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IN THE ADMINISTRATIVE DECISIONS TRIBUNAL  
GENERAL DIVISION  
SYDNEY REGISTRY

RECEIVED

29 JAN 2013

No. 123306

ADMINISTRATIVE  
DECISIONS TRIBUNAL

**BETWEEN:**

**NSW FIRE BRIGADE EMPLOYEES' UNION**

Applicant

**AND:**

**FIRE AND RESCUE NSW**

Respondent

**RESPONDENT'S SUBMISSIONS**

**1 Background to Administrative Decisions Tribunal Application  
No. 123306**

- 1.1 The Applicant has made an application under the *Government Information (Public Access) Act 2009 (GIPA Act)* to the Respondent (**Access Application**) for access to the following information:

*Any and all documents relating to possible strategies to meet the NSW Government's labour expense cap, including but not limited to temporary off line policy, risk assessments in relation to taking stations off line, moving up stations and increasing out duty limits or introducing out duties for officers, and service delivery models.*

- 1.2 On 28 September 2012, the Respondent determined to:
- (a) release in full the documents numbered 1-32 in the Schedule of Documents attached to the written reasons for decision dated 28 September 2012 (**Determination**);
  - (b) release in part, with deletions pursuant to section 74 of the GIPA Act, the documents numbered 33-36 in the Schedule of Documents attached to the Determination; and
  - (c) refuse access to the documents numbered 37-159 in the Schedule of Documents attached to the Determination.

- 1.3 On 25 October 2012, the Applicant made an application to the Administrative Decisions Tribunal (**Tribunal**) for a review of the Respondent's Determination.
- 1.4 Pursuant to orders made at a planning meeting of the Tribunal on 27 November 2012 (and by further variation to the timetable with the consent of the Applicant), the Respondent has filed and served these submissions.

## **2 Further release of documents to the Applicant**

2.1 The Respondent has determined that it is in the public interest to release the following documents to the Applicant in full (as per the numbering in the Schedule of Documents attached to the Determination):

- (a) 33-35;
- (b) 43-45;
- (c) 51;
- (d) 55;
- (e) 57;
- (f) 59;
- (g) 61-64;
- (h) 66-70;
- (i) 73-75;
- (j) 80;
- (k) 83;
- (l) 95;
- (m) 111;
- (n) 114;
- (o) 115;
- (p) 122;
- (q) 124-125;
- (r) 127-128;
- (s) 132-135;

- (t) 137;
- (u) 143-145;
- (v) 154-155;
- (w) 159.

2.2 The Respondent has further determined that it is in the public interest to release, in part with deletions pursuant to section 74 of the GIPA Act, the following documents to the Applicant (as per the numbering in the Schedule of Documents attached to the Determination):

- (a) 56;
- (b) 65; and
- (c) 71.

2.3 For the reasons set out in these submissions, the Respondent contends that, on balance, the public interest considerations against disclosure outweigh the public interest considerations in favour of disclosure with respect to the remaining information in the Schedule of Documents attached to the Determination (**withheld documents**).

### 3 Public interest test

- 3.1 The Respondent's Determination is a reviewable decision under s 80(d) of the GIPA Act. The Respondent bears the onus of establishing that its decision to refuse access is justified.<sup>1</sup>
- 3.2 Section 5 of the GIPA Act creates a statutory presumption in favour of the disclosure of government information unless there is an overriding public interest against disclosure of the government information to which access is sought. This statutory presumption is further recognised in s 12 of the GIPA Act, which confirms there is a general public interest in favour of the disclosure of government information.
- 3.3 Under the GIPA Act there is an overriding public interest against disclosure if, and only if, the public considerations against disclosure, on balance, outweigh those in favour of disclosure.<sup>2</sup>
- 3.4 Section 14 of the GIPA Act sets out the public interest considerations against disclosure an agency may have regard to when balancing the public interest considerations for and against disclosure in accordance with s 13 of the GIPA Act.

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<sup>1</sup> Section 105(1) of the GIPA Act.

<sup>2</sup> GIPA Act section 13.

