

Mr Philip Charles Walker
184 Warriewood Road
MONA VALE NSW 2103

By email: calalkarma@gmail.com

Application for access to government information

Dear Mr Walker

I refer to your application made under the *Government Information (Public Access) Act 2009* (the GIPA Act) to Service NSW dated 29 March 2018, and provided to the Department of Premier and Cabinet (the Department) by Service NSW as an agency-initiated transfer on 11 April 2018, requesting access to:

"KPMG Report – analysis of cost of repairs to Moore Park stadium 2017".

Decision about access

I have today decided your application by:

- deciding to refuse access to the records described in **Annexure A** because there is an overriding public interest against disclosure, pursuant to section 58(1)(d) of the GIPA Act.

Scope of application

I have interpreted this application as seeking access to a report prepared by KPMG providing analysis of the cost of repairs to Moore Park stadium, also known as the Sydney Football Stadium. Draft documents have also been interpreted as within the scope of your application.

Statement of reasons

There is a presumption in favour of disclosing government information. You have a legally enforceable right to be provided with access to the information sought, unless there is an overriding public interest against disclosure of the information.

In determining whether there is an overriding public interest against disclosure, the Department must apply the public interest test under section 13 of the GIPA Act, which provides that there will only be an overriding public interest against disclosure where public interest considerations in favour of disclosure are, on balance, outweighed by those against disclosure.

Public interest considerations in favour of disclosure

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

I consider that the public interest considerations in favour of disclosure are that the release of the requested information could reasonably be expected to:

- promote open discussion of public affairs, enhance Government accountability or contribute to positive and informed debate of issues of public importance (section 12(2)(a)),
- inform the public about the operations of agencies (section 12(2)(b)), and
- ensure effective oversight of the expenditure of public funds (paragraph (c) of the Note to section 12(2)).

Public interest considerations against disclosure

Section 14(1) of the GIPA Act provides that it is to be conclusively presumed that there is an overriding public interest against disclosure of any of the government information described in Schedule 1 to the GIPA Act. I have identified clause 2 (Cabinet information) of Schedule 1 to the GIPA Act as being relevant to your application.

Clause 2(1) of Schedule 1 to the GIPA Act provides that it is to be conclusively presumed that there is an overriding public interest against disclosure of Cabinet information. I have identified the following clauses as being relevant to your application:

- 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) (clause 2(1)(b));
- 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 (clause 2(1)(e)); and
- 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) (clause 2(1)(f))

Clause 2(4) of Schedule 1 to the GIPA Act provides that information is not Cabinet information to the extent that it consists solely of factual material unless the information would:

- reveal or tend to reveal information concerning any Cabinet decision or determination; or
- reveal or tend to reveal the position that a particular Minister has taken, is taking or will take on a matter in Cabinet.

Records 1 and 2: Cabinet information

I am advised that Record 1 as described in **Annexure A** was prepared for the dominant purpose of submission to Cabinet, and was submitted to Cabinet, in relation to the redevelopment of the Sydney Football Stadium. I am also advised that Record 1 was prepared before Cabinet's deliberation, on the matter of the redevelopment of Sydney Football Stadium, and that it reveals or tends to reveal the position that a particular Minister has taken or has been recommended on the matter in Cabinet. I am satisfied that this record is Cabinet information for the purposes of clauses 2(1)(b) and 2(1)(e) of Schedule 1 to the GIPA Act. Accordingly, I am satisfied that there is a conclusive presumption that there is an overriding public interest against disclosure of Record 1 and access to that information is refused.

I am advised that Record 2 as described in **Annexure A** is a preliminary draft of Record 1. I am satisfied that this record is Cabinet information for the purposes of clause 2(1)(f) of Schedule 1 to the GIPA Act. Accordingly, I am satisfied that there is a conclusive presumption that there is an overriding public interest against disclosure of Record 2 and access to that information is refused.

I am satisfied that Records 1 and 2 as described in **Annexure A** do not consist solely of factual material.

