



Civil and Administrative Tribunal New South Wales

Medium Neutral Citation:	Walker v NSW Department of Premier and Cabinet [2018] NSWCATAD 178
Hearing dates:	22 March 2018; 26 March 2018; 10 April 2018
Date of orders:	08 August 2018
Decision date:	08 August 2018
Jurisdiction:	Administrative and Equal Opportunity Division
Before:	S Montgomery, Senior Member
Decision:	The decision under review is affirmed
Catchwords:	ADMINISTRATIVE LAW – public access to government information – access to Cabinet information – reasonable grounds for claim that information is Cabinet information –waiver – meaning of ‘report’ - reasonableness of searches
Legislation Cited:	Administrative Decisions Review Act 1997 Civil and Administrative Tribunal Act 2013 Government Information (Public Access) Act 2009
Cases Cited:	Amos v Central Coast Council [2018] NSWCATAD 101 BNQ v South Eastern Sydney Local Health District [2015] NSWCATAD 156 Camilleri v Commissioner of Police, New South Wales Police Force [2012] NSWADT 5 Primrose v NSW Department of Premier and Cabinet [2017] NSWCATAD 366 Public Service Association and Professional Officers Association, Amalgamated Union of NSW v Director General, Premier's Department [2002] NSWADT 277 Robinson v Commissioner of Police [2014] NSWCATAP 73. Shepherd and Department of Housing, Local Government and Planning [1994] QICmr 7, (1994) 1 QAR 464
Texts Cited:	The Macquarie Dictionary
Category:	Principal judgment
Parties:	Phillip Walker (Applicant) Department of Premier and Cabinet (Respondent)

Representation:	Phillip Walker (Applicant in person)
	Counsel: D Birch (Respondent)
	Solicitors: Crown Solicitor's Office (Respondent)
File Number(s):	2017/226200
Publication restriction:	Pursuant to section 64(1)(d) of the Civil and Administrative Tribunal Act 2013 any confidential evidence filed with the Tribunal or given in a confidential hearing pursuant to section 107 of the Government Information (Public Access) Act 2009, is not to be disclosed to the applicant.

REASONS FOR DECISION

Introduction

- 1 This matter relates to an access application made by the Applicant under the *Government Information (Public Access) Act 2009* ("the GIPA Act"). By application dated 3 May 2017, the Applicant requested access to the following information:
"Report by Consultancy KPMG - Analysis and Modelling on Council Mergers"
- 2 The access application concerns information relating to a proposed merger of local government areas. The access application was directed to the "Department of Local Government" but by way of an agency-initiated transfer it was transferred to the Department of Premier and Cabinet ("the Department" or "the agency"). The Local Government Reform branch of the Department ("the LGR branch") carried out work relating to local government reform involving the amalgamations of local government areas.
- 3 Mr Matt Richards, Director, Legal Branch of the Department determined the application. Mr Richards interpreted that access application as seeking a report by KPMG providing analysis and modelling in relation to the proposed mergers of NSW local councils, and that 'draft documents are outside the scope of the application'.
- 4 He identified 52 documents as falling within the scope of the access application. He determined that some of the requested information was publicly available and that other requested information was not held by the agency. Access to the remaining information was refused on the basis that there was an overriding public interest against disclosure.
- 5 KPMG Options Analysis documents marked 'Draft Cabinet-in-confidence' (Records 1-20) and 5 additional documents (Records 21-25) were identified as Cabinet information and therefore as subject to an overriding public interest against disclosure. Spread sheets and formulas used by KPMG in its proprietary model in preparation of

the modelling outputs and analysis and to model assumptions against inputs were stated as being held by KPMG and not by the Department.

6 The Applicant sought review of Mr Richards' decision by the Tribunal.

7 The agency subsequently agreed to the release of a number of withheld documents and orders were made to that effect. It no longer pressed its claim against disclosure and granted access to Records 1-20 and 23-25. It did not release Record 21 ("The Business Case") or Record 22 ("Local Government Reform: Merger Impacts and Analysis Report" or "the long form document").

8 On 26 March 2018 I determined that the scope of the Applicant's access application is to be construed as a request for "any report by KPMG that provides analysis and modelling in relation to proposed mergers of NSW local councils".

9 Mr Richards provided a schedule to his determination in which he identified the information that he considered to be captured by the access application. The withheld information identified in Part B of the schedule to the determination included Record 21 which he referred to as the *Business Case* and Record 22 which he referred to as *Local Government Reform: Merger Impacts and Analysis Report*.

10 Mr Richards determined to refuse to release Record 21 and Record 22 pursuant to Clause 2(1) of Schedule 1 to the GIPA Act. The agency continues to refuse to release Record 21 and Record 22. This issue remains in dispute.