3.5 In *Flack v Commissioner of Police, New South Wales Police* [2011] (**Flack**),<sup>3</sup> the Tribunal confirmed that in all cases other than those falling under Schedule 1 of the GIPA Act, agencies are to apply the public interest test under s 13 of the GIPA Act by:

- (a) identifying the public interest in favour of disclosure;
- (b) identifying the public interest against disclosure (with reference to the Table to s 14 of the GIPA Act), and
- (c) determining where the balance lies.<sup>4</sup>

3.6 In the subsequent decision in *Hurst v Wagga Wagga City Council* [2011] (**Hurst**),<sup>5</sup> the Tribunal noted that when weighing the public interest considerations in favour of and against disclosure, the balancing of competing interests “is a question of fact and degree, requiring the weighing of competing matters, and is a task that is not amenable to mathematical calculation”.<sup>6</sup>

3.7 That is, an agency must balance the competing public interest factors for and against disclosure in each specific case, rather than apply some other test for determining whether there is an overriding public interest against disclosure of the information.

#### **4 Public interest considerations in favour of disclosure**

In its determination, the Respondent identified the following public interest considerations in favour of disclosure:

- (a) there is a public interest in obtaining information concerning the budgetary considerations of government agencies;
- (b) there is a public interest in obtaining information concerning the workings of government agencies; and
- (c) there is a public interest in providing citizens of NSW with information enabling them to participate in public consultation, education and debate regarding the provision of fire emergency services, including the location of stations and the responsiveness to emergency of fire and rescue services.

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<sup>3</sup> NSWADT 286.

<sup>4</sup> Flack at [19]. This approach was followed by the Tribunal in the later case of *Hurst v Wagga Wagga City Council* [2011] NSWADT 307.

<sup>5</sup> NSWADT 307.

<sup>6</sup> Hurst at [94].

## 5 Tribunal's approach to the public interest considerations against disclosure

- 5.1 Section 13 of the GIPA Act provides that 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" (emphasis added).
- 5.2 Section 14(2) of the GIPA Act provides that the public interest considerations listed in the Table to section 14 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".
- 5.3 The public interest considerations against disclosure listed in the Table to section 14 depend on whether the disclosure "could reasonably be expected to" have the stated effect. The words "could reasonably be expected to" were considered by the Tribunal in *Flack and Hurst*.
- 5.4 In *Flack*, the Tribunal confirmed the proper construction of the phrase "could reasonably be expected to" in the GIPA Act was to give the words "their ordinary meaning"<sup>7</sup> and it followed the decision in *Leech v Sydney Water Corporation* [2010] (**Leech**)<sup>8</sup>, where it was said:

The term "could reasonably be expected" has been considered in a number of cases. The words have their ordinary meaning: *Searle Australia Pty Ltd v PIAC* (1992) 108 ALR 163. The test to be applied is an objective one, approached from the view point of the reasonable decision-maker: *Neary v State Rail Authority*. Something which could reasonably be expected is something which is more than a mere possibility, risk or a chance. It must be based on real and substantial grounds, and it must not be purely speculative, fanciful, imaginary or contrived: *Searle Australia Pty Ltd v PIAC*.

- 5.5 The Tribunal said that whether the disclosure of information could reasonably be expected to have one of the effects outlined in the Table to section 14 of the GIPA Act is ultimately a question of fact.<sup>9</sup>
- 5.6 The Tribunal's decision in *Leech* drew on its earlier decision of *Neary v State Rail Authority* [1999] (**Neary**).<sup>10</sup> In *Neary*, President O'Connor stated:

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<sup>7</sup> *Flack* at [40].

<sup>8</sup> NSWADT 298 at [25].

<sup>9</sup> *Flack* at [42].

<sup>10</sup> NSWADT 107.

... it is not necessary that the level of risk be such that it be assessed as more probable than not. Nor is it necessary for the administrator to apply a balance of probabilities calculus similar to that used to set the burden of proof in litigation.<sup>11</sup>

## 6 Specific public interest considerations against disclosure

- 6.1 There are a number of public interest considerations against disclosure of the remaining documents. These considerations are addressed in more detail below.

### Item 3(c) - Prejudice court proceedings

- 6.2 Item 3(c) in the Table to section 14 of the GIPA Act refers to prejudicing court proceedings by revealing matter prepared for the purposes of or in relation to current or future proceedings.
- 6.3 The Applicant and the Respondent are currently parties in proceedings in the Industrial Relations Commission of New South Wales (**IRC**) relating to the Respondent's Temporary Off Line (**TOL**) arrangements, being IRC proceedings 829 of 2012) (**IRC proceedings**).
- 6.4 The Applicant and the Respondent are also parties to a number of other IRC proceedings relating to disputes between them as to measures to be implemented by the Respondent to achieve significant reductions in labour costs growth (**Labour Expense Cap**), as directed by the NSW Treasury.
- 6.5 Attached to these submissions at Annexure A is a copy of Treasury Circular 12/14, dated 4 July 2012, which sets out the requirements for agencies, including the Respondent, to manage their budget and forward estimates within the Labour Expense Cap. Ongoing discussions and negotiations with the Applicant have been occurring on a regular basis since the announcement of the Labour Expense Cap.

