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| Case Name:  | Newcastle City Council v Newcastle East Residents Action Group Inc |
| Medium Neutral Citation:  | [2018] NSWCATAP 254 |
| Hearing Date(s):  | 25 May 2018 |
| Date of Orders: | 29 October 2018 |
| Decision Date:  | 29 October 2018 |
| Jurisdiction:  | Appeal Panel |
| Before:  | Hennessy LCM, Deputy PresidentJ Currie, Senior Member |
| Decision:  | Orders 1. In relation to the disputed information, referred to in Note 2 below, the internal appeal is to be dealt with by way of a new hearing. 2. In relation to the “disputed information”, the appellant’s decision to withhold that information is set aside and, in substitution for that decision, a decision is made to give the respondent access to that information. 3. In relation to Annexure 2 to the Newcastle 500 Civil Works Tripartite Agreement, which is information about which the Tribunal made no decision,the internal appeal is to be dealt with by way of a new hearing. 4. The appellant’s decision to refuse to give access to Annexure 2 to the Newcastle 500 Civil Works Tripartite Agreement is set aside. In substitution for that decision, a decision is made to give the respondent access to that information.  Notes 1. There is no appeal from the Tribunal’s decision to refuse to give access to the following information in the Newcastle 500 Civil Works Tripartite Agreement between Destination NSW, the Newcastle City Council and V8 Supercars Australia Ltd dated May 2017:(a)   the dollar amount in the definition of “Event Works Funding” on p 4;(b)   the dollar amount in the definition of “Event Works Limitation Amount” on p 4;(c)   the dollar amount in the definition of “NCC Works Funding” on p 5;(d)   the dollar amount in the definition of NCC Works Limitation Amount” on p 5;(e)   the information in Annexure 1 – Cash flow/payment schedule for Government Funding. 2. There is no appeal from the Tribunal’s decision to give access to all the remaining information in each of the four documents apart from the “disputed information”. The disputed information is: (a)   some text under the heading “Entire agreement” and an email address on p 23 of the Newcastle 500 Civil Works Tripartite Agreement(b)   general information about the role of Destination NSW in the Memorandum of Understanding and the letter of commitment; and(c)   information about the rights and obligations of V8SCA and the Council in relation to the Event in the Services Deed. |
| Catchwords:  | APPEAL – administrative law – access to government information – where residents action group requested access to information in documents relating to the Newcastle 500 Supercars Event – whether Tribunal had erred in providing access to certain information – re-determination on merits – whether there is an overriding public interest against disclosure of information |
| Legislation Cited:  | Civil and Administrative Tribunal Act 2013 (NSW), s 38(4), s 50, s 80Government Information (Public Access) Act 2009 (NSW) (GIPA Act) ss 3, 5, 9(1), 12, 13, 14, 54, 55, 105(1), 113 |
| Cases Cited:  | Attorney General’s Department v Australian Iron and Steel Pty Limited v Cockcroft (1986) 10 FCR 180Australian Vaccination Network v Department of Finance & Services [2013] NSWADT 60Beale v Government Insurance Office of NSW (1997) 48 NSWLR 430Collector of Customs v Pozzolanic (1993) 43 FCR 280Commissioner of Police, NSW Police Force v Camilleri [2012] NSWADTAP 19DL v The Queen [2018] HCA 26Manly v Ministry of Premier and Cabinet (1995) 14 WAR 550Minister for Immigration and Ethnic Affairs v Wu Shan Liang (1996) 185 CLR 259Prendergast v Western Murray Irrigation Ltd [2014] NSWCATAP 69Transport for NSW v Searle [2018] NSWCATAP 93 |
| Category:  | Principal judgment |
| Parties:  | Newcastle City Council (Appellant)Newcastle East Residents Action Group Inc (Respondent) |
| Representation:  | Counsel:S Ross (Appellant)C Fraser (Respondent) |
| File Number(s):  | AP 18/10361 |
| Publication Restriction:  | Nil |
| Decision under appeal:  |   |
|  Court or Tribunal:  | Civil and Administrative Tribunal |
|  Jurisdiction:  | Administrative and Equal Opportunity Division |
|  Date of Decision:  | 22 February 2018 |
|  Before:  | D Dinnen, Senior Member |
|  File Number(s):  | 2017/00333562 |

REASONs FOR DECISION

Overview

1. Newcastle City Council has appealed from a decision made by the Tribunal under the *Government Information (Public Access) Act* 2009 (NSW) (GIPA Act). The Tribunal decided to provide the Newcastle East Residents Action Group Inc with almost all the information they requested about the Newcastle 500 Supercars Event. The only information the Tribunal withheld was the dollar amounts paid by the Council or Destination NSW to V8 Supercars Australia Pty Limited (V8SCA).
2. We agree with the Council that the Tribunal made some legal mistakes (errors of law) when making that decision. Because of those mistakes, we have decided to hear the application again applying the law correctly. After doing so, we have come to the same decision that the Tribunal made. The Tribunal did not make a final decision about the whole of Annexure 2 to the Tripartite Agreement. We have decided to give the Residents Action Group access to that information.

Background

1. The Newcastle 500 Supercars Event was held for the first time in Newcastle over 3 days in November 2017. The Event, which is scheduled to take place each year for five years, is owned and organised by V8 Supercars Australia Pty Limited. A year before the Event was first held, the Newcastle East Residents Action Group Inc applied to the Newcastle City Council for access to information about the Event. The information was in deeds, agreements and correspondence between the Council, V8SCA and Destination NSW.
2. Before deciding whether to give access to the information, the Council consulted Destination NSW and V8SCA in accordance with s 54 of the GIPA Act. Both objected to the disclosure of all the information in the documents.
3. The Council refused to provide the Residents Action Group with access to the information in each of the following four documents on the basis that there was an overriding public interest against disclosure of that information:
4. a Services Deed between V8 Supercars Australia and the Council signed on 14 December 2016 (Document 1);
5. a Memorandum of Understanding between the Council, Destination NSW and V8 Supercars Australia signed on 4 May 2017 (Document 2);
6. Newcastle 500 Civil Works Tripartite Agreement between Destination NSW, the Council and V8 Supercars Australia dated May 2017 (Document 3);
7. a letter of commitment from Destination NSW formalising the relationship between Destination NSW and the Council dated 22 May 2017 (Document 4).
8. The Residents Action Group applied to the Tribunal for a review of the Council’s decision not to provide access to the information in the four documents. The Tribunal set aside the Council’s decision and gave access to all the information in the documents apart from the dollar amounts to be paid by one party to another party and the “Cash flow/payment schedule for Government Funding”.
9. On appeal, the Council only challenged the Tribunal’s decision to give the Residents Action Group access to the following information:
10. some text under the heading “Entire agreement” and an email address on p 23 of the Newcastle 500 Civil Works Tripartite Agreement (Document 3)
11. general information about the role of Destination NSW in the Memorandum of Understanding (Document 2) and the letter of commitment (Document 4);
12. information about the rights and obligations of V8SCA and the Council in relation to the Event in the Services Deed (Document 1); and
13. Annexure 2 to the Tripartite Agreement setting out the scope split between Event Works and the Newcastle City Council (NCC) Works (Document 3).
14. The information identified at (1) – (3) above is information that the Council submits the Tribunal should have withheld. The information identified in (4) is the whole of Annexure 2 to the Tripartite Agreement. The Tribunal has not made a final decision about this information.

