. Section 16 provides:

> 16 Agencies to provide advice and assistance
>
> (1) An agency must provide advice and assistance to a person who requests or proposes to request access to government information, for the purpose of assisting the person to access, or seek access to, information that is or may be made publicly available.

(2) An agency must provide the following specific advice and assistance to a person who requests access to government information:

(a) advice as to whether or not the information is publicly available from the agency and (if it is) how the information can be accessed,

(b) advice on how to make an access application for the information if the information is not publicly available from the agency but appears likely to be held by the agency,

(c) if the information appears unlikely to be held by the agency but appears likely to relate to the functions of some other agency, the contact details of the other agency,

(d) the contact details of the Information Commissioner and advice on the availability of and how to access any information published by the Information Commissioner that it appears maybe relevant to the person's request.

(3) An agency is only required to provide advice and assistance under this section that it would be reasonable to expect the agency to provide.

82 The material before me indicates that Ms Pendergast endeavored to assist the Applicant to make a valid request. By letter dated 19 March 2014 she wrote to the Applicant and suggested a form of amendments and gave him until 16 April 2014 to respond.

83 Correspondence from the Applicant dated 21 March 2014 did not narrow the scope of the request to remove an overlap with access application 13-252. The Applicant had not responded to narrow the scope of the request to remove that overlap at the time of the determination on 23 April 2014. His response dated 24 April 2014 was therefore not taken into account in the determination.

84 Ms Pendergast again wrote to the Applicant by letter dated 6 May 2014. In that letter she responded to some of his concerns and provided further explanation for the determination. In that letter she explained that parts 1 - 4 and 6 of access application 14-046 were fundamentally the same as access application 13-252. Section 60(1)(b) of the GIPA Act would continue to apply unless any amendment of the request removed any overlap between the two access applications. Further, section 60(1)(a) of the GIPA Act would apply because of the overlap and the work load involved in processing access application 13-252.

85 In my view, Ms Pendergast has satisfied the requirements of section 16 of the GIPA Act. Therefore, there is no basis for finding that she failed to act in good faith in that regard.

Allegations in relation to 1410330/14-107

86 The Applicant's allegations in relation to 1410330/14-107 are contained at Part 10.c of his submissions. This part of the submissions itemises sections of the Respondent's determination of the access application 14-107. Again, he appears to be challenging the determination and again he appears to be alleging the Respondent's failure to satisfy the requirements of section 16 of the GIPA Act.

87 I have considered the documentation showing the exchanges between the Applicant and the Respondent in regard to access application 14-107. Again I am satisfied that the requirements of section 16 of the GIPA Act have been met. In my view, there is no

basis for finding that Ms Pendergast or any other officer of the Respondent failed to act in good faith in that regard.

88 However, even if I am wrong on this point and the officers of the Respondent could have done more to assist the Applicant, this does not of itself show that the officer failed to act in good faith. At most it demonstrates an error or misjudgement on the part of the relevant officers.

89 For the same reason, I do not agree with the Applicant that making a determination that processing an access application would amount to a substantial and unreasonable diversion of resources or otherwise refusing to meet the Applicant's request shows that the officer failed to act in good faith. These decisions, without more, do not demonstrate a lack of good faith.

90 I agree with the Respondent that an officer employed in an agency is entitled to form the view that consideration of an access application would amount to an unreasonable diversion of resources or the officer is entitled to form the view that, because a decision had already been made in respect of that material, the agency's resources would better be spent elsewhere. The officer may well be wrong, which is why there is a right for this Tribunal to review the decision. Even were that decision to be set aside by this Tribunal, it would not prove a lack of good faith so long as the officer was endeavouring to give effect to the purposes of the Act as he or she understood them.

91 In regard to the allegations against officers of the Respondent who were in fact performing a function under the GIPA Act, the Applicant must show that the officer had failed to demonstrate an honest and conscientious approach to the functions conferred under the GIPA Act. He has not done so. In the circumstances, no action should be taken under section 112 of the GIPA Act in relation to any of those officers.