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<sup>11</sup> The Tribunal's decision in Neary drew on a line of authority beginning with the Full Federal Court decision in *Attorney General's Department v Cockcroft* (1986) 10 FCR 180 (Cockcroft), in which Bowen CJ and Bowen J stated in relation to the relevant provision of the Freedom of Information Act 1982 (Cth) that "... the words "could reasonably be expected to prejudice the future supply of information" were intended to receive their ordinary meaning. That is to say, they require a judgment to be made by the decision-maker as to whether it is reasonable, as distinct from something that is irrational, absurd or ridiculous, to expect that those who would otherwise supply information of the prescribed kind to the Commonwealth or agency would decline to do so if the document in question were disclosed under the Act" and, later, "[i]t is preferable to confine oneself to the language of the provision itself and to attempt to form an opinion, on the evidence, as to what can reasonably be expected to happen if disclosure occurs. In our opinion, in departing from the terms of s 43(1)(c)(ii) and requiring the applicants to establish a case on the balance of probabilities, the majority of the Tribunal fell into error in their construction of the provision". The decision in Cockcroft was applied to the GIPA Act by the Tribunal in Hurst.

- 6.6 Attached to these submissions at Annexure B is a Notification to Industrial Registrar of Industrial Dispute Pursuant to section 132, which was filed by the Applicant in the IRC proceedings on 26 July 2012 and relates in particular to the Respondent's TOL policy.
- 6.7 Annexure B sets out some of the background to the IRC proceedings and attaches correspondence from the Respondent to the Applicant dated 20 July 2012 outlining specific changes to existing TOL policy. The Respondent's TOL policy is one of a number of measures that the Respondent is taking to meet the Labour Expense Cap.
- 6.8 Attached to these submissions at Annexure C is a copy of the Respondent's opening submissions in the IRC proceedings dated 30 July 2012, which were filed in response to the Notification application referred to in paragraph 6.6 above.
- 6.9 Annexure C sets out further information and background to the Respondent's TOL policy and the imperative for NSW government agencies to ensure that labour expenses do not exceed 1.2% growth per annum for the next four years as part of the NSW Government's 2012-2013 budget (see paragraphs 15-16 of Annexure C in particular and Annexure A).
- 6.10 Also attached to these submissions are the following documents by way of background information relating to the Respondent's TOL policy and the Respondent's initiatives to achieve reductions in its labour costs as per the Labour Expense Cap:
- (a) Annexure D - Media Release by the Respondent dated 5 November 2012; and
  - (b) Annexure E – "FACT SHEET – TOLING" issued by the Respondent (undated).
- 6.11 On 6 December 2012, the IRC suspended the IRC proceedings and granted liberty to the Applicant and the Respondent to apply to the presiding judge to restore the proceedings if required.<sup>12</sup>
- 6.12 The suspension was ordered by the IRC so that the Applicant and the Respondent could negotiate and consult in good faith, with respect to contentious issues, including the TOL policy and the revisions to it as announced by the Respondent in Annexure D.

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<sup>12</sup> The parties are still under an obligation to "report back" to the IRC on the progress of their discussions and the IRC proceedings could potentially be restored at any point in time, upon the application by either party.

- 6.13 Disclosure of the “withheld documents” referred to in paragraph 2.3 above would reasonably be expected to prejudice the IRC proceedings by revealing matters in relation to IRC proceedings:
- (a) that are relevant, and of important probative value, to the IRC proceedings; and
  - (b) which would be detrimental to the Respondent’s conduct of the IRC proceedings if the withheld documents were disclosed to the Applicant.
- 6.14 The Respondent would not hand over the withheld documents to the Applicant during the suspension period of the IRC proceedings which commenced on 6 December 2012. Disclosing the withheld documents during that period would adversely affect ongoing negotiations and consultations between the parties in good faith. Disclosing the withheld documents would undermine the Respondent’s negotiation and bargaining positions during the suspension period.
- 6.15 If the dispute is not able to be resolved by the parties through negotiation and consultation, the IRC proceedings are likely to be relisted before the presiding Judge. The Applicant would then be able to seek discovery of documents from the Respondent in the normal course of the IRC proceedings. The documents sought through the discovery process are likely to include the whole or a large part of the withheld documents.
- 6.16 In that event, the Respondent would also be likely to object to discovery of the withheld documents to the Applicant following the relisting of the proceedings on similar grounds as those mentioned in paragraph 6.13, namely:
- (a) the withheld documents are relevant, and would be of probative value; and
  - (b) discovery of the withheld documents to the Applicant would not be appropriate.
- 6.17 The issue of contested withheld documents may then be determined by the IRC... The presiding Judge would make a determination as to which of the withheld documents (if any) could be released to the Applicant. The IRC’s function in this regard would be pre-empted or usurped if the withheld documents were disclosed in the Tribunal pursuant to the Access Application.
- 6.18 The Respondent submits that it would effectively be an abuse of process for the contested withheld documents to be disclosed pursuant to the Access Application.