11 Clause 2 of Schedule 1 to the GIPA Act provides:

2 CABINET INFORMATION

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

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

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

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

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

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

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

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

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

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

(3) Information is not Cabinet information merely because it is contained in a document

attached to a document referred to in subclause (1).

(4) Information is not Cabinet information to the extent that it consists solely of factual material unless the information would:

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

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

(5) In this clause,

"Cabinet" includes a committee of Cabinet and a subcommittee of a committee of Cabinet.

- 12 The Applicant also contends that the agency should hold other information that falls within the scope of his request.

The Issues in Dispute

- 13 The issues in dispute are:

- (1) whether the Department's determination to refuse to release Record 21 and Record 22 is the correct and preferable decision; and
- (2) whether the Department's determination that it does not hold other requested information is the correct and preferable decision. This aspect turns on the question of whether the searches that the Department undertook to locate information that was within the scope of the access application were reasonable.

Applicable legislation

- 14 The approach to be taken in relation to GIPA matters is now well established.

- 15 Section 63 of the *Administrative Decisions Review Act 1997* provides that when determining an application for an administrative review of an administratively reviewable decision, the Tribunal may confirm or vary that decision, set it aside and make a substitution for the decision, or set aside the decision and remit the matter for reconsideration by the administrator. The Tribunal is not limited to considering the grounds of exemption relied upon by the original decision-maker: *Public Service Association and Professional Officers Association, Amalgamated Union of NSW v Director General, Premier's Department* [2002] NSWADT 277 at paragraph [57].

- 16 In regard to Clause 2(1) of Schedule 1 to the GIPA Act the Tribunal is limited to deciding whether there were reasonable grounds for the agency's claim that Records 21 and 22 are Cabinet information. The Tribunal is not authorised to make a decision as to the correct and preferable decision on the matter other than in accordance with section 106 of the GIPA Act. Section 106 provides:

106 DECISIONS ABOUT CABINET AND EXECUTIVE COUNCIL INFORMATION

(1) On an NCAT administrative review of a decision by an agency that there is an overriding public interest against disclosure of information because the information is claimed to be Cabinet or Executive Council information (as described in Schedule 1), NCAT is limited to deciding whether there were reasonable grounds for the agency's claim and is not authorised to make a decision as to the correct and preferable decision on the matter.

(2) If NCAT is not satisfied, by evidence on affidavit or otherwise, that there were reasonable grounds for the claim, it may require the information to be produced in evidence before it.

(3) If NCAT is still not satisfied after considering the evidence produced that there were reasonable grounds for the claim, NCAT is to reject the claim when determining the review application and may then proceed to make a decision as to the correct and preferable decision on the matter.

(4) NCAT is not to reject the claim unless it has given the Premier a reasonable opportunity to appear and be heard in relation to the matter.

(5) The Premier is a party to any proceedings on an application under this section.

17 For a relevant discussion in regard to section 106 of the GIPA Act see *Primrose v NSW Department of Premier and Cabinet* [2017] NSWCATAD 366. Much of the substance of this matter was also considered in *Primrose*.

18 As noted, the Applicant also contends that the Department should hold further information that falls within the scope of his request and expressed concerns as to the adequacy of the search undertaken by the agency. Section 53 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.

19 The question of what constitutes an adequate search has been considered in many decisions under the GIPA Act and similar legislation. In *Shepherd and Department of Housing, Local Government and Planning* [1994] QICmr 7, (1994) 1 QAR 464, the Queensland Information Commissioner outlined a two-stage approach to the question of what constitutes an adequate search:

- (1) whether there are reasonable grounds to believe that the requested documents exist and are documents of the agency and, if so,
- (2) whether the search efforts made by the agency to locate such documents have been reasonable in all the circumstances of a particular case.

20 The decision in *Shepherd* has been followed in a number of decisions of this Tribunal in matters under the GIPA Act. See, for example, *Camilleri v Commissioner of Police, New South Wales Police Force* [2012] NSWADT 5, and *BNQ v South Eastern Sydney Local Health District* [2015] NSWCATAD 156.

- 21 Section 53(1) limits the agency's obligation to respond to a request for information held by it at the time of the access request. The obligation does not extend to information once held by the agency but which is no longer held in the primary systems of the agency: *Robinson v Commissioner of Police* [2014] NSWCATAP 73.
- 22 The Tribunal's task is to determine the correct and preferable decision at the time of the decision. If there are reasonable grounds to believe that the agency holds more information than it has identified, the correct and preferable decision will not be to affirm the agency's decision that it does not hold the information. As Senior Member Lucy noted in *Amos v Central Coast Council* [2018] NSWCATAD 101, this may be the case even if the agency's searches appear to have been reasonable at the time they were conducted.
- 23 The Applicant submitted that there are difficulties in searching for words within documents that have been scanned or an image document and that insufficient searches were undertaken in the Policy branch of the Department. He sought to have the opportunity to obtain evidence from Mr John Clark who was the executive director of the Taskforce that dealt with council mergers. Mr Clark was responsible for managing the Department's engagement of KPMG. He also contends that Mr Dennis Smith worked in the special unit set up within the Department and that both Mr Clark and Mr Smith could provide useful evidence for this application in circumstances where the sufficiency of search is in issue. He contends that they would know what relevant documents were held by the Department.
- 24 The Applicant referred to section 38(6) of the *Civil and Administrative Tribunal Act 2013* which provides that the Tribunal is to ensure that all relevant material is disclosed to it so as to enable it to determine all of the relevant facts in issue in any proceedings.
- 25 The Department did not obtain evidence from Mr Clark and no summons was issued for his attendance. Pursuant to section 105 of the GIPA Act the burden of establishing that the decision is justified lies on the agency. In my view it is a matter for the Department how it presents its case.