92 For completeness, I note that I have not considered those areas of concern to the Applicant where the Tribunal has no jurisdiction. I therefore am unable to comment on the reasonableness of the Applicant's concerns. I have merely found that this Tribunal is not the appropriate forum to deal with those issues.

## Conclusion

93 For the reasons given, the Respondent's decisions with respect of proceedings 1410329 and 1410330 should be affirmed. No action should be taken under section 112.

## Orders

1. The Respondent's decision in matter No. 141329 is affirmed.
2. The Respondent's decision in matter No. 141330 is affirmed.
3. The application for a referral pursuant to section 112 of the Government Information (Public Access) Act 2009 is refused.

I hereby certify that this is a true and accurate record of the reasons for decision of the Civil and Administrative Tribunal of New South Wales.
Registrar

**Amendments**

11 March 2016 - File number amended



Decision last updated: 11 March 2016


# Civil and Administrative Tribunal
## New South Wales

| | |
|---|---|
| **Medium Neutral Citation:** | **Zonnevylle v NSW Department of Finance & Services [2016] NSWCATAD 47** |
| **Hearing dates:** | 25 August 2015 |
| **Decision date:** | 08 March 2016 |
| **Jurisdiction:** | Administrative and Equal Opportunity Division |
| **Before:** | S Montgomery, Senior Member |
| **Decision:** | The application for a referral pursuant to section 112 of the Government Information (Public Access) Act 2009 is refused. |
| **Catchwords:** | ADMINISTRATIVE REVIEW - government information - jurisdiction - failed to exercise in good faith - function conferred on officer - the approach to be taken to section 112 issues - power to conduct 'satellite' hearings - need to accorded procedural fairness to an officer who is the subject of allegations. |
| **Legislation Cited:** | Government Information (Public Access) Act 2009<br>Freedom of Information Act 1987 |
| **Cases Cited:** | Bankstown City Council v Alamdo Holdings Pty Ltd [2005] HCA 46<br>Briginshaw v Briginshaw [1938] HCA 34; (1938) 60 CLR 336<br>Bropho v Human Rights & Equal Opportunity Commission [2004] FCAFC 16<br>O'Hara v North Sydney Council [2005] NSWADT 100.<br>Saggers v Environment Protection Authority (No 2) [2013] NSWADT 109<br>Saggers v Environment Protection Authority [2013] NSWADT 204<br>Shoebridge v The Office of the Minister for Police and Emergency Services [2014] NSWCATAD 189<br>Warragamba Winery Pty Ltd v State of New South Wales (No 9) [2012] NSWSC 701<br>Zonnevylle v NSW Department of Finance & Services [2015] NSWCATAD 175 |

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| **Category:** | Procedural and other rulings |
| **Parties:** | Peter Zonnevylle (Applicant)<br>NSW Department of Finance & Services (Respondent) |
| **Representation:** | Solicitors:<br>P Zonnevylle (Applicant in person)<br>Crown Solicitor's Office (Respondent) |
| **File Number(s):** | 1410273 |

## REASONS FOR DECISION

1 The Applicant seeks an order under section 112 of the *Government Information (Public Access) Act* 2009 ("the GIPA Act"). section 112 provides:

> 112 Report on improper conduct
>
> If NCAT is of the opinion as a result of an NCAT administrative review that an officer of an agency has failed to exercise in good faith a function conferred on the officer by or under this Act, NCAT may bring the matter to the attention of the Minister who appears to NCAT to have responsibility for the agency.

### Background

2 The substantive matter concerned a request for information under the GIPA Act. Details of the Applicant's access application and the relevant discussion of issues in the matter can be found in my decision at *Zonnevylle v NSW Department of Finance & Services* [2015] NSWCATAD 175.