- 6.19 The Respondent also submits that an important consideration in determining whether or not documents ought to be released to the Applicant pursuant to the Applicant is the operation of section 15(e) of the GIPA Act. Section 15(e) provides that disclosure of government information cannot be made subject to any conditions in relation to the use or further disclosure of information. Under the GIPA Act, disclosure is effectively "to the world".
- 6.20 This contrasts with the IRC proceedings, where the withheld documents may be produced in accordance with conditions ordered by the IRC, such as:
- (a) a confidentiality undertaking by the Applicant, and
  - (b) that the documents would only be used in relation to the IRC proceedings and not for any collateral purpose.
- 6.21 Even if the IRC determined at a later stage in the proceedings that contested withheld documents should be produced to the Applicant, such production is likely to be subject to restrictive conditions on the use or dissemination of the documents.

**Item 1(e) - Deliberative process**

- 6.22 Item 1(e) in the Table to section 14 of the GIPA Act provides that there is a public interest consideration against disclosure of government information where disclosure could reasonably be likely to prejudice a deliberative process of an agency.
- 6.23 The revised TOL policy currently being implemented by the Respondent, in an effort to meet the requirements of the Labour Expense Cap, in the interests of preserving jobs for the Respondent's employees, is subject to ongoing development and refinement as with the implementation of any government policy.
- 6.24 Such development and refinement of the revised TOL policy, and its consequent implementation in the operational context of the Respondent's functions, necessarily involve deliberations or consultations conducted by the Respondent.
- 6.25 The Respondent submits that such activities constitute deliberations or consultations conducted in relation to the implementation of the policy and that disclosure of the remainder of the documents would potentially undermine the implementation process by enabling the Applicant to hinder or raise disputes in relation to that implementation process.

- 6.26 As such, the effective delivery of the revised TOL policy, with its attendant and overarching aims with respect to the Labour Expense Cap, will be reasonably likely to be undermined.
- 6.27 Furthermore, the disclosure of the information in the withheld documents, and in particular documents 38, 40 and 60, would prejudice the deliberative processes of the Respondent with respect to the development and discussion of all potential options for meeting the requirements of the Labour Expense Cap. This includes deliberations and discussions regarding budget strategies and operational reforms.
- 6.28 The Respondent submits the disclosure of such information could reasonably be expected undermine the full and frank consideration of all operational issues facing the Respondent, particularly where difficult decisions are required to be made in an environment of economic austerity and cutbacks.
- 6.29 The public interest consideration in item 1(e) in the Table to section 14 of the GIPA Act is similarly worded to the previous exemption in the predecessor *Freedom of Information Act 1989* (FOI Act).
- 6.30 Clause 9 of Schedule 1 to the FOI Act exempted from disclosure under the FOI Act "internal working documents" if they would disclose "any opinion, advice or recommendation that has been obtained, prepared or recorded" or "any consultation or deliberation that has taken place" in "the course of, or for the purpose of the decision-making functions of the Government, a Minister or an agency" (provided that disclosure would, on balance, be contrary to the public interest).
- 6.31 The deliberative processes of an agency, a Minister or the Government include the thinking, reflecting, deliberating, consultation and recommendation that occurs prior to a decision or before or while undertaking a course of action. They are an agency's or Minister's thinking processes involving weighing up or evaluating competing arguments or considerations that may have a bearing on a course of action, decision or proposal: *Re Waterford and Department of the Treasury (No 2)* (1984).<sup>13</sup>
- 6.32 Deliberative processes are those concerned with both policy-making processes and non-policy decision making processes involved in agency, ministerial or governmental functions (*Re Murtagh and Federal Commissioner of Taxation* (1984)<sup>14</sup>; and

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<sup>13</sup> 5 ALD 588.