Cabinet information – are there reasonable grounds for the agency's claim

- 26 The issue of whether or not there are there reasonable grounds for the agency's claim in regard to Record 21 and Record 22 was the subject of consideration by Principal Member Titterton in *Primrose*. In that matter the Principal Member affirmed the Department's decision to deny the applicant access to the documents because there was an overriding public interest against their disclosure because of section 14(1) and clause 2(1) of Schedule 1 of the GIPA Act.
- 27 The Department relies on the evidence of Ms Karen Smith. Ms Smith is the Deputy Secretary, Cabinet and Legal, Department of Premier and Cabinet. Ms Smith provided two affidavits. Her first affidavit was affirmed on 20 October 2017 and her second affidavit was affirmed on 17 November 2017. Each affidavit contained confidential portions and annexures. Ms Smith attended the hearing and was cross-examined. Ms

Smith also gave evidence on a confidential basis.

28 I note that Ms Smith was also the Department's main witness in *Primrose* and I adopt the summary of Ms Smith's experience set out in the *Primrose* decision:

8 Ms Smith is the Deputy Secretary of the Cabinet and Legal Group of the respondent. She has occupied that role since 12 September 2016. Her responsibilities include acting as the legal advisor to the Premier, by leading and directing the provision of expert Legal services and cabinet secretariat functions, and ensuring the delivery of high quality services and support to meet the requirements of the Premier, Cabinet and the respondent.

9 Ms Smith has direct experience and knowledge of Cabinet and its processes, as the respondent is responsible for the provision of secretariat services to the NSW Cabinet. As the Deputy Secretary of the Cabinet and Legal group, she has overall responsibility for the provision of secretariat services to Cabinet. She provides advice on a regular basis on vice-regal, administrative and procedural issues relating to the conduct of Cabinet meetings and the handling of Cabinet records. She also provides advice to the Premier for her use in Cabinet, and has been responsible for the drafting of numerous Cabinet submissions, and the drafting of Cabinet decisions.

10 Ms Smith has on occasion attended Cabinet, in the absence of the Cabinet Secretary or their Deputy. She is the Committee Secretary to the Cabinet Standing Committee on Legislation and regularly attends meetings of that Cabinet Committee.

11 For the purposes of preparing her affidavits, Ms Smith sought information from other employees within the respondent about matters relating to the Documents, in particular from:

(1) Mr John Clark, who was the Executive Director of the Local Government Reform Branch of the respondent from June 2015 to March 2016. During that time Mr Clark was responsible for managing the Department's engagement of KPMG to provide consulting services in relation to the local government reform process; and

(2) Mr Dennis Smith, a solicitor in the Legal Branch of the respondent, who has provided legal advice on the local government reform process since December 2015.

29 It is apparent from the discussion of the evidence in *Primrose* that Ms Smith's evidence in that matter and her evidence in this matter were consistent. I adopt the Principle Member's summary of the evidence and I will not repeat it here. In *Primrose* the Principle Member referred to Record 21 as "the Business Case" and to Record 22 as "the Long Form Document". He concluded:

"The Long Form Document"

54 The respondent refused to provide access to the Long Form document on the basis that the document constituted Cabinet information for the purposes of cl 2(1)(b) of Sch 1 of the Act. However, the respondent now submits that the document is Cabinet information by application of cl 2(1)(c) of Sch 1 of the Act. In doing so the respondent submits, correctly, that the Tribunal is not limited to consideration of the original reasons for the decision, or to the material upon which the decision-maker relied: *Searle v Transport for NSW* [2017] NSWCATAD 256 at [32].

55 Relying on the evidence of Ms Smith, the respondent submits that the Long Form document:

(1) Was prepared for the purpose of being submitted to Cabinet for Cabinet to consider approving public release of the document;

(2) Was submitted to Cabinet for Cabinet's approval for the document to be publicly released, in the form of an attachment to a Cabinet submission;

(3) Was not publicly released, a document different to the Long Form document, but based on that document, being released on 18 December 2015,

and that the protection in cl 2(1)(c) continues to apply "by dint or the words: 'whether or not the approval is actually given'".