3 I affirmed the Respondent's decision to release some of the requested information in full or in part and found that the Respondent had undertaken reasonable searches for the requested information that could not be located. I formed the view that it is improbable that further searches would locate additional information that fell within the scope of the access application. I therefore accepted the Respondent's assertion that it did not hold some of the information that the Applicant requested.

4 The Respondent relied on the evidence of Mr Andrew Johnson, who gave evidence relating to the searches undertaken and Mr Andrew Bauman, who gave evidence about the structure of the Respondent in support of the claim of legal professional privilege.

### Further issues

5 I noted that the Applicant had expressed concern and raised numerous issues in relation to the Respondent's conduct in processing his various access applications. He requested that the Tribunal take action pursuant to section 112 of the GIPA Act. I also noted that the Tribunal's powers in relation to section 112 are a matter of some disagreement between the parties and I listed the matter for further hearing in relation to that issue.

6

Mr Dalla-Pozza provided written submissions setting out the Respondent's arguments in regard to the construction of section 112. Mr Granziera appeared at the hearing on the issue and subsequently provided additional submissions.

7 The Applicant has also provided a considerable amount of material in relation to the issue. His material is directed towards the conduct that he contends warrants an order under section 112.

8 He identified a number of officers whom he alleged had failed to act in good faith. The Respondent has advised that the following officers identified in the complaint are not currently employed by the Respondent:

Helen Dickinson, Jenny Wiggins, Julie King, Peter Duncan, Michael Coutts-Trotter, Anne Skewes, James Norfor, Sanjay Sridher, Deidre O'Donnell.

9 The following officers identified in the complaint are currently employed by the Respondent:

Elizabeth Verteouris, Andrew Johnson, Anthony Lean, Paul Dobing, Andrew Bauman

*History to the Applicant's allegations*

10 Mr Dalla-Pozza provided a detailed history to the Applicant's allegations. That history appears to be correct. In summary:

- the Applicant's allegations relate to two GIPA applications - referred to as "GIPA #13" and "GIPA #17";
- there is an overlap between GIPA #13 and GIPA #17. Item 1 of the GIPA #17 access application requested information in respect of GIPA #13;
- the GIPA #13 access application was made in 2012. The decision was largely handled by Ms Helen Dickenson. Ms Dickenson and others involved in the processing of GIPA #13 have since left the Respondent;
- GIPA #17 was the subject of the review in the substantive proceedings in this matter;
- Mr Johnson was the officer primarily responsible for responding to GIPA #17. At times, he worked under the supervision of Ms Elizabeth Verteouris;
- In July 2014, the Respondent conceded that GIPA #13 had not been processed in time and that, accordingly, it was not entitled to levy a processing charge;
- the Respondent also conceded that the Applicant was entitled to the information requested in item 1 of GIPA #17 and agreed to provide the documentation that had been located in response to GIPA#13;
- the GIPA#13 information (which was requested in 2012) was ultimately released on 23 July 2014;
- some material was located in relation to item 2 of GIPA #17 and it was released on 30 July 2014;
- the Respondent subsequently became aware that GIPA #13 searches had failed to locate some documents. It requested that the Tribunal remit the application so that fresh searches could be performed. The remittal was ordered in November 2014;
- a large number of other documents were located and that material, with some redactions, was ultimately released in December 2014 (i.e. GIPA #13 information that was requested in 2012 was not released until December 2014);

- during the hearing, the Applicant submitted that referrals under section 112 should be made against a number of officers of the Respondent. He identified a number of officers and conduct that he alleged indicates that the officers had failed to act in good faith;

- there is often no clear differentiation between conduct alleged to have been committed by a specific officer and the alleged conduct of the Respondent;

- most of the officers who the Applicant has identified were not exercising a function conferred on them "by or under" the GIPA Act and therefore the Applicant's allegations concerning those officers are not within the scope of this request;

- the Applicant alleged that officers of the Respondent, including Ms Dickenson, Ms Wiggins and Ms King and various other senior officers, acted inappropriately in the course of dealing with GIPA#13. In particular he contends:

  (a) he never received a copy of the decision made in GIPA #13;

  (b) during GIPA #13, some material was redacted;

  (c) GIPA #13 was not decided within time;

  (d) the Respondent initially decided to charge a processing fee;

  (e) the decision-makers did not treat various correspondence from him as an application for an internal review;

  (f) senior staff within the Respondent (including, at least, Mr Lean), made false and misleading statements and were otherwise inappropriately motivated to obstruct GIPA #13;

  (g) Ms Dickenson sent numerous emails to him on 17 April 2012;

  (h) the copy of one of the documents which the Respondent released was not legible;

  (i) the Respondent failed to respond to the Applicant's complaints about Ms Dickenson;

  (j) Ms King may have made a false and misleading statement by emailing that she was not the person the Applicant was trying to contact.

- the Applicant alleged that officers of the respondent, including Mr Johnson and Ms Verteouris, acted inappropriately during GIPA #17 by:

  (k) refusing to reply to his correspondence of 9 April;

  (l) failing to accede to his requests to send all correspondence by email;

  (m) initially deciding that the application was invalid and suggesting a re-scoping of the application, particularly by omitting parts 2 and 3 of the application;

  (n) failing to advise the applicant appropriately regarding his application;

  (o) failing to decide the application in time;

  (p) inappropriately relying on the excluded information exemption.

- the Applicant alleged that those who instructed the Crown Solicitor to make the offer prior to the initial planning meeting acted inappropriately; and

- the Applicant alleged that Mr Bauman is in breach of the *Legal Profession Act* 2012 because he is not a lawyer.

**The Tribunal's approach to section 112 matters**

The Tribunal has previously considered section 112 of the GIPA Act in *Saggers v Environment Protection Authority* (No 2) [2013] NSWADT 109 ("Saggers No.2") and *Shoebridge v The Office of the Minister for Police and Emergency Services* [2014] NSWCATAD 189 ("Shoebridge").

12 In regard to each of the identified officers, the question to be explored is one of whether or not the officer failed to exercise in good faith a function conferred on them by or under the GIPA Act.

13 In *Saggers v Environment Protection Authority* [2013] NSWADT 204 ("Saggers No.1") I expressed the view at paragraph [28]:

> 28. The Applicant has requested referral of the matter pursuant to section 112. Such a referral requires that the Tribunal form the opinion that an officer of an agency has failed to exercise in good faith a function conferred or imposed on the officer by or under the GIPA Act. In my view, the Applicant has taken on a role comparable to that of prosecutor. He therefore bears the burden of establishing the facts upon which he seeks to rely for the purposes of section 112.

14 I remain of that view. The Respondent submits that, in light of its seriousness and the potential gravity of the consequences against those responsible, were they to be upheld, this allegation must be proved to a high standard (*Briginshaw v Briginshaw* [1938] HCA 34; (1938) 60 CLR 336 at 361 - 362).

15 In both *Saggers and Shoebridge* I conducted separate 'satellite' hearings to address the issues raised in relation to section 112. In each case it was with the consent of the parties as to the most appropriate approach to be adopted in the circumstances. Witnesses were available without the need for summonses and in each case they were cross-examined in relation to the issues raised by the applicant. In *Shoebridge* the officers who were the subject of the alleged failure to exercise a function in good faith were separately represented.

16 In the present matter, the Applicant has requested that the Tribunal require the officers to attend a hearing. The Respondent has questioned the Tribunal's power to conduct 'satellite' hearings, to summons witnesses or to require a witness to attend for cross-examination.

17 The Respondent contends that the section 112 requirement that the Tribunal form the opinion that an officer of an agency has failed to exercise a function in good faith 'as a result of an NCAT administrative review' suggests that consideration of a section 112 referral will ordinarily happen after evidence and argument has been heard in the course of the administrative review.

18 There seems to be merit in this argument. However, it also raises the question of whether or not an officer who is the subject of allegations needs to be accorded procedural fairness and given an opportunity to respond to the allegations. Such an opportunity would not be available if the Tribunal has no power to conduct 'satellite' hearings.