<sup>14</sup> 54 ALR 313.

*Re Reith and Attorney-General's Department (1986)*<sup>15</sup> and *Re Zacek and Australian Postal Corporation [2006]*<sup>16</sup>.

- 6.33 Deliberative processes extend beyond the business of making policy to the design and operation of administrative systems (*Re Waterford and Department of the Treasury (No 2)*) but the term does not extend to every document that is prepared by the Minister or the agency in the course of discharging its functions (*Re Hart and Deputy Commissioner of Taxation [2002]*<sup>17</sup>).
- 6.34 The Respondent notes that to "reveal" information means, as defined in item 1 of Schedule 4 to the GIPA Act, to "disclose information that has not already been publicly disclosed (otherwise than by unlawful disclosure)". To date, the withheld documents have not been publicly disclosed.

**Item 1(f) - Prejudice agency functions**

- 6.35 Item 1(f) of the Table in section 14 of the GIPA Act refers to prejudicing the effective exercise of an agency's functions.
- 6.36 Disclosure of the withheld documents referred to in paragraph 2.3 above could reasonably be expected to prejudice the effective exercise by FRNSW of its statutory functions.
- 6.37 FRNSW is one of the world's largest urban fire and rescue services and is the busiest in Australia. Its overriding purpose is to enhance community safety, quality of life, and confidence by minimising the impact of hazards and emergency incidents on the people, property, environment and economy of NSW. Its functions include:
- (a) fire prevention and suppression;
  - (b) rescue;
  - (c) responding to hazardous materials incidents;
  - (d) supporting other agencies;
  - (e) terrorism consequence management; and
  - (f) community safety.
- 6.38 Paragraphs 3-6 of Annexure C to these submissions outline the core functions of the Respondent, and further outlines how the TOL policy is critical to achieving those functions in a cost effective manner whilst preserving jobs.

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<sup>15</sup> 11 ALD 345.

<sup>16</sup> AATA 124.

<sup>17</sup> AATA 1190.

- 6.39 Section 6 of the *Fire Brigades Act 1989 (FB Act)* provides that the Commissioner has a duty to take all practicable measures for:
- (a) preventing and extinguishing fires and protecting and saving life and property in case of fire (section 6(1)); and
  - (b) protecting and saving life and property endangered by hazardous material incidents (section 6(2)).
- 6.40 Section 7 of the FB Act provides that the Commissioner is authorised to take any measures anywhere in NSW to protect persons from injury or death and property from damage, whether or not fire or a hazardous material incident is involved.
- 6.41 Disclosure of the information in the withheld documents could reasonably be expected to prejudice the effective exercise of the Respondent's prevention and protection functions as they relate to life and property.
- 6.42 The withheld documents, if disclosed, would undermine the Respondent's capacity to implement any strategies developed to meet the requirements of the Labour Expense Cap, including its revised TOL policy, to reduce labour costs. This would be likely to have, in turn, a negative impact on staffing levels within the agency and a flow-on effect for its ability to fulfil its functions under the FB Act.
- 6.43 Furthermore, as the current IRC proceedings show, there are a number of issues in dispute between the Applicant and the Respondent as to how the Respondent should operationally achieve the Labour Expense Cap.
- 6.44 The Respondent submits that it is in the public interest, and in fulfilment of its obligations and core functions to protect life and property from fire and hazardous material emergencies, to limit industrial action as far as possible. This will ensure adequate protection for the public and the overall exercise of the Respondent's functions. The Respondent therefore also submits that disclosure of the withheld documents would also be reasonably likely to prejudice the effective exercise of its functions.

**Items 1(h) and 4(e): - investigations, research and the like**

- 6.45 Item 1(h) of the Table in section 14 to the GIPA Act refers to prejudicing the conduct, effectiveness or integrity of any audit, test, investigation or review conducted by or on behalf of an agency by revealing its purpose, conduct or results (whether or not commenced and whether or not completed).