Legal test

Presumption and onus

1. To understand the Tribunal’s decision and the grounds of appeal, it is useful to set out a brief overview of the legal tests relevant to this case.
2. There is a *presumption* in favour of disclosure of government information: GIPA Act, s 5. Under s 9(1), “[A] person who makes an access application … has a legally enforceable right to be provided with access to the information … unless there is an overriding public interest against disclosure”. The *onus* is on the Council to justify its decision not to give access to the information: GIPA Act, s 105(1).

Public interest test

1. One of the objects of the GIPA Act is that “access to government information is restricted only when there is an overriding public interest against disclosure”: GIPA Act, s 3(c). The circumstances in which there will be an overriding public interest against disclosure are set out in s 13:

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.

1. Section 12(1) provides that there is a general public interest in favour of the disclosure of government information. Section 12(2) further provides that nothing limits any other public considerations in favour of disclosure that may be taken into account for the purpose of determining whether there is an overriding public interest against disclosure. The Note to s 12(2) lists examples of the other types of considerations in favour of disclosure that may be taken into account.
2. A decision maker must identify whether there are any public interest considerations against disclosure. Apart from the disclosure of information described in Sch 1 to the GIPA Act, the public interest considerations listed in the Table to s 14 are the only considerations that may be taken into account as public interest considerations against disclosure: GIPA Act, s 14(2). There is a public interest consideration against disclosure of information if disclosure of the information *could reasonably be expected* to have one or more of the effects listed in the Table to s 14.
3. A decision maker must take into account that there is a presumption in favour of disclosure of government information and then identify any other public interest considerations in favour of disclosure. A decision maker must evaluate all the considerations and determine whether ‘on balance’ the public interest considerations against disclosure outweigh the public interest considerations in favour of disclosure.
4. Section 15 sets out the principles that apply when determining whether there is an overriding public interest against disclosure:

A determination as to whether there is an overriding public interest against disclosure of government information is to be made in accordance with the following principles:

(a) Agencies must exercise their functions so as to promote the object of this Act.

(b) Agencies must have regard to any relevant guidelines issued by the Information Commissioner.

(c) The fact that disclosure of information might cause embarrassment to, or a loss of confidence in, the Government is irrelevant and must not be taken into account.

(d) The fact that disclosure of information might be misinterpreted or misunderstood by any person is irrelevant and must not be taken into account.

(e) In the case of disclosure in response to an access application, it is relevant to consider that disclosure cannot be made subject to any conditions on the use or disclosure of information.

1. This approach is summarised in *Commissioner of Police, NSW Police Force v Camilleri* [2012] NSWADTAP 19 at [25]:

The agency case for refusal must rely on one or more of the section 14 Table considerations. The Tribunal's task is then to weigh that case against the factors favouring disclosure (s 13), mindful of the injunctions that appear in both ss 12 and 15. It is important, in our view, that the Tribunal proceed in the structured way reflected by these provisions. The Table considerations are concerned with systemic features of the operation of government.

Personal factors

1. Section 55(1) provides that, in some circumstances, the decision maker is entitled to take into account the following “personal factors of the application” when considering whether there is an overriding public interest against disclosure of the information:

(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.

1. But those factors may not be taken into account when considering whether the disclosure of the information could reasonably be expected to have any of the effects referred to in clauses 1, 6 or 7 to the Table to s 14: GIPA Act, s 55(3). Clauses 6 and 7 were not relied on in these proceedings.

Public interest considerations relied on by the parties

1. The Council relied on several public interest considerations against disclosure. On appeal, Council relied on the following five considerations: cll (1)(d), (f) and (g) and cll (4)(a) and (d) in the Table to s 14:

**1. Responsible and effective government**

There is a public interest consideration against disclosure of information if disclosure of the information could reasonably be expected to have one or more of the following effects (whether in a particular case or generally)

…

(d) prejudice the supply to an agency of confidential information that facilitates the effective exercise of that agency's functions,

…

(f) prejudice the effective exercise by an agency of the agency's functions,

(g) found an action against an agency for breach of confidence or otherwise result in the disclosure of information provided to an agency in confidence

...

**4. Business interests of agencies and other persons**

There is a public interest consideration against disclosure of information if disclosure of the information could reasonably be expected to have one or more of the following effects:

(a) undermine competitive neutrality in connection with any functions of an agency in respect of which it competes with any person or otherwise place an agency at a competitive advantage or disadvantage in any market,

…

(d) prejudice any person's legitimate business, commercial, professional or financial interests,

1. On appeal, the Council did not rely on cl 1(c) to the Table to s 14. We will not refer to that provision in these reasons.
2. In addition to the general public interest considerations in favour of disclosure, the Council and the Residents Action Group identified two other public interest considerations which are listed in s 12(2) as examples of public interest considerations in favour of disclosure. They were that disclosure of the information could reasonably be expected:

(a) to promote open discussion of public affairs, enhance Government accountability or contribute to positive and informed debate on issues of public importance; and

…

(c) to ensure effective oversight of the expenditure of public funds.

1. The Council also took into account as a personal factor, the fact that the respondent is comprised of residents living in the circuit of the Event seeking information about the Event and its effect on residents: GIPA Act, s 55.