19

However, I note that Division 2 of Part 6 of the GIPA Act, which provides for offences of acting unlawfully (section 116); directing unlawful action (section 117); improperly influencing decision on access application (section 118); unlawful access (section 119); and concealing or destroying government information (section 120) provides an avenue whereby action can be taken directly against an officer and the officer would be afforded procedural fairness in any such action.

20 The Respondent has invited me to reconsider the issue of the approach to be taken to section 112 issues and I have done so. Notwithstanding the approach that I took in *Saggers No.2* and *Shoebridge*, I am now of the view that the Tribunal has no power to conduct 'satellite' hearings for the purpose of section 112 of the GIPA Act. Further, I am now of the view that the Tribunal does not need to accorded procedural fairness to an officer who is the subject of allegations or to give an opportunity to respond to the allegations. That issue is addressed by the provisions of Division 2 of Part 6 of the GIPA Act and any disciplinary action that followed from a referral under section 112 would be subject to agency policies concerning such action.

21 It would follow that I agree with the Respondent in regard to GIPA #13. The Applicant has never made any application to the Tribunal in respect of GIPA #13. GIPA # 17 sought the same information sought in GIPA #13 but there has been no administrative review in relation to GIPA #13. Accordingly, the Tribunal could not form the opinion in relation to GIPA #13 that an officer of an agency has failed to exercise a function in good faith 'as a result of an NCAT administrative review'. Therefore I have decided that no action should be taken under section 112 in relation to GIPA #13.

22 I note however that the delay in providing the material that was requested in GIPA #13 and which was ultimately provided to the Applicant gives the agency serious cause for concern in terms of how it handled the matter and suggests that effort needs to be made to ensure that a similar situation does not arise in the future. As noted above, information that was requested in 2012 was not released to the Applicant until December 2014. Clearly this delay is unacceptable and it fails to accord with the object of the GIPA Act. It is difficult to understand how it could be explained in terms of 'honest ineptitude' or how it could be seen as demonstrating an 'honest and conscientious' approach to the functions conferred under the GIPA Act.

23 I also note that where an agency releases a document which is clearly not legible, it is difficult to see how the agency can be said to have released the information that is contained within the document. In my view, a decision to provide access to information under section 58(1)(a) of the GIPA Act requires that the agency release an legible copy of the document if it is within the agency's capacity to do so.

24 I also note that I do not agree with the Respondent that there could be no utility in taking action under section 112 of the GIPA Act in circumstances where the officers most closely associated with an access application are no longer employed in the agency. A referral to the Minister is an avenue whereby issues of concern can be

raised with the view that they be addressed by the agency. There may be circumstance in which this could be advantageous, for example in relation to systemic issues of concern, even though individual officers may have left the agency.

25 I agree that it appears that the object of section 112 of the GIPA Act is to enable the relevant Minister to be informed of any circumstances where an officer may be thought to have acted inappropriately with respect to his or her functions under the GIPA Act. This would permit that Minister to take appropriate administrative or disciplinary steps and thereby achieving the objects of the GIPA Act and ensuring greater compliance with the Act in the future. However, there may be circumstances in which there are wider implications arising from the conduct or other factors impacting on officers with functions under the GIPA Act that warrant action being taken. I note that this does not appear to be the case in the circumstances of this matter. Further, the fact that an officer has left the agency would not necessarily prevent action being taken in regard to that officer.

26 The Applicant has made an application to the Tribunal in respect of GIPA # 17 and the question arises as to whether a referral should be made pursuant to section 112 in relation to that matter.

**Standard of good faith**

27 What is required for something to be done or omitted in good faith may vary from one case to the next. This makes it unwise, if not impossible, to place a definitive gloss upon the words of the statute: *Bankstown City Council v Alamdo Holdings Pty Ltd* [2005] HCA 46 at [50].