- 6.46 Item 4(e) of the Table in section 14 to the GIPA Act refers to prejudicing the conduct, effectiveness or integrity of any research by revealing its purpose, conduct or results (whether or not commenced and whether or not completed).
- 6.47 The revised TOL policy was based on research conducted by the Respondent's personnel and experts.
- 6.48 If the information in the withheld documents was to be disclosed, the disclosure would tend to undermine the further development of the proposed revised TOL policy, and is likely to undermine the conduct and effectiveness of any future audits, tests or investigations into the implementation of the revised TOL policy.
- 6.49 The personnel and experts who conduct such tests or investigations would be reluctant to conduct such future studies if their opinions or investigation results were disclosed to the Applicant, because they would not have the right of reply or the opportunity to reply. They would therefore be loath to document their opinions and research.

**Item 4(d) - legitimate business or financial interests**

- 6.50 Item 4(d) on the Table to section 14 of the GIPA Act refers to prejudicing any person's legitimate business, commercial, professional or financial interests.
- 6.51 The Respondent clearly has legitimate financial interests (as evidenced by the directions made by NSW Treasury in Annexure A), relating to its annual expenditure budget, including reducing its overall labour growth costs as per the Labour Expense Cap.
- 6.52 The Respondent has outlined its concerns above about the impact on the current IRC proceedings of the disclosure of the information to which the Applicant seeks access. Disclosure of information in the withheld documents could reasonably be expected to prejudice the Respondent's ability to manage its financial interests and budget constraints as directed by NSW Treasury.
- 6.53 As outlined in Annexure D, the Respondent has experienced a significant challenge in managing overtime costs, with \$7 million in budgeted overtime costs for the entire financial year 2012-2013 having already been exhausted by the end of October 2012.
- 6.54 Given the potential prejudice to the IRC proceedings, the weakening of the Respondent's bargaining position in those proceedings, and the significance of the successful implementation of the revised TOL policy to the Respondent's

legitimate financial interests (as one of many strategies intended to contribute towards the meeting of the requirements of the Labour Expense Cap), the Respondent submits that disclosure of the withheld documents would prejudice its legitimate financial interests by:

- (a) affecting its ability to implement operational strategies to meet significant budgetary restraints without compromising the fulfilment of its core statutory functions; and
- (b) enabling full and frank consideration and discussion by the Respondent as to the development and refinement of budget strategies and other measures put forward to meet the Labour Expense Cap.

**Items 2(c), 2(d) and 2(e) - public emergency, protection of life and property**

- 6.55 Item 2(c) in the Table to section 14 of the GIPA Act refers to increasing the likelihood of, or prejudice the prevention of, preparedness against, response to, or recovery from, a public emergency (including any natural disaster, major accident, civil disturbance or act of terrorism).
- 6.56 This provision is similar in purpose and broader in scope than its equivalent provision under clause 4A(2) in Schedule 1 of *Freedom of Information Act 1989 (NSW) (FOI)*, which created an exemption for documents whose release could reasonably be expected to facilitate the commission of a terrorist act or prejudice the prevention of, preparedness against, the commission of a terrorist act.
- 6.57 The Tribunal in *Hutchinson v Roads & Traffic Authority* [2006]<sup>18</sup> (**Hutchinson**) considered the FOI equivalent provision and concluded that the release of photographs which showed structural details of the Sydney Harbour Bridge not normally visible or accessible to the public could reasonably be expected to facilitate the commission of a terrorist attack and prejudice counterterrorism measures.
- 6.58 The Tribunal found in *Hutchinson* that the photographs fell within the exemption and should not be released even though different photographs of the structure of the bridge were available through other means.
- 6.59 The Respondent submits that disclosure of the remaining documents would lead to a similar prejudice or vulnerability in the Commissioner's ability to prevent or respond to a public

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<sup>18</sup> NSWADT 147.

emergency because the information tends to reveal information about the patterns of timing and closure of fire stations.

- 6.60 As outlined above, the Commissioner has duties under the FB Act to protect life and property.
- 6.61 The Respondent submits that disclosing information about when and where fire stations or appliances will be 'offline' gives rise to a real security risk. It is reasonable to expect that such information about when and where, and on what basis, fire stations were temporarily offline could be used by criminal or terrorist elements to reduce the Respondent's ability to respond to a public emergency. As noted above, disclosure under the GIPA Act is effectively disclosure to the world and cannot be made the subject of any conditions upon disclosure
- 6.62 In relation to items 2(d) and 2(e) of the Table to section 14, in *Re A Member of the Legislative Assembly and Corrective Services Commission (Qld) (1997) 4 QAR 99*, the Information Commissioner considered the interpretation of the phrase 'procedure' under a similar provision from previous FOI legislation. The Information Commissioner concluded that a procedure has to have an identifiable method or procedure, the method or procedure must be lawful and for protecting public safety and disclosure of the documents in issue could reasonably be expected to prejudice the maintenance or enforcement of the method or procedure.
- 6.63 The Respondent submits that the withheld information tends to disclose information about the implementation and design of the TOL policy, which is essentially a procedure which promotes and protects public safety. The TOL policy seeks to implement a pattern and procedure which allocates workers to fire stations or appliances.
- 6.64 This process of allocating workers is crucial to the procedure of the Respondent in maintaining quick response times to emergency calls.
- 6.65 The Respondent repeats its submissions in relation to item 2(c) of the Table to section 14 at paragraphs 6.52 to **Error! Reference source not found..**