Availability of information sought

I am advised that on 8 June 2018, a redacted copy of the Final Business Case on the redevelopment of Sydney Football Stadium prepared by KPMG was delivered by the Department, on behalf of the Government, to the Clerk of the Legislative Council on a voluntary basis. This was

in accordance with Minister Harwin's statement to the House on 6 June 2018 that the Department would "provide the documents sought to the Clerk of the Legislative Council by 5.00pm on Friday".

I understand that Ms Julia Carland, Director, Legal, Department of Premier and Cabinet, advised you on 19 June 2018 that this document was available for public viewing at the Parliament of NSW. If you wish to inspect this document, the Parliament of NSW is located at 6 Macquarie Street, Sydney NSW 2000. Further information about planning a visit to the Parliament of NSW is available on the Parliament of NSW's website (at www.parliament.nsw.gov.au).

Fees and charges

I have decided that no further charges should be imposed for this application.

Rights of review

This decision is a reviewable decision under section 80(d) of the GIPA Act. If you are aggrieved by my decision, you may seek review under Part 5 of the GIPA Act.

There are three forms of review:

- internal review by a senior officer of the Department;
- external review by the Information Commissioner; or
- external review by the NSW Civil and Administrative Tribunal.

Your review rights are summarised in the enclosed fact sheet. You have 20 working days after the date of this letter to apply for an internal review, and 40 working days to apply for an external review.

Inquiries

Please contact Sandra Scacciotti, Senior Project Officer, Legal Branch, Cabinet and Legal on telephone (02) 9228 3168 if you have any questions in relation to your application.

Yours sincerely



Laura Shumack

Acting Director

19 JUL 2018

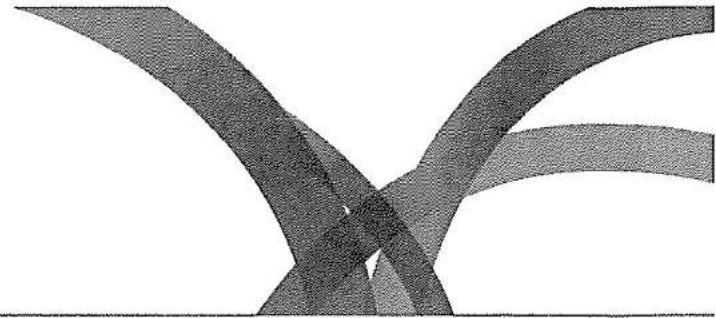
Annexure A – Schedule of Documents

Item	Document	Location	Overriding public interest against disclosure?	Comment
1	Final Business Case - The Redevelopment of Sydney Football Stadium	Cabinet branch	Yes	Clauses 2(1)(b) and (e) of Schedule 1 to the GIPA Act
2	Business Case - The Redevelopment of Sydney Football Stadium	Cities branch	Yes	Clauses 2(1)(b), (e) and (f) of Schedule 1 to the GIPA Act

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Your review rights under the GIPA Act

Fact sheet

May 2018

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

You have the right to request a review of certain decisions¹ made by government agencies about the release of information under the *Government Information (Public Access) Act 2009* (GIPA Act):

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

You generally have three review options.

1. Internal review

You have **20 working days**² after the notice of a decision has been given to you to ask for an internal review by the agency that made the decision. An agency may accept an application for internal review out of time, but is not obliged to do so.³

If a Minister or their personal staff, or the principal officer of an agency made the decision, you cannot ask for an internal review⁴, but you can ask for an external review.

The review must be carried out by an officer who is no less senior than the person who made the original decision.⁵ The review decision must be made as if it was a fresh application.⁶

There is a \$40 fee for an internal review application. An agency may choose to waive the internal review fee.⁷

No fee applies for an internal review if the decision is a 'deemed refusal' because the agency did not process your application in time⁸ or the internal review is conducted because the Information Commissioner has recommended the agency reconsider its decision under section 93 of the GIPA Act.⁹ In this case, you cannot be charged any review fee.