56 I accept that submission. The evidence of Ms Smith, which I accept, in particular her confidential evidence, establishes that there are reasonable grounds for the respondent's claim that the Long Form document was Cabinet information by reason of cl 2(1)(c) of Sch 1 of the Act. In addition, I am satisfied that the instructions to KPMG were consistent with the position of the Taskforce, and that the claims made in Ms Smith's her evidence were correct, and that a proper basis exists for her evidence to the extent that it is based on information and provided to her from officers of the respondent.

The Business Case document

57 Clause 2(5) of Sch 1 of the Act provides that "Cabinet" includes a committee of Cabinet and a subcommittee of a committee of Cabinet. I am satisfied on the basis of Ms Smith's evidence, in particular her confidential evidence, that the Business Case document was prepared for the dominant purpose of being submitted to ERC for ERC's consideration and approval, and therefore that there are reasonable grounds for the respondent's claim that the Business Case document was Cabinet information by reason of cl 2(1)(c) of Sch 1 of the Act.

30 I have formed the same view as that formed by Principal Member Titterton in *Primrose* in regard to Record 21 and Record 22. I am satisfied that there are reasonable grounds for the Department's claim that each of Record 21 and Record 22 was Cabinet information by reason of clause 2(1) of Schedule 1 to the GIPA Act.

Waiver

The Applicant's case

31 The Applicant does not appear to dispute that there were reasonable grounds for the Department's claim. However, he contends that Records 21 and 22 are no longer Cabinet information because that status has been waived. In support of his case he relies on the evidence of Mr Philip Jenkyn who provided an affidavit in which he set out his background and in particular his involvement in opposing the proposed council mergers. Mr Jenkyn was not required for cross-examination.

32 He submits that at common law a person or body that would otherwise be entitled to the benefit of privilege may waive that privilege at any time, either expressly or impliedly. Conduct that is inconsistent with the maintenance of the confidentiality which the privilege is intended to protect can amount to implied waiver.

33 The Applicant notes that a total of 47 records all marked 'Cabinet-in-confidence' have been released. He submits that by releasing those documents their status as Cabinet information has been waived.

34 The Applicant further contends that the Department publicly released 35 Merger Proposals each of which identified 'net financial savings' and 'yearly savings' figures and referred to the Long Form Document as the source document. He submits that the Long Form Document was a reference point for support and as a place for information for the final figures produced in the Proposals. Without the Long Form Document there is no way of testing or evaluating the final figures or conclusions. He

says that the public's ability to understand, evaluate, or form a view on the veracity and strength of the KPMG final figures publicly released was severely undermined by the failure to release named source KPMG documents.

35 The Applicant contends that once the Merger Proposals were made public, the referenced documents were held out as being available for access to the public, having been approved by Cabinet as references. Any claim for privilege, be it Cabinet or otherwise is either expressly or impliedly waived by this course of action. He submits that the Department has impliedly waived any privilege that may or may not be available to this source document or information, and it should be produced.

36 The Applicant says that once the KPMG reports and Merger Proposals were release, the Department and the Government relied upon their contents, including their referenced sources, to mount a campaign to convince the public of alleged financial benefits from proposed forced council mergers. He contends that this course of action amounts to a direct or implied waiver of any privilege of Cabinet confidentiality over these sources. These source references were being held out as documents that explained or supported or informed the contents of the KPMG reports and Merger Proposals.

37 The Applicant submits that Record 22 should be produced as it is the specific reference in the KPMG Merger Proposals publicly released by the Cabinet. Record 21 has been identified as a document prepared by KPMG.

38 Mr Jenkyn stated:

On 20 January 2016 the Department placed on the Government website a document called 'Outline of Financial Modelling Assumptions for Local Government Merger Proposals - Technical Paper 19 January 2016'. It states (p2) 'KPMG was engaged by Department of Premier and Cabinet to prepare independent modelling of the potential financial impacts of selected council mergers. The financial modelling undertaken relied on publicly available council data and a financial model developed by KPMG. The financial model drew on a series of assumptions to estimate the potential savings, costs and overall financial impacts of council mergers'. The 'Data Source' for 'Assumptions - Metropolitan Councils' (p3) is 'Comparator and jurisdictional analysis/merger business cases'. The 'KPMG Business Case' Record 21 is one of the documents being sought in this application. The 'Data Source' reference to 'analysis/merger business cases' is deemed as approved by Cabinet for release, and the only document identified as such is Record 21.

39 In the KPMG 'Financial Modelling Assumptions' paper publicly released 20 January 2016 the 'Data Source' for metropolitan councils was called 'Comparator and jurisdictional analysis/merger business cases'. The Applicant says that this 'Data Source' should be released, confidentiality having been waived by the naming of the source and its approval by Cabinet for inclusion. It is no longer 'Cabinet information' and requires not only its production but also that of the 'Business Case'.