#### **Personal factors of the applicant**

- 6.66 Section 55(1) of the GIPA Act provides that, in determining whether there is an overriding public interest against disclosure of information in response to an access application, an agency is entitled to take the following "personal factors of the application" into account:

- (a) the applicant's identity and relationship with any other person,
- (b) the applicant's motives for making the access application,
- (c) any other factors particular to the applicant.

6.67 The Applicant is the peak representative body for employees of the Respondent. As noted above, the Applicant has notified the IRC of a dispute in relation to the implementation of the revised TOL policy. There are also several other IRC proceedings and ongoing discussions with the Applicant regarding the implementation of operational strategies designed to meet the requirements of the Labour Expense Cap, where the Respondent is concerned to minimise unnecessary expenditure in preference to restructuring which may entail job cuts.

6.68 To date, the IRC proceedings have not resolved and the Respondent reasonably believes that the Applicant's motives for making the access application are to:

- (a) circumvent the usual procedure for obtaining documents in IRC proceedings in an apparent abuse of process; and
- (b) adversely affect the ability of the Respondent to settle the dispute quickly and in the interests of not just the Applicant's members, but also in the interests of the general public and the protection of life and property, as per the Respondent's critical functions in the FB Act, including dealing with the peak industrial union.

## **7 Balancing the public interest considerations**

7.1 The Respondent has, to date, made a significant amount of material and information available to the public, through the media and on its website relating to the implementation of various measures to meet the Labour Expense Cap, including information about the TOL policy (for example, Annexures D and E to these submissions).

7.2 Accordingly, the Respondent submits that it has proactively released information in the public interest relating to such measures and in accordance with the spirit and intent of the GIPA Act and open access to government information.

7.3 The Respondent has done so as part of its broader obligation to ensure that the general public feels safe and has confidence in the ability and capacity of the Service to meet its essential obligations and functions of responding to emergencies.



7.4 The Respondent submits, having considered the public interest factors both for and against disclosure of the report, that the public interest considerations against disclosure outweigh those in favour of disclosure in the circumstances.

## **8 Orders sought**

8.1 That the Tribunal notes that the Respondent has released the following documents to the Applicant in full:

- (a) 33-35;
- (b) 43-45;
- (c) 51;
- (d) 55;
- (e) 57;
- (f) 59;
- (g) 61-64;
- (h) 66-70;
- (i) 73-75;
- (j) 80;
- (k) 83;
- (l) 95;
- (m) 111;
- (n) 114;
- (o) 115;
- (p) 122;
- (q) 124-125;
- (r) 127-128;
- (s) 132-135;
- (t) 137;
- (u) 143-145;
- (v) 154-155;

(w) 159.

8.2 That the Tribunal notes that the Respondent has released the following documents to the Applicant in part, and otherwise affirms the decision under review in relation to these documents:

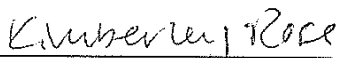
(a) 56;

(b) 65; and

(c) 71.

8.3 That the decision under review, in so far as it relates to the remainder of the documents, be affirmed.

29 January 2013

  
\_\_\_\_\_  
For Dr Stephen Thompson  
For Phillip Salem  
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# Annexure “A”

Treasury Circular 12/14: Budget Controls – Labour Expense Cap



## Budget Controls – Labour Expense Cap

**Commencing in 2012-13, all general government agencies and selected public trading enterprises are required to manage their budget and forward estimates within a Labour Expense Cap. The cap sets the maximum agencies can incur in any year on employee related and contractor expenses. This Circular is to be read in conjunction with Treasury Circular TC 12/08.**

### Summary:

This Circular applies to all general government agencies and selected public trading enterprises and provides details of the Labour Expense Cap introduced as part of the 2012-13 State Budget. The Labour Expense Cap:

- caps the total of employee related and contractor expenses that can be incurred in any year
- applies to the budget year and each forward estimate year.