Evidence before the Tribunal

1. The evidence before the Tribunal from the Council was: a detailed submission to the Council from Destination NSW dated 24 August 2017; two emails from V8SCA dated 22 August 2017 and 6 September 2017 and the Council’s submissions dated 29 December 2017 and 13 February 2018.
2. The evidence before the Tribunal from the Residents Action Group was two statements, one from Christine Everingham about a noise monitoring report and one from Julian Ellis about exposure to excessive noise levels. The Residents Action Group also provided various newspaper articles and submissions in support of their position. As well as concerns about the disruption to the lives of residents and business owners, the Residents Action Group was concerned about the secrecy surrounding the amount of money spent by Destination NSW promoting the Event and the amounts the Council had contributed in cash or in kind to hosting the event.
3. The Tribunal accepted all that material as evidence even though it was a mixture of evidence and submissions. No witness was required for cross-examination and no oral evidence was given at the hearing.

Tribunal’s decision

1. The Tribunal gave oral reasons for its decision. The Tribunal noted that the Council has the burden of establishing that the decision is justified: GIPA Act, s 105. The Tribunal also referred to the objects of the GIPA Act in s 3 and the presumption in favour of disclosure of government information unless there is an overriding public interest against disclosure in s 5.
2. The evidence satisfied the Tribunal that access should not be given to the dollar figures for the total of the Event Works Funding, the Event Works Limitation Amount, the NCC (Newcastle City Council) Works Funding and the NCC Works Limitation Amount. The Tribunal also decided to refuse to provide access to the information in Annexure 1 to the Newcastle 500 Civil Works Tripartite Agreement. It can be seen from the Table of Contents to that document that Annexure 1 is “Cash flow/payment schedule for Government Funding”.
3. The orders the Tribunal made were as follows:
4. Documents 1 and 2 to be provided to Applicant within 7 days.
5. Documents 3 and 4 to be provided to Applicant with redactions (noted in confidential session with Respondent) within 7 days.
6. Respondent to notify Tribunal within 7 days as to which pages of Annexure 2 to Document 3 have not been publicly released prior.
7. The Residents Action Group has not appealed from the Tribunal’s decision to refuse to give access to the amount of funding for the Event Works or for the NCC (Newcastle City Council) Works which were the works that the Council wished to be carried out at the same time as the Event Works. Consequently, that part of the Tribunal’s decision which refused to give access to the following information in the Newcastle 500 Civil Works Tripartite Agreement between Destination NSW, the Council and V8SCA remains operative:
8. the dollar amount in the definition of “Event Works Funding” on p 4;
9. the dollar amount in the definition of “Event Works Limitation Amount” on p 4;
10. the dollar amount in the definition of “NCC Works Funding” on p 5;
11. the dollar amount in the definition of NCC Works Limitation Amount” on p 5;
12. the information in Annexure 1 – Cash flow/payment schedule for Government Funding.
13. In relation to the remaining information, the Tribunal addressed each of the public interest considerations against disclosure but gave those considerations little or no weight. The Residents Action Group correctly characterised the Tribunal’s reasons as containing a “recurring theme” of “the absence or minimal amount of evidence before the Tribunal” which would justify withholding the remainder of the information.
14. Following a confidential session, the Tribunal set aside the Council’s decision. In substitution for that decision, the Tribunal decided to provide access to all the information in the Services Deed (Document 1) and the MOU (Document 2). The Tribunal decided to provide access to most of the information in the Tripartite Agreement and the letter of commitment (Documents 3 and 4).
15. The Tribunal has not made a final decision about the information in Annexure 2 to the Tripartite Agreement setting out the scope split between Event Works and the Newcastle City Council (NCC) Works (Document 3).

Grounds of appeal

1. The Council has appealed from the Tribunal’s decision on questions of law: *Civil and Administrative Tribunal Act 2013* (NSW), s 80(2). The grounds of appeal can be summarised as follows:
2. when considering the public interest considerations in favour of disclosure, the Tribunal:
3. gave weight to unsubstantiated assertions made in submissions;
4. gave weight to assertions that were inconsistent with the evidence;
5. conflated “public interest considerations” and “public concerns” when the legal test does not relate to public concerns;
6. when considering the public interest considerations against disclosure, the Tribunal:
7. failed to give proper consideration and weight to the evidence of those considerations;
8. applied the wrong test in relation to the public interest considerations against disclosure identified in clauses 1(f), 1(g), 4(a) and 4(d) of s 14 and failed to draw proper inferences from the evidence;
9. when making the finding that supporting tourism is not a major function of local government, the Tribunal erred by not taking into account the evidence about the statutory role that Council plays in tourism and recreation events and failing to give sufficient weight to cl 1(f) (prejudice the effective exercise by an agency of the agency's functions); and
10. gave inadequate reasons for the decision.

Grounds of appeal relating to public interest considerations in favour of disclosure

Tribunal’s reasoning

1. The Tribunal identified 17 ‘concerns’ that the Residents Action Group had identified as being public interest considerations in favour of disclosure. The Tribunal accepted that these were factors demonstrating issues of public concern supported in the statement of Julian Ellis and contained in the newspaper articles attached to the submissions. The Tribunal noted that there was a general public interest in favour of disclosure: GIPA Act, s 12(1). The Tribunal mentioned the two examples of public interest considerations in favour of disclosure relied on by the parties as being relevant in this case: GIPA Act, s 12(2)(a) and (c).

(a) Disclosure of the information could reasonably be expected to promote open discussion of public affairs, enhance Government accountability or contribute to positive and informed debate on issues of public importance.

(c) Disclosure of the information could reasonably be expected to ensure effective oversight of the expenditure of public funds.

1. The Tribunal gave these factors significant weight. The Tribunal also took into account the fact that the respondent is a residents action group as being a “personal factor”: GIPA Act, s 55(1)(a) and (b).