28 There has been limited consideration as to what constitutes and what falls short of good faith for the purposes of the GIPA Act and the *Freedom of Information Act* 1989 in this Tribunal and the former Administrative Decisions Tribunal: see *Saggers No.1*; *Shoebridge*; *O'Hara v North Sydney Council* [2005] NSWADT 100.

29 I have previously expressed the view that the test of good faith is predominantly subjective: *Saggers No.1*; *Shoebridge*.

30 However, there are some objective components as well. For example, consideration as to whether there had been a real attempt to answer the request for information at least by recourse to the available materials. Further, serious and careful consideration must be given to the application; there must be more than a cursory review. The GIPA Act does not allow an agency to simply turn a blind eye to the legislative requirements: *Shoebridge* at paragraphs [37], [40] – [42].

31 An agency may make any information that it holds publicly available either proactively or in response to an informal request unless there is an overriding public interest against disclosure. However, agencies must comply with the GIPA Act when providing access to government information in response to an access application.

32

When an agency receives an access application it is to decide whether the access application is valid and notify its decision to the applicant. It must provide reasonable advice and assistance so as to enable the applicant to make a valid access application.

33 An agency must exercise its functions so as to promote the object of the GIPA Act. It must have regard to any relevant guidelines issued by the Information Commissioner and must not take irrelevant considerations into account.

34 The obligations on an agency, and on those officers an agency's who have a function conferred on them by or under the GIPA Act, include the obligation to provide advice and assistance to a person who requests, or proposes to request, access to government information. It must undertake such reasonable searches, using any resources reasonably available, as may be necessary to find any of the information applied for that was held by the agency when the application was received. An agency must decide an access application within the timeframe set up by the GIPA Act and in doing so must conduct necessary consultations.

35 An agency may refuse to deal with an access application for any of a number of reasons set out in section 60 of the GIPA Act. However, before refusing to deal with an access application on the basis that dealing with it would require an unreasonable and substantial diversion of an agency's resources, the agency must give the applicant a reasonable opportunity to amend the application.

36 Before determining an access application the agency has an obligation to balance the public interest considerations in favour of disclosure and those against disclosure.

37 The officer who performs these tasks is obliged to perform them in good faith and will also be subject to applicable policies and procedures that apply to them in their capacity as a public officer.

38 It is conceivable that the Tribunal could form an opinion under section 112 of the GIPA Act independently of a request from one of the parties. However, where a section 112 referral is raised by the Applicant, as is the case in this matter, the Applicant takes on a role comparable to that of a prosecutor, and bears the burden of establishing the facts upon which he or she seeks to rely for the purpose of section 112.

39 In *Shoebridge* at paragraph [44] I expressed the view that each of the officers who had dealt with the access application and had a role in the final determination had an obligation to perform their task in good faith. The obligation did not merely reside with the officer who made the final determination. It extended to an officer who supervised the officer determining the application and to his supervisor who reviewed the process and had input into the final assessment.

40 The Respondent has submitted that insofar as an allegation of lack of good faith relates to the outcome of a decision listed in section 80 of the GIPA Act, the only persons susceptible to referral under section 112 are those who are conferred with a decision-making function under section 9(3) of the GIPA Act.

41

It remains my view that each officer who has responsibility in relation to the determination of an access application has an obligation to perform their task in good faith. It is possible that a person who makes a decision listed in section 80 may do so without the actual authority of the principal officer of the agency purely because of a failure to formally delegate the functions. In my view it would not follow that a referral under section 112 could not be made in relation to that person.

42 I agree that that the Tribunal is entitled to apply the presumption of regularity to the conduct of a particular officer, such that it can assume that an officer of an agency exercising a function is properly authorised by the agency to do so. They would have an obligation to perform their task in good faith. This will require honest action and fidelity to whatever norm, or rule or obligation the statute prescribes. An obligation to perform a task in good faith offers a warning against game playing at the margins of a statutory proscription: see *Bropho v Human Rights & Equal Opportunity Commission* [2004] FCAFC 16 per French J at paragraph [93].