The Coordinating Minister of a cluster, supported by the Director-General of the principal department, is required to:

- ensure that Labour Expense Cap for each agency within a cluster is managed within limits for that agency
- meet any additional expenditure needs in any agency by reprioritising the Labour Expense Cap between agencies in a cluster.

The primary means for adjusting the Labour Expense Cap limits is through the Budget process. Approval must be sought for any proposed increase in Labour Expense Cap for the cluster in aggregate.

For general government agencies, the Labour Expense Cap is in addition to net cost of services controls outlined in Treasury Circular *Budget Controls – Net Cost of Services* (NSWTC 12/08).

Mark Ronsisvalle  
For Secretary

Further Information: **Your Agency's Treasury Analyst**  
NSW Treasury Internet: [www.treasury.nsw.gov.au](http://www.treasury.nsw.gov.au)

## **Budget Controls – Labour Expense Cap**

### **1. Background**

The introduction of the Labour Expense Cap supports tighter fiscal control necessary during a period of subdued revenue growth. This circular adds to the existing net cost of services control framework and is consistent with the Government's commitment to devolve financial management responsibilities for clusters to Coordinating Ministers and the Directors-General of principal departments.

This Circular is to be considered in conjunction with NSWTC 12/08 *Budget Controls – Net Cost of Services*.

### **2. Labour Expense Cap**

All general government agencies (as shown in Budget Paper 3) must operate within approved Labour Expense Cap for 2012-13 Budget year and the three forward years. In addition, selected public trading enterprises must also operate within their approved Labour Expense Cap.

The Labour Expense Cap comprises total employee related expenses as well as expenditure on contractors. For 2012-13 only, the Labour Expense Cap includes the impact of the Government's decision to cap annual leave liabilities of individual employees at 40 days by June 2013.

### **3. Setting Labour Expense Cap Limits in the Budget Process**

The Labour Expense Cap was approved by Expenditure Review Committee of Cabinet and is a key additional budget control measure introduced in the 2012-13 Budget. The cap limits employee related and contractor expenses across general government sector agencies as well as selected public trading enterprises.

The Government has decided not to mandate the specific method for achieving employee savings. This provides Directors-General and agency CEOs the flexibility to develop and implement workforce strategies appropriate for the services being delivered. Strategies to meet the Labour Expense Cap include:

- improving efficiency of staffing arrangements to better manage overtime
- reviewing current contracting levels, needs and arrangements
- applying more rigorous job evaluation processes to ensure jobs are properly graded to curb 'grade creep'
- improving workforce management by reducing staffing through natural attrition and retirements
- improving the alignment of staff resourcing with work demands, which may include increasing temporary, part time and/or casual staff for peak workload periods.

As noted in the Budget announcements, teachers in schools, sworn police officers and nurses in hospitals will not be impacted by the Labour Expense Cap although ongoing efficiencies will continue to apply as normal in these areas.

#### **4. Adjustments to the Labour Expense Cap**

Clusters are expected to manage their employee related and contractor costs within their Labour Expense Cap. Any additional expenditure needs and cost pressures should be managed through re-prioritisation within the cluster and in accordance with NSWTC 12/08 *Budget Controls – Net Cost of Services*.

The principal department must write to NSW Treasury to advise that the Coordinating Minister has exercised this discretion to reallocate the Labour Expense Cap between agencies in the cluster providing details (including reasons) for the change concurrently with the submission of monthly monitoring data.

Any other adjustments to the Labour Expense Cap will normally be made as part of the Budget process and require specific approval by the Treasurer (in consultation where necessary with the Expenditure Review Committee of Cabinet) or Treasury under delegation. Adjustments will include appropriate escalation (inflation) for general government agencies

#### **5. Carrying forward any unused Labour Expense Cap**

In appropriate circumstances and subject to approval, any unspent Labour Expense Cap may be carried forward from the current financial year to a future financial year.

The criteria for carrying forward any unspent Labour Expense Cap is the same as outlined in TC 12/08 – Budget Controls – Net Cost of Services.

#### **6. Commonwealth National Agreements and National Partnerships**

Where the extent of Commonwealth funding through National Agreements and National Partnerships is modified, Treasury will automatically adjust the Labour Expense Cap by an appropriate amount.

#### **7. Further information**

If you require further information or have any queries on this circular, please contact the Treasury analyst for your agency.