Consideration

1. In our view, the Tribunal did not make an error of law when considering the public interest considerations in favour of disclosure for the following reasons. First, while we agree that the Tribunal’s reference to “concerns” was imprecise, we are satisfied that, when read in context, the Tribunal was referring to the public interest considerations in favour of disclosure. We should not be concerned, on appeal with “looseness in the language … nor with unhappy phrasing” of the Tribunal’s reasons: *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 272 (Brennan CJ, Toohey, McHugh, Gummow JJ) citing *Collector of Customs v Pozzolanic* (1993) 43 FCR 280 at 287.
2. Secondly, in relation to the submission that some of the assertions made by the Residents Action Group were unsubstantiated, the Tribunal was not required to reject that evidence because it was mere assertion. While the Tribunal must only act on probative evidence, it is not bound by the rules of evidence: *Civil and Administrative Tribunal Act 2013* (NSW), s 38(2). The Tribunal did not insist that either party provide evidence by way of statements and no witness was cross-examined. However, even if the Tribunal did rely on evidence which was not probative, there is a third reason why this ground of appeal fails.
3. There is “a general public interest in favour of disclosure”: GIPA Act, s 12(1). No evidence is needed of that fact. That general interest must be taken into account when applying the public interest test in s 13. Furthermore, the Council itself acknowledged that the two other public interest considerations in favour of disclosure listed as examples in s 12(2)(a) and (c) of the GIPA Act should be taken into account. It was not in dispute that Council and Destination NSW have expended public funds on the Event and on works that Council wished to be carried out at the same time as the Event works. Nor was it in dispute that disclosure of the information could reasonably be expected to enhance Government accountability.

Grounds of appeal relating to public interest considerations against disclosure

1. In summary, the Council submitted that the Tribunal applied the wrong legal test and failed to give proper consideration and weight to the evidence of those considerations and the inferences to be drawn.
2. The public interest test in s 13 of the GIPA Act requires the Council to identify which public interest considerations against disclosure are relevant to the disputed information. They made it clear that they were not relying on the consideration in cl 4(b) – “reveal commercial-in-confidence provisions of a government contract”. In their submissions to the Tribunal at first instance, the Council relied on the public interest consideration against disclosure in cl 1(g) to the Table in s 14 and submitted that the release of all the information in the each of the four documents could reasonably be expected to have the effects set out in that clause. That clause states that there is a public interest consideration against disclosure if the information could reasonably be expected to “found an action against an agency for breach of confidence or otherwise result in the disclosure of information provided to an agency in confidence”.
3. The Tribunal found that there was “no evidence before me to support the respondent relying on this claim on the basis that any of the documents could reasonably be expected to *result* in a breach of confidence claim”. The Tribunal went on to say that the confidentiality obligations in the documents are subject to the requirements of law which include requirements under the GIPA Act.
4. The Council submitted that the Tribunal stated the test correctly but then applied only part of the test and applied it incorrectly. The test is not whether disclosure could reasonably be expected to *result* in a breach of confidence claim. Rather, the test is whether disclosure could reasonably be expected to *found* a breach of confidence claim.
5. In our view, this ground of appeal is an example of imprecise language rather than a statement or application of the wrong test. We should not be concerned, on appeal with “looseness in the language … nor with unhappy phrasing” of the Tribunal’s reasons: *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 272 (Brennan CJ, Toohey, McHugh, Gummow JJ) citing *Collector of Customs v Pozzolanic* (1993) 43 FCR 280 at 287. In any case, we do not understand the Council to be submitting on appeal that disclosure of the disputed information under the GIPA Act could reasonably be expected to found an action against it for breach of confidence: GIPA Act, s 113.
6. The Council submitted that the Tribunal did not apply the second part of the test which is whether disclosure could reasonably be expected otherwise to result in the disclosure of information provided to an agency in confidence. Council submitted that, “there was plainly information provided to the Council that was provided in confidence”.
7. We agree with the Council that the Tribunal did not apply the second part of the test in cl 1(g), that disclosure could reasonably be expected to “... result in the disclosure of information provided to an agency in confidence”. That was an error of law on the part of the Tribunal.
8. We also agree with the Council that the Tribunal misconceived the nature of the evidence required to establish that disclosure of the information could reasonably be expected to have one of the effects in the Table to s 14. The question is not, as the Tribunal suggested, whether the evidence “*substantively demonstrates”* that one of the effects could result from disclosure. Rather, there must be real and substantial grounds for the opinion that disclosure could reasonably be expected to have one of those effects. In addition, that opinion must be based on some probative evidence. We appreciate that this distinction may appear to be an overly fine one, especially in view of the fact that the Tribunal gave oral reasons. We explain our conclusion in more detail below.
9. The Tribunal correctly noted that “[T]he considerations that the Tribunal needs to take into account against disclosure are only relevant if it is established that disclosure could reasonably be expected to have any of the effects identified in table 14”. After identifying the public interest considerations in favour of disclosure, the Tribunal addressed the question of whether disclosure of the information could reasonably be expected to have the effect of prejudicing any person’s legitimate business, commercial, professional or financial interests – cl 4(d) to the Table in s 14. While the Tribunal found that the interests of a third party (presumably V8SCA) had been identified, the Tribunal found that there was no evidence that “those interests are prejudiced by the disclosure of the information with the exception of some aspects of those documents …”
10. The Tribunal then considered the Council’s legitimate business, commercial, professional and financial interests and again found that here was “no evidence” that disclosure of the information could reasonably be expected to prejudice those interests.
11. Next, the Tribunal addressed the public interest consideration against disclosure in cl 1(d) – “prejudice the supply to an agency of confidential information that facilitates the effective exercise of that agency’s functions, whether in a particular case or generally”. The Tribunal found that there was “little or no confidential information within the material to be disclosed” and the Senior Member afforded that factor little weight.
12. The Tribunal then considered the public interest consideration against disclosure in cl 1(g) – “found an action against an agency for breach of confidence or otherwise result in the disclosure of information provided to an agency in confidence”. Again, the Tribunal found that there was “no evidence” supporting the proposition that disclosure would found an action for breach of confidence. The Tribunal pointed out that the confidentiality obligations in the documents are subject to the requirements of law. Those requirements include requirements under the GIPA Act. As we have noted, disclosure under the GIPA Act is protected by s 113.
13. Next, the Tribunal considered whether disclosure could reasonably be expected to prejudice the effective exercise by an agency of the agency’s functions”: cl 1(f) to the Table to s 14. The Tribunal found that “tourism is an aspect of the functions engaged in” by the Council, but accepted a submission from the Residents Action Group that tourism “is not the major focus ... nor should it be”. In those circumstances, the Tribunal gave this consideration “minimal weight”. The Tribunal did not refer to the Council’s reliance on cl 1(f) of the Table to s 14 in relation to the functions of Destination NSW.
14. Finally, the Tribunal considered the public interest consideration against disclosure in cl 4(a) – “undermine competitive neutrality in connection with any functions of an agency in respect of which it competes with any person or otherwise place an agency at a competitive advantage or disadvantage in any market”. The Tribunal accepted that this was a public interest consideration against disclosure supported by the Council’s evidence and submissions. However, the Tribunal gave this consideration “little weight in the context of the minimal evidence before (her) which does not *substantively demonstrate* any disadvantage in any market, which could be had as a result of disclosure of this information”. (Words in brackets and emphasis added.)
15. This ground of appeal raises the issue of the nature and probity of the evidence required to establish that disclosure of the information could reasonably be expected to have one of the effects in the Table to s 14. The Appeal Panel addressed that issue in *Transport for NSW v Searle* [2018] NSWCATAP 93 at [68]. In that paragraph the Appeal Panel held that in order to establish that disclosure “could reasonably be expected” to have one of those effects, “… the appellant needed to show more than a mere possibility, risk or chance of prejudice”. Quoting *Australian Vaccination Network v Department of Finance & Services* [2013] NSWADT 60 at [22], the Appeal Panel held that the expectation must be based on “real and substantial grounds”.
16. The phrase “real and substantial grounds” was first used by Sheppard J in *Attorney General’s Department v Australian Iron and Steel Pty Limited v Cockcroft* (1986) 10 FCR 180 at 196. In that case, the Court was considering one of the public interest considerations against disclosure in an equivalent provision in Commonwealth freedom of information legislation. Bowen CJ and Beaumont J (at 190) and Sheppard J (at 195-196) decided that the phrase “could reasonably be expected to prejudice the future supply of information to the Commonwealth or an agency” should not be interpreted as imposing on an agency an obligation to establish its case on the balance of probabilities. Sheppard J added at 196 that:

In my opinion he (the decision maker) will not be justified in claiming the exemption unless, at the time the decision is made, he has *real and substantial grounds for thinking* that the production of the document could prejudice that supply. (Words in brackets and emphasis added.)

1. Owen J relied on that view of the law in in *Manly v Ministry of Premier and Cabinet* (1995) 14 WAR 550 at 43. At 44, His Honour explained the basis on which a decision maker must hold the view that disclosure of the information would have a particular effect:

How can the Commissioner, charged with the statutory responsibility to decide on the correctness or otherwise of a claim to exemption, decide the matter in the absence of some probative material against which to assess the conclusion of the original decision maker that he or she had ‘real and substantial grounds for thinking that the production of the document could prejudice that supply’ or that disclosure could have an adverse effect on business or financial affairs? In my opinion it is not sufficient for the original decision maker to proffer the view. It must be supported in some way. The proof does not have to amount to proof on the balance of probabilities. Nonetheless it must be persuasive in the sense that it is based on real and substantial grounds and must commend itself as the opinion of a reasonable decision maker.

1. Relying on this passage, the Appeal Panel in *Transport for NSW v Searle* [2018] NSWCATAP 93 held at [68] that:

It will not be sufficient for the decision-maker to proffer the view. It must be supported in some way: *Manly v Ministry of Premier and Cabinet* (1995) 14 WAR 550 at 573G; *Raven* at [53].

1. The Appeal Panel in *Searle* considered whether the Tribunal had made an error of law by requiring that there be “factual” evidence as to the likely effect of disclosure of information. The Appeal Panel concluded at [61] that “... the Tribunal did set an overly demanding evidentiary requirement”. The Appeal Panel reached that conclusion partly because of the number of references the Tribunal made to the lack of specific evidence as to what suppliers of information would actually do in the hypothetical circumstances in issue. The Appeal Panel went on to express the view at [61], that:

Given the administrative nature of the decision and the abstract and hypothetical subject matter, it does seem to us that the emphasis the Tribunal gave to such evidence not only overstated its potential significance but was also too stringent in approach.

1. At [35] the Appeal Panel was satisfied that the evidence given by the witnesses “went beyond mere opinion and included the basis for the views they expressed about the impact of disclosure on the future supply of information”. The correct approach, according to the Appeal Panel, at [63] is to “give prominence to inferences drawn from the objective and otherwise established facts rather than the subjective views of witnesses”. Those inferences include “the considered and understandable confidentiality to the process, the rationale for such confidentiality and the natural implication for future supply if such confidentiality was to be undermined”.
2. Based on these authorities when considering the evidence on which it is asserted that disclosure “could reasonably be expected” to have a particular effect, the following principles should be kept in mind:
3. a mere statement that disclosure could reasonably be expected to have a particular effect is insufficient;
4. there must be real and substantial grounds supporting an opinion that disclosure could reasonably be expected to have a particular effect;
5. prominence should be given to inferences capable of being drawn from established facts, rather than on the subjective views of witnesses.
6. The Tribunal’s error in this case was to misunderstand the nature and extent of the evidence required, at least in relation to the public interest consideration against disclosure in cl 4(a). The Tribunal gave little weight to that consideration because the evidence did not “*substantively demonstrate* any disadvantage in any market, which could be had as a result of disclosure of this information”. The question should have resolved this issue in accordance with the principles summarised above.
7. The Council also challenged the Tribunal’s finding of fact when considering the public interest consideration against disclosure in cl 1(f), that while “tourism is an aspect of the functions engaged in” by the Council, it “is not the major focus ... nor should it be”. In those circumstances, the Tribunal gave this consideration “minimal weight”. The Tribunal did not refer to the Council’s reliance on cl 1(f) of the Table to s 14 in relation to the functions of Destination NSW. We agree that the Tribunal made a mistake by suggesting that tourism needed to be a major focus and by expressing the view that is should not be the major focus. Instead, the Tribunal should have accepted the objective fact that promoting tourism is one of Council’s functions.