40 The Applicant submits that there is no longer a valid claim for Cabinet confidentiality and that the public interest grounds clearly show that these documents should be publicly released.

The Department's case

- 41 In response to the Applicant's contention that the Department has waived any claim for Cabinet confidentiality, Mr Birch, counsel for the Department, argues that there is no distinct legal doctrine of "waiver" that is capable of application to clause 2 of Schedule 1 to the GIPA Act.
- 42 He submits that there is no basis to infer into clause 2 a general concept of "waiver" that would cut down the scope of the conclusive presumption enacted by clause 2(1). It is a matter of statutory construction whether or not Records 21 or 22 answer the definition of "Cabinet information".
- 43 Mr Birch further submits that where the legislature intended "waiver" to be relevant to one of the conclusive presumptions in Schedule 1 to the GIPA Act, it expressly provided for that result. A reference to "waiver" has been included in clause 5(1) of Schedule 1 to the GIPA Act in the context of waiver of legal professional privilege. There is no such reference in clause 2 of Schedule 1.
- 44 To the contrary, in Mr Birch's submission, clause 2(2) of Schedule 1 sets out circumstances in which information which is otherwise Cabinet information ceases to be so. Clause 2(2) of Schedule 1 provides:
- (2) Information contained in a document is not Cabinet information if:
 - (a) public disclosure of the document has been approved by the Premier or Cabinet, or
 - (b) 10 years have passed since the end of the calendar year in which the document came into existence.
- 45 Mr Birch submits that neither criterion is satisfied in relation to Records 21 or 22.

Discussion

- 46 As I have noted above, I have agreed with the finding in *Primrose* that there are reasonable grounds for the Department's claim that Records 21 and 22 are "Cabinet information". "Waiver" appears to be the only basis upon which the Applicant contends that there are no longer reasonable grounds for the Department's claim.
- 47 I agree with the Department that there is no basis on which a doctrine of "waiver" is capable of application to clause 2 of Schedule 1 to the GIPA Act. This view is reinforced by the express inclusion of a reference to 'waiver' in clause 5(1) of Schedule 1 to the GIPA Act. If the legislature had intended "waiver" to be relevant to clause 2 of Schedule 1 to the GIPA Act it could have made a similar provision.
- 48 In my view it is clear that Clause 2(2) of Schedule 1 provides the basis on which a document that answers the definition of Cabinet information ceases to become Cabinet information. I am satisfied that neither of those is satisfied here in regard to Records 21 and 22. I have formed that view after considering both the open and confidential material that is before me.
- 49 I have found that there are reasonable grounds for the agency's claim that there is an overriding public interest against disclosure of Records 21 and 22 because the information is claimed to be Cabinet information. Clause 2(2)(b) of Schedule 1 is not applicable. In the circumstances I am not satisfied that either Record 21 or Record 22

has ceased to become Cabinet information as a result of action under Clause 2(2)(a) of Schedule 1.

50 Accordingly, the decision under review in relation to Records 21 and 22 should be affirmed.

Reasonableness of searches

51 It is necessary to determine whether there are reasonable grounds to believe that further information exists that falls within the scope of the access application but which has not been identified by the Department's searches.

The Applicant's case

52 The access application has requested "any report by KPMG that provides analysis and modelling in relation to proposed mergers of NSW local councils". The Applicant submits that in this context a 'report' is a spoken or written account of something that one has observed, heard, done or investigated. He contends that the word 'report' embraces an account that can be preliminary, draft, recurrent or final.

53 He says that given the scope of the request, one might expect for example the Department to have identified KPMG reports, draft reports, documents, merger proposals, a business case, merger impacts, analysis, options analysis, metro and regional options, presentations, data sources, spreadsheets, financial modeling assumptions and model design methodology.

54 He submits that a search that was limited to a final report is insufficient. He also noted that there are difficulties in searching for words within documents that have been scanned or an image document and with inadequate headings.

55 He says that the searches were inadequate because they did not look for drafts or file names that were not 'reports', or emails or spreadsheets or Taskforce papers. He noted that one spreadsheet was produced and says that it is likely that further searches would find other information that is within the scope of the access application that may be found under various headings including 'drafts' and 'spreadsheets'.

56 The Applicant submits that there are many grounds for holding that there has not been an adequate search. He says that the Department has misconceived the width of the scope by limiting it to 'final reports' and that further searches could include information that had been excluded such as drafts, emails, spreadsheets and the like, and could carry out site specific searches for documents like "draft business case".

57 He seeks an order that the decision of the Department that it does not hold any more information than it has now identified should be set aside. He also seeks the following orders

- (1) That the Department carries out further searches for KPMG records within the scope of "request for any report by KPMG containing analysis and modeling on council mergers", as has been determined by the Tribunal.
- (2) That 'report' is defined as "an account brought back or presented; a statement submitted in reply to inquiry as the result of investigation, or by a person

authorised to examine and bring or send information."