43 They have an obligation to make a genuine attempt to discharge the relevant functions, having regard to the circumstances in which they are exercised, such as having limited resources, and established procedures: *Warragamba Winery Pty Ltd v State of New South Wales (No 9)* [2012] NSWSC 701 per Walmsley AJ at paragraph [756].

44 In my view, the exercise of a power in good faith requires an 'honest and conscientious' approach. However, before the Tribunal could form the opinion that an officer of an agency has failed to exercise a function in good faith it would be necessary to form the view that the officer's conduct demonstrates something more than honest ineptitude: see discussion in *Saggers No. 1* from paragraph [30].

45 This view is consistent with the provision of section 115 of the GIPA Act which states:

> 115 Personal liability
>
> No matter or thing done by an agency or officer of an agency, or by any person acting under the direction of an agency or officer of an agency, if the matter or thing was done in good faith for the purposes of executing this Act, subjects the officer or person so acting, personally to any action, liability, claim or demand.

**Consideration of the allegations**

46 As noted above, the Applicant has made allegations in regard to the conduct of a number of officers of the Respondent in regard to GIPA #17. He has lodged voluminous material in support of his allegations. Many of these allegations and the supporting materials are general in nature. Those that are specific are mostly alleged failures to engage with the Applicant e.g. not responding to correspondence or not communicating with him as he requested. More significant are the alleged failures to comply with requirements of the GIPA Act in regard to timeframes or the conduct of the matter before the Tribunal. However, I agree with the Respondent that the failure is explicable by the complex nature of the application and the history of communication between the Applicant and the agency. I am not satisfied that it demonstrates that an officer failed to act in good faith.

47 The fact that an officer decided to redact or withhold some material cannot demonstrates that an officer failed to act in good faith in either a subjective or objective sense. I agree with the Respondent that even were the Tribunal ultimately to set aside or disagree with various decisions and actions taken by officers of the Respondent, that would not be enough to warrant making of a section 112 referral.

48 The legislative intent in the GIPA Act is to balance the public interest in favour of releasing government information against legitimate considerations against its release. Therefore, without more, the fact that an officer employed at an agency considered that some information ought not be released, even if the Tribunal was to set aside that decision, could not evidence either objective or subjective bad faith.

49 It must be shown that the officer did not adopt an honest and conscientious approach. I am not persuaded that the material I have been given indicates that officers of the Respondent failed to adopt an honest and conscientious approach in regard to determining GIPA #17.

50 I note that the Applicant also asserts that the offer made by the Respondent by its letters of 23 June 2014 and 27 June 2014, at the time of the initial planning meeting, somehow show a failure to exercise a function under the GIPA Act in good faith. I am not satisfied that this is the case but, in any event, I do not accept that the giving of instructions to lawyers in litigation is a function under the GIPA Act for the purposes of a section 112 referral.

51 Similarly, I am not satisfied that the Applicant has established that Mr Bauman engaged in conduct in breach of the *Legal Profession Act* 2012. I am not satisfied that this demonstrates a failure to act in good faith and, in any event, Mr Bauman was not performing a function under the GIPA Act for the purposes of a section 112 referral.

52 In summary I note that I have read and considered the material that the parties have lodged in relation to this issue. While I accept that there is some reasonable basis for the Applicant's dissatisfaction in regard to the manner in which the Respondent dealt with his access application, I am not satisfied that any of the matters that he has raised demonstrate a failure by an officer of the Respondent to exercise in good faith a function conferred on the officer by or under the GIPA Act.

53 Accordingly, I do not consider that any action under section 112 of the GIPA Act is warranted.

**Order**

(1) The application for a referral pursuant to section 112 of the *Government Information (Public Access) Act* 2009 is refused.

I hereby certify that this is a true and accurate record of the reasons for decision of the Civil and Administrative Tribunal of New South Wales.
Registrar

Decision last updated: 09 March 2016