Inadequate reasons

1. In oral submissions, the Council said that the parties should know from the reasons for decision which evidence the Tribunal accepted and which evidence it rejected.
2. A failure to provide adequate reasons for a decision is an error of law: *Prendergast v Western Murray Irrigation Ltd* [2014] NSWCATAP 69 at [13](1). The relevant propositions in relation to adequacy of reasons were recently summarised by Nettle J in *DL v The Queen* [2018] HCA 26 at [130]-[131]. Of particular relevant in these proceedings is the following passage at [131]:

Since parties must be able to see the extent to which their cases have been understood and accepted, a trial judge will ordinarily be expected to expose his or her reasoning on points critical to the contest between the parties: See Soulemezis v Dudley (Holdings) Pty Ltd (1987) 10 NSWLR 247 at 279 per McHugh JA; Assad v Eliana Construction & Developing Group Pty Ltd [2015] VSCA 53 at [34]. This applies both to evidence and to argument. If a party relies on relevant and cogent evidence which the judge rejects, the judge should provide a reasoned explanation for the rejection of that evidence: See Sun Alliance Insurance Ltd v Massoud [1989] VR 8 at 18 per Gray J (Fullagar J and Tadgell J agreeing at 20).

1. The evidence before the Tribunal from the Council was: a detailed submission to the Council from Destination NSW dated 24 August 2017; two emails from V8SCA dated 22 August 2017 and 6 September 2017 and the Council’s submissions dated 29 December 2017 and 13 February 2018. The Council makes the following submissions about the way the Tribunal addressed the evidence provided by Destination NSW and V8SCA at [79] and [80] of its written submissions dated 30 April 2018:

The extent of the reference to the Destination NSW letter and the Supercars Australia letter is … where the Tribunal says, “I have taken into consideration the third party objections…”.

The Destination NSW letter, in particular, goes into detail with respect to why it refused its consent to disclosure of the Documents. It sets out the evidence of Destination NSW by reference to the clauses in the table to section 14. This evidence is not engaged with by the Senior Member on the face of the decision.

1. The Residents Action Group submitted that the Tribunal considered each of the considerations against disclosure raised by Destination NSW and gave the following reasons for giving those considerations little or no weight:
2. the issues of confidentiality generally and of “found an action for breach of confidence” is dealt with on page 5 by identifying that there are sufficient qualifiers in the confidentiality clauses of each document which ‘carve out’ the Appellant’s legal obligations under legislation such as the GIPA Act;
3. in relation to competitive neutrality and placing an agency or a third party at a disadvantage in a market the Senior Member specifically considered Destination NSW and concludes that there is “minimal evidence before me, which does not substantively demonstrate any disadvantage in any market, which could be had as a result of disclosure of this information”;
4. in relation to prejudicing the Destination NSW functions and the relationship between the Appellant and Destination NSW, the Senior Member acknowledges there may be some adverse effect but reasons that given the objects of the GIPA Act and that both agencies are obliged to support the objects of that Act, the balance favours disclosure.

Consideration

1. The Tribunal found that there was little or no evidence to support the Council’s reliance on various public interest considerations against disclosure. The Tribunal came to that view without explaining why it rejected the detailed evidence provided by Destination NSW. The Tribunal should have explained to the parties why that evidence was not persuasive. The parties were unable to see, from the Tribunal’s reasons, the extent to which its case was understood and accepted or rejected.
2. The Council also submitted that the Tribunal failed to undertake the task in s 13 of the GIPA Act of balancing the public interest considerations against disclosure with the public interest considerations in favour of disclosure. While it could be inferred that this is what the Tribunal did, the reasoning process is not apparent from the decision. However, as Meagher JA said in *Beale v Government Insurance Office of NSW* (1997) 48 NSWLR 430 at 444, “[I]t does not automatically follow that because reasons for decision are inadequate then an appealable error has occurred”. For example, if the only conclusion open on the evidence was the conclusion reached by the Tribunal, the matter does not have to be re-heard.
3. Given the errors we have identified and the inadequacy of the reasons, we have decided to deal with the disputed information identified in the internal appeal by way of a new hearing: NCAT Act, s 80(3). That course will “facilitate the just, quick and cheap resolution of the real issues in the proceedings” NCAT Act, s 36(1). We note that the disputed information is identified at (1) – (3) of [7].
4. We have taken into account submissions which Council and the Residents Action Group made on appeal about this information as well as some evidence given from the bar table.

Document 3 – Newcastle 500 Civil Works Tripartite Agreement between Destination NSW, Newcastle City Council and V8 Supercars Australia Pty Ltd

Text under heading “Entire Agreement”

1. The first item of disputed information is the text under 9.7 headed “Entire Agreement” beginning with the word “strategic” in line 1 to the word “Agreement” in line 4 and beginning with the word “including” in line 7 to the word “Agreement” in line 9. The relevant text is italicised in the passage below.
2. **[CONFIDENTIAL REASONS]**
3. **[CONFIDENTIAL REASONS]**
4. **[CONFIDENTIAL REASONS]**
5. **[CONFIDENTIAL REASONS**]
6. **[CONFIDENTIAL REASONS**]
7. Destination NSW submitted that disclosing the information would “potentially compromise Destination NSW and embarrass event owners and tourism partners who expect their commercial arrangements to be kept confidential”. We note that the fact that disclosure might cause embarrassment to Destination NSW is irrelevant: GIPA Act, s 15 (c). There was no evidence from V8SCA on this issue. The only evidence they provided related to their legitimate business, commercial, professional or financial interests.
8. The public interest considerations in favour of disclosure are both the general public interest in favour of disclosure and the two other considerations set out in s 12(2)(a) and (c).
9. **[CONFIDENTIAL REASONS]**
10. The confidentiality provisions at 9.2 of the Tripartite Agreement do not expressly mention the existence of agreements as being part of the definition of confidential information, although we acknowledge that that definition is not exhaustive. We are satisfied based on the evidence that the information redacted under the heading “Entire Agreement” was information provided in confidence to the Council. It follows that it could reasonably be expected that disclosure of that information would result in the disclosure of information provided to an agency in confidence. That is the only public interest consideration against disclosure that we were able to identify from the material.
11. There is a presumption in favour of disclosure: GIPA Act, s 5. The Council itself acknowledged that disclosure of the information could reasonably be expected to promote open discussion of public affairs, enhance Government accountability and contribute to positive and informed debate on issues of public importance: GIPA Act, s 12(2)(a).
12. **[CONFIDENTIAL REASONS]**