- (3) Such searches to include "KPMG" and "council", "KPMG" and "analysis", "KPMG" and "modeling", "KPMG" and "impacts and analysis". It should also include "KPMG" and "Business case", "KPMG" and "ICT Options Paper", "Business case", "draft Business case", "KPMG analysis", "ICT Options Paper" and "draft ICT Options Paper".
- (4) That such searches do not exclude any 'draft' documents, file names with 'draft' in it, file names that indicated that they weren't reports, Taskforce papers, emails, excel spreadsheets containing data, presentations, and documents that were prepared by DPC using information supplied by KPMG.
- (5) That the Department prepares a list of documents that have been identified by the search that are within scope. The Department to also set out how it carried out the search and the words used in any search. Both to be served upon the Applicant by way of an affidavit.
- (6) Such further orders as to give effect to the decision reached by the Tribunal in this application.

The Department's case

- 58 The Department relies on the evidence of Ms Catherine Chang, a Director within the Legal Branch of the Department, and Mr Daniel Van Dyk, a Senior Policy Officer with the Department. Each provided affidavits in regard to the searches that were undertaken to locate information that was captured by the access application.
- 59 In regard to the Applicant's reference to Mr Clark, the Department referred to Ms Smith's evidence that Mr Clark had previously been an employee of the Department but that he left in 2016. He returned to the Department in different role. It was in that period that Ms Smith consulted with Mr Clark in 2017. Mr Clark is no longer engaged by the Department as either an employee or as a consultant and the Department submits that it should not be required to engage a former employee in order for that employee to assist with this application.
- 60 The Department submits that the Applicant's proposed definition of "report" is too broad to sensibly apply to the specific request in the Applicant's access application. It says that the ordinary use of the term "report" does not include drafts. The Macquarie Dictionary definition suggests that a "report" is "an account brought back or presented" or "a statement submitted in reply to inquiry as the result of investigation". The Department submits that even that broad definition demonstrates that draft documents should not be considered to be within the scope of the Applicant's access application. Implicitly, the Macquarie Definition is that a "report" is a document provided which conveys the reporter's opinion. That is, the reporter's concluded view.

Ms Catherine Chang

- 61 Ms Chang was previously a Director within the LGR branch where she worked from September 2015 until it was disbanded in late 2017.
- 62 In her affidavit sworn 12 February 2018 Ms Chang referred to the searches that she had undertaken to identify information captured by the access application. She stated:

I am informed by Mr Matt Richards, Director, Legal Branch of the Department and believe that:

- a. In January 2018, the applicant amended his Review Application to, in effect, challenge the adequacy of the Department's searches;
- b. the original review of documents which formed the basis of the Decision was conducted by an employee who no longer works for the Department; and
- c. he has become aware that the Department holds a further 27 KPMG "Options Analysis" documents which fall within the scope of the Access Application, which he anticipates will be provided to the applicant.

Further searches

I have conducted the following further searches to determine whether the Department holds any other records within the scope of the Access Application, in addition to those identified in the Decision and at paragraph 9.c above:

- a. manual review of hard copy folders of documents previously provided to me by the policy team within the LGR branch in response to a request, made for the purposes of litigation, to be provided with documents (including any Cabinet documents) prepared by KPMG for the Government containing analysis or modelling regarding council mergers;
- b. manual review of a bundle of documents provided to me by Mr Dennis Smith, another solicitor who was employed within the LGR branch and Legal Branch of the Department, at the time he ceased working for the Department;
- c. keyword searches, using the term "KPMG", of electronic folders in Objective titled "Legal Branch/Local Government/Fit for Future Reforms" and "Legal Branch/Local Government/Fit for Future Reforms Transitional and Implementation Issues"; and
- d. keyword searches, using the term "KPMG", of my own "Inbox", "sent" and "Local Government" email folders.

I did not identify any additional documents within the scope of the Access Application through the searches described ...

Searches were also conducted by the Resources and Land Use Branch of the Department to determine whether the Department holds any other records within the scope of the Access Application, in addition to those identified ... I am informed by Danielle Woolley, Executive Director of that Branch and believe that the following searches were conducted:

- a. a keyword search of Objective using the search terms "KPMG" and "council", so as to pick up any document which contained both those words, which produced 7,641 'hits';
- b. a manual scan of those "hits" to exclude those which:
 - i. had file names that were irrelevant to council mergers;
 - ii. had file names that indicated that they were not reports;
 - iii. had 'draft' in the file name;
 - iv. were located in folders unrelated to local government reforms;
 - v. were emails;
 - vi. were Excel spread sheets containing data; or
 - vii. were Taskforce papers such as briefs or minutes.
- c. a manual review of the remaining documents to exclude:
 - i. presentations;
 - ii. drafts;
 - iii. project plans;
 - iv. documents prepared by DPC;

- v. project status update papers; and
- vi. proposals to undertake work.