The agency must acknowledge your application within **five** working days of receiving it.¹⁰ The agency must decide the internal review within **15** working days¹¹ (this can be extended by **10** working days if

¹ Section 80 GIPA Act

² Section 83(1) GIPA Act

³ Section 83(2) GIPA Act

⁴ Section 82(2) GIPA Act

⁵ Section 84(2) GIPA Act

⁶ Section 84(1) GIPA Act

⁷ Section 127 GIPA Act

⁸ Section 85(2) GIPA Act

⁹ Section 93(6) GIPA Act

¹⁰ Section 83(3) GIPA Act

¹¹ Section 86(1) GIPA Act

the agency has to consult with a third party not previously consulted¹², or by agreement with you¹³).

What is a working day?

A working day is defined as any day that is not a Saturday, a Sunday or a public holiday.¹⁴

The close down for Christmas/ New Year is not excluded from the meaning of working day, so that only those days in the close down period that are Saturdays, Sundays or public holidays are excluded from working days for the purposes of calculating time in the GIPA Act.

What do the words 'given to' mean?

A recent Tribunal decision, *Choi v University of Technology Sydney* [2017] NSWCATAD 198 considered the meaning of the words 'given to' in looking at whether an application for internal review had been made within time.

The question before the Tribunal in *Choi* was about giving a notice of decision by email however the Tribunal in looking at the words "given to" also looked at decisions being given to a person by post.

In *Choi*, at [23], the Tribunal's reasoning was that the words "given to" have their ordinary meaning of "delivered" or "handed over".

The Tribunal in *Choi* at [24] to [25] also referred to previous decisions of Tribunals which considered the question of when a decision may be given to a party by posting a letter, served by post, which is when the letter would be delivered in the ordinary course of the post, unless it can be proved otherwise.

The Tribunal in *Choi* found that the notice was given to the applicant when it was received by email.

The Tribunal observed that the email notice was sent by the agency to the Applicant and there was no dispute that the email was received. In those circumstances the Tribunal could not be satisfied that there was a reasonable excuse for the Applicant's delay in lodging a request for administrative review to the Tribunal.

What is service by post?

Section 76 of the *Interpretation Act 1987* provides that:

- (1) If an Act or instrument authorises or requires any document to be served by post (whether the word "serve", "give" or "send" or any other word is used), service of the document:

- (a) may be effected by properly addressing, prepaying and posting a letter containing the document, and
- (b) in Australia or in an external Territory—is, unless evidence sufficient to raise doubt is adduced to the contrary, taken to have been effected on the fourth working day after the letter was posted, and
- (c) in another place—is, unless evidence sufficient to raise doubt is adduced to the contrary, taken to have been effected at the time when the letter would have been delivered in the ordinary course of post.

2. External review by the Information Commissioner

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

If you are the person applying for access to information, you do **not** have to have an internal review of the decision before asking the Information Commissioner to review it.¹⁵

If you are not the access applicant, you **must** seek an internal review before applying for review by the Information Commissioner. However, if an internal review cannot be sought (if a Minister or their personal staff, or the principal officer of an agency made the decision), you can seek a review by the Information Commissioner.¹⁶

You have **40 working days**¹⁷ from being notified of the decision to ask for a review by the Information Commissioner.

There is not a provision in the GIPA Act that enables the Information Commissioner to accept applications out of time. On reviewing the decision, the Information Commissioner can make recommendations about the decision to the agency.

Note: You cannot ask the Information Commissioner to review a decision that has already been reviewed by the NSW Civil and Administrative Tribunal (NCAT)¹⁸.

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

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

¹² Section 86(2) GIPA Act; IPC Fact Sheet [Why consult third parties; Guideline 5 Consultation on the public interest considerations](#)

¹³ Section 86(4) GIPA Act

¹⁴ Clause 1, Schedule 4 to the GIPA Act

¹⁵ Section 89 (2)(a) GIPA Act

¹⁶ Section 89 (2)(b) GIPA Act

¹⁷ Section 90 GIPA Act

¹⁸ Section 98 GIPA Act

Information Commissioner before applying for review by NCAT.

You have **40 working days**¹⁹ from being notified of the decision to apply to NCAT for review. However, if you have applied for review by the Information Commissioner, you have **20 working days**²⁰ from being notified of the Information Commissioner's review outcome to apply to NCAT.

For more information

Contact the Information and Privacy Commission NSW (IPC):

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

¹⁹ Section 101(1) GIPA Act

²⁰ Section 101(2) GIPA Act