Email address of Destination NSW

1. The Council appealed from the Tribunal’s decision to provide an email address set out at p 23 of the Tripartite Agreement. Under the heading ‘Notices’ at 9.4, the document lists the ways in which a notice, consent or other communication under the Agreement can be given and when it is deemed to have been received. The addresses for the notices for each of the three parties to the Tripartite Agreement are set out at 9.4(c). The street address for Destination NSW is given as well as an email address. Any communication to Destination NSW is to be marked to the attention of the Chief Executive Officer.
2. We accept the new evidence given from the bar table on appeal that the email address is not a public email address. We also find that the email address is not that of the Chief Executive Officer of Destination NSW. It is an email address of an officer of Destination NSW to whom the Council or V8SCA can send a notice, consent or communication under the Agreement.
3. It was said from the bar table on appeal that it had been Destination NSW’s experience that disclosing emails of this kind leads to it being inundated with emails from the public. The Council did not provide any other evidence as to how disclosure of the email address could reasonably be expected to “prejudice the effective exercise by an agency of the agency's functions” or have any other relevant impact. We note that Council did not rely on any of the public interest considerations against disclosure based on individual rights in cl 3(a) or (b) to the Table in s 14 such as that disclosure would reveal personal information.
4. The only public interest consideration in favour of disclosure that we were able to identify is the general public interest consideration in favour of disclosure of government information: GIPA Act, s 12. The only evidence of an adverse effect on the agency’s functions was a comment from the bar table by Council’s legal representative, on behalf of Destination NSW, that disclosure of the email will lead to being inundated with emails from the public. We appreciate that this email address is not for use by members of the public but we are not persuaded that disclosure will prejudice the effective exercise by an agency of its functions. There is no overriding public interest consideration against disclosure in relation to this information.

Information about the role and responsibility of Destination NSW (Documents 2 and 4)

Nature of the information

1. The Council appealed from the Tribunal’s decision to give access to information about one of the roles of Destination NSW. That information is in the last dot point in Schedule 1 to the Memorandum of Understanding under the heading ‘Roles and Responsibilities.’ It is also in a document attached to the letter of commitment dated 22 May 2017 in the final dot point under the heading ‘Roles and Responsibilities, Destination NSW’.
2. **[CONFIDENTIAL REASONS]**
3. The Council itself acknowledged that disclosure of the information could reasonably be expected to promote open discussion of public affairs, enhance Government accountability and contribute to positive and informed debate on issues of public importance: GIPA Act, s 12(2)(a). We would add that disclosure of the information could reasonably be expected to inform the public about the operations of agencies.
4. **[CONFIDENTIAL REASONS**]
5. We note that the purpose of the Memorandum of Understanding is to “define how the Council, Destination NSW and Supercars Australia will work together over the life” of the Event. (1.1) The Memorandum of Understanding goes on to state at 2.2 that:

On behalf of the NSW Government, Destination NSW is the NSW government lead agency for the investment in the Event ...

1. Schedule 1 to the Memorandum of Understanding lists the roles and responsibilities of the three parties. Apart from the information about one of the roles of Destination NSW, the Council has not appealed from the Tribunal’s decision to give access to the entirety of the Memorandum of Understanding and the letter of commitment. In particular, we note that the Council has not appealed from the Tribunal’s decision to give access to the following information which also appears in the Memorandum of Understanding and the letter of commitment under the heading “Roles and Responsibilities, Supercars Australia”:

Supercars Australia manages contractual benefits and deliverables to Council and Destination NSW.

1. Council acknowledged on appeal that no evidence had been provided to the Tribunal which supported its decision to withhold access to this specific information. However, Council submitted that there was general evidence which supported their decision. The general evidence which we were able to identify includes the following passage from Destination NSW’s submission:

In attempting to secure events, (the Council) is required to operate in a highly competitive and price sensitive market place. The information contains significant commercial, financial and statistical details which, if released may benefit competitors and prejudice the commercial operations around delivering the Supercars motor racing event and other similar major tourist events. (Words in brackets added.)

1. The evidence provided by Destination NSW in relation to cl 4(d) “prejudice any person's legitimate business, commercial, professional or financial interests” included that:

… The amount of investment provided by the NSW government is commercially sensitive information with regard to other entities that provide sponsorship dollars to the events. The dollar amount of financial support and the corresponding benefits provided to sponsors vary between sponsorship deals.

Destination NSW achieves a degree of prominence in the publicity and advertising at events. It enjoys influence over the way the event is organised and conducted. These benefits are secured by the contracts. The sponsors enjoy different benefits as each relationship occurs on a separate footing. There is a commercial imperative underpinning the confidentiality of these arrangements and release of this information could prejudice the current degree of funding and co-operation between sponsors.

1. The public interest considerations in favour of disclosing this information include the general public interest in favour of disclosure and the examples given in s 12(2)(a) and (b). Accountability of Destination NSW will be promoted if the public understands the general nature of their contractual obligations. Destination NSW has disclosed that it enjoys influence over the way the event is organised and conducted and that these benefits are secured by the contracts. The information in dispute is not significant commercial, financial or statistical information.
2. **[CONFIDENTIAL REASONS]**
3. None of the evidence provides real and substantial ground for the opinion about the effect of disclosing this information. We are not persuaded that its release could reasonably be expected to have any of the relevant effects relied on by the Council. In those circumstances, there are no overriding public interest considerations against disclosure.

Information in the Services Deed (Document 1)

Nature of the information

1. The information in dispute relates to the rights and obligations of V8SCA and the Council in relation to the Event. None relates to Destination NSW. The information under 3.9 ‘V8SCA Rights’ is the rights that V8SCA has under the Deed in relation to the Event. The information under 5.1 headed ‘V8SCA Obligations’ sets out the roles and responsibilities of V8SCA and the Council in relation to the Event. Schedule 2, headed ‘Services’ sets out the services the Council will provide to V8SCA in respect of the Event. Schedule 3, headed ‘Event Benefits’ sets out the benefits V8SCA will provide to the Council.

Evidence

1. V8 Supercars Australia provided short submissions in two emails dated 22 August 2017 and 6 September 2017. The evidence was that:

The information could prejudice V8 Supercars Australia Pty Ltd’s “legitimate business, commercial, professional or financial interests” by revealing confidential information that could indicate the financial return of V8 Supercars Australia Pty Ltd ...

If the third parties are aware of the payments (**cash and/or contra**) that V8 Supercars Australia Pty Ltd is receiving from Council, this could prejudice V8 Supercars Australia Pty Ltd’s negotiations with other commercial partners in respect of the event. That is, those third party partners will have information on what the partner in the event (being Council) has paid to V8 Supercars Australia Pty Ltd, putting V8 Supercars Australia Pty Ltd at a disadvantage in those negotiations. (Emphasis added.)

1. The Council’s submission in relation to this public interest consideration included that:

In attempting to secure events, (the Council) is required to operate in a highly competitive and price sensitive market place. The information contains significant commercial, financial and statistical details which, if released may benefit competitors and prejudice the commercial operations around delivering the Supercars motor racing event and other similar major tourist events. (Words in brackets added.)

1. The Residents Action Group provided the minutes of the Council’s meeting of 14 March 2017. Those minutes record that Council had approved “the financial contribution of $8.8 million and the allocation of the funding from Council’s Major Asset Preservation Program with the majority of the costs being attributable to the 2017/18 financial year”. There is no evidence of precisely what this financial contribution covered.
2. **[CONFIDENTIAL REASONS]**
3. **[CONFIDENTIAL REASONS]**

Is there an overriding public interest against disclosing this information?

1. As well as the general public interest in favour of disclosure, the Council acknowledges that disclosure of the information could reasonably be expected to promote open discussion of public affairs, enhance Government accountability and contribute to positive and informed debate on issues of public importance: GIPA Act, s 12(2)(a). Another public interest consideration in favour of disclosing this information is that “disclosure of the information could reasonably be expected to ensure effective oversight of the expenditure of public funds”. Whether in cash or kind, public funds are being expended to pay for the benefits Council has provided to V8SCA and has received from them. There is a significant public interest in favour of the public knowing the nature and extent of those benefits.
2. There was evidence before the Tribunal, not just about the consequences of disclosing the dollar amounts to be paid by one party to another, but also about disclosing the other benefits to be provided. V8SCA referred to payments by way of “cash or contra”. Both V8SCA and Council referred to the commercial value of the information. We understand this evidence to be directed partly towards the effect disclosure could reasonably be expected to have on the effective exercise by the Council of its functions including its function of promoting tourism: cl 1(f) to the Table to s 14. Two other relevant considerations are the effect of disclosure on the Council’s competitive neutrality and its legitimate commercial or financial interests: cll 1(f) 4(a) and (d) of the Table to s 14.
3. The information under 3.9 ‘V8SCA Rights’ is the rights that V8SCA has under the Deed in relation to the Event. V8SCA stated that release of this information could reasonably be expected to prejudice its legitimate business, commercial, professional or financial interests. The basis for that view was that disclosure could indicate the financial return V8SCA was receiving and flag to other potential partners the amounts Council has paid it. The information under consideration does not relate to payments, whether by way of cash or contra, that V8SCA is receiving from Council. Rather, it relates to the rights V8SCA is retaining in respect of the Event.
4. V8SCA has not stated that disclosure of the information under 3.9 ‘V8SCA Rights’ could reasonably be expected to have a particular effect. Nor has it provided real and substantial grounds supporting an opinion that disclosure of that information could reasonably be expected to prejudice its legitimate business, commercial, professional or financial interests. The information does not relate to the financial return V8SCA is receiving or the amounts Council has paid it, whether in cash or contra. There is no overriding public interest against disclosure of this information.
5. The following paragraph relates to the disclosure of the text in 5.1 of the Services Deed.
6. **[CONFIDENTIAL REASONS]**
7. Schedule 2, headed ‘Services’ sets out the services the Council will provide to V8SCA in respect of the Event. Schedule 3, headed ‘Event Benefits’ sets out the benefits V8SCA will provide to the Council. Council’s evidence was that release of this information “may benefit competitors and prejudice the commercial operations around delivering the Supercars motor racing event and other similar major tourist events”. Disclosure would give competitors information about what services and benefits Council is giving and receiving. However, the value of that information in relation to future negotiations is limited. That information does not reveal how much it is costing Council to provide the services or how much Council is paying, in cash or kind, for the benefits it is receiving. Without that information, disclosure could not reasonably be expected to undermine the Council’s competitive neutrality or put it at a competitive disadvantage in the market for such Events. Nor could disclosure reasonably be expected to prejudice V8SCA’s legitimate commercial or financial interests.
8. As there are no public interest considerations against disclosure, the information should be disclosed.

Information in Annexure 2 to the Tripartite Agreement (Document 3)

Procedural background

1. The whole of Annexure 2 was the subject of the following direction from the Tribunal:

Respondent to notify Tribunal within 7 days as to which pages of Annexure 2 to Document 3 have not been publicly released prior.

1. The Council did not notify the Tribunal in accordance with this direction. Instead, the Council lodged an appeal from the Tribunal’s decision. The Council advised the Appeal Panel that none of the information in Annexure 2 has been publicly released.
2. **[CONFIDENTIAL REASONS]**
3. It is clear from this passage that if the information in Annexure 2 to the Tripartite Agreement was in the public domain, the Tribunal would have decided to provide the Residents Action Group with access to the information. It is not clear what the Tribunal would have decided if Annexure 2 to the Tripartite Agreement was not in the public domain.
4. The Council has since advised the Appeal Panel that none of the information in Annexure 2 to the Tripartite Agreement has been publicly released. In those circumstances, we consider that we should determine this issue by way of a new hearing on the papers: NCAT Act, s 80(3) and s 50.

Nature of the information in the document

1. Annexure 2 – Civil Works and Civil Works Area – begins on page 29 and comprising 31 pages.
2. **[CONFIDENTIAL REASONS]**

Is there an overriding public interest against disclosing this information?

1. Council did not appeal from the Tribunal’s decision to give access to the Recitals to the Tripartite Agreement. Those Recitals set out the roles of each of the parties and the subject matter covered in the Agreement:

V8SC organisers, promotes and manages Supercar motor racing events at various locations in Australia and internationally.

V8SC has agreed with Destination NSW that V8SC will organise, promote, manage, conduct and underwrite the Event in each of the Event Years in accordance with the Motor Racing Act.

The NSW Government has agreed to provide an investment for Event Works in accordance with this Agreement. Destination NSW is the NSW Government lead agency for the investment.

Council is the local government authority responsible for the Civil Works Area. Council wishes for certain NCC Works to be carried out, and Council and V8SC agree that it will be beneficial and efficient for the NCC Works to be carried out in parallel with the Event Works.

The parties wish to enter into this Agreement to record the terms on which:

(i) Council will pay the NCC Works Funding to Destination NSW;