I am informed by Ms Woolley and believe that the Resources and Land Use Branch did not identify any additional documents within the scope of the Access Application through the searches described ...

Through my work in the LGR branch and Legal Branch, I am aware that:

- a. between early 2016 and the present, multiple local councils commenced litigation against the Minister for Local Government and other State parties;
- b. in the context of that litigation, some of those councils sought access to documents prepared by KPMG containing analysis and modelling relating to the proposed amalgamation of local government areas; and
- c. the Department has also received multiple previous applications under the GIPA Act in broadly similar terms to the Access Application.

To the best of my knowledge, information and belief, the Department holds no other documents within the scope of the Access Application aside from those identified ...

- 63 Ms Chang's evidence was not varied under cross-examination. She found the documents that she expected to find but she did not search for 'spread sheets', if there was 'draft' in the file name, nor if it was a presentation, or 'file names that indicated that they were not reports'.

Mr Daniel Van Dyk

- 64 In February and March 2018, Mr Van Dyk conducted new searches for documents sought by the Applicant in these proceedings. In his affidavit dated 3 April 2018 Mr Van Dyk set out the process that he followed:

February 2018 searches

On 23 January 2018, the Legal Branch of the Department requested that I assist in conducting new searches for documents sought by the applicant in these proceedings.

I reviewed the following documents:

- a. application to the Department under the GIPA Act dated 3 May 2017;
- b. decision of the Department dated 7 June 2017, including Annexures A-B to that decision;
- c. a list of documents disclosed to the applicant on or about 28 November 2017; and
- d. a list of additional "options analysis" documents which the Department anticipated disclosing to the applicant.

I also met with Catherine Chang, Director Legal within the Department to discuss the new searches. At that meeting, we agreed upon the searches that we would each carry out and the search terms to be used for any electronic keyword searches.

In or about the first week of February 2018, I conducted keyword searches on Objective (the Department's electronic document management system). I prepared a "GIPA Results Certification Form", which explained the way in which I had conducted my searches, and provided that form to Danielle Woolley, an Executive Director within the RLU Branch of the Department. ...

I used the search terms "KPMG" and "council", so as to identify documents held on Objective which contained both those terms. These search terms produced a 'hit' on 7,641 documents held in Objective. I searched all the documents held in Objective, not only those documents in the folder belonging to the former Local Government Reform Branch.

Many of those 7,641 hits involved documents that were obviously irrelevant to the applicant's request ... (for example, because the file name and/or the folder in which the document was held indicated that it was unrelated to council mergers/local government reform). Given the very large number of hits, my review involved eliminating documents of this kind. If I considered there to be doubt about whether the document could fall within the scope of the applicant's request, I opened the document and manually reviewed it. ...

I reviewed the documents which I had not eliminated on the bases described at 9-10 above against the lists (described at 5.b-5.d above) of documents which were publicly available, had already been provided or were expected to be provided to the applicant. All the remaining documents appeared on one of those lists.

March 2018 searches

12. On or about 27 March 2018, Matt Richards (a Director within the Department) asked me to conduct a further search on Objective for a document with the title "ICT Options Paper". On that same day, I conducted a further search on Objective using the phrase "ICT Options Paper". That search produced 19 "hits". I then reviewed each of those 19 documents and ascertained that none of them was a final ICT Options Paper.

65 In relation to the searches, Mr Van Dyk set out the following information on the GIPA Results Certification Form:

"searched Objective using the search term "KPMG council". The result was 7,641 objects.

scanned the objects and excluded those that:

Had files names that were irrelevant to council mergers

Had file names that indicated that they weren't reports

Had "draft in the file name

Were located in folders unrelated to local government reform

Were emails

Were Excel spread sheets containing data

Were Taskforce papers such as briefs or minutes

I reviewed the remaining documents and excluded:

- Presentations
- Drafts (any document with the title 'draft', highlighted sections, track-changes, missing words or figures or containing comments)
- Projects plans
- Documents that were prepared by DPC using information supplied by KPMG
- Project status update papers
- Proposals to undertake work

When I found a document that I considered to be in scope of the original Walker GIPA I checked the schedule of records (Annexure A), the list of 23 records that were later released (Attachment C) and the list of further options analyses identified (Attachment D).

All documents appeared on one of these lists."

66 Under cross-examination Mr Van Dyk confirmed that he had excluded drafts, emails, Excel spreadsheets and presentations. However, he said that if he was unsure about whether an item was within scope of the access application he opened the file and checked it to satisfy himself on that issue. He also excluded documents that were prepared by the Department from information provided by KPMG. However, he included merger proposals and other material that he was aware had already been

found to fall within the scope. He cross-references any documents that he considered were within scope against the schedule that Mr Richards had prepared.

- 67 Mr Van Dyk confirmed that his searches did not locate a document identified as ITC Options paper. He could not explain why it had not been identified by the search.
- 68 In regard to the further searches that the Applicant has suggested should be undertaken, the Department submits that further searches including the term "KPMG" would be a duplication of the searches already undertaken. That is because the term "KPMG" had already been used to narrow the searches that had been undertaken.
- 69 The Department submits that Ms Chang was best placed to conduct searches and reviews of the principal documents in response to the access application, given her knowledge of the issues and the documents and the Tribunal should be satisfied that Ms Chang's searches were a reasonable response to the Applicant's access application.
- 70 Mr Van Dyk conducted a further softcopy search and review of documents in order to supplement Ms Chang's hardcopy review. The Department further submits that it would have been unreasonable to conduct searches for all documents held by the Office of Local Government including the word "KPMG" or the word "council", as the Applicant suggested. A search on the word "council" would pick up documents containing the word "council" but completely unrelated to KPMG and the local government reform process. Therefore it would be overly broad. Further, it submits that it would be reasonable to consider that KPMG would be unlikely to prepare a report without using the word "KPMG" anywhere in the document.
- 71 The Department further submits that it would be almost impossible for KPMG to prepare a report containing analysis and modelling on proposed mergers of local councils without using the word "council" anywhere in the document.
- 72 The Department disputes the Applicant's contention that searches were only conducted to pick up documents with the word "report" in the file name. Mr Van Dyk gave evidence that a document was excluded only if the file name clearly indicated that it was not a report. In contrast, for Powerpoint presentations he went through the whole document to determine whether the document was a presentation or a "report". The Department says that that is clearly a responsible approach.
- 73 In regard to the Applicant's concern in regard to the exclusion of documents that had "draft" in the file name, and Mr Van Dyk's acceptance that some of the documents which have subsequently been released would not have been captured by the softcopy searches that he conducted, the Department submits that its method of a hardcopy review by someone with first-hand knowledge supplemented by a softcopy review of the its electronic database was a reasonable way to proceed.
- 74 The Department further submits that even for a reviewer with first-hand knowledge it would be difficult to undertake the task of reviewing multiple "drafts" to determine which, if any, of them was nevertheless the "final version. That difficulty is only magnified where the whole search picked up 7,641 documents. It argues that in the

circumstances it is not reasonable to require an agency to conduct a forensic analysis of the status of each document marked "draft" in order to ascertain whether that is its true status.

75 The Department further submits that it was reasonable for documents such as emails and spread sheets to be excluded from Mr Van Dyk's review. It says that the Tribunal can infer that that any report provided by KPMG would be unlikely to be provided in the form of a document such as an email or a spread sheet.

76 In the Department's submission it follows that the combination of a hardcopy search and review of documents conducted by Ms Chang and a softcopy search and review of documents conducted by Mr Van Dyk in response to the Applicant's access application constituted "reasonable searches" for the purposes of s 53(2) of the GIPA Act.

Discussion

77 I agree with the Department that the definition of "report" that is urged by the Applicant is too broad in light of the access application. A further, differently framed access application would be necessary to capture the information that the Applicant contends should have been located in response to this application.

78 The Macquarie Dictionary defines a "report" as:

"an account brought back or presented; a statement submitted in reply to inquiry as the result of investigation, or by a person authorised to examine and bring or send information."

79 I agree with the Department that the Macquarie Dictionary definition suggests that a "report" is a document provided which conveys the reporter's opinion. That is, the reporter's concluded view. That being the case, a draft document would not be a 'report' that falls within the scope of the Applicant's access application. It would only be a preliminary view rather than a concluded view.

80 I accept that it is possible that a report from KPMG could have been forwarded as an attachment to an email. However, it is improbable that such a report would have only been presented by that method. It is reasonable to assume that "any report by KPMG that provides analysis and modelling in relation to proposed mergers of NSW local councils" would have been provided in a hard copy form even if it had been provided as an attachment to an email. If that were the case such a report would have been located by the searches that were undertaken.

81 I also agree with the Department that the additional searches that the Applicant has proposed would be either futile or so cumbersome as to be unreasonable.

82 In my view, the access application is too narrow to capture the additional material that the Applicant is seeking.

83 Given the breadth of the searches that have been undertaken already, as discussed in the evidence of both Ms Chang and Mr Van Dyk, I think it is unlikely that any further searches that could be reasonably undertaken would locate further information falling

within the scope of the access application.

- 84 It follows, in my view, that the searches that the Department has undertaken were reasonable. I am satisfied that the Department does not hold further information falling within the scope of the access application.
- 85 It follows that the Department's decision to refuse to release Record 21 and Record 22 and that it does not hold further information falling within the scope of the access application is the correct and preferable decision should be affirmed.

Order

- (1) The decision under review is affirmed

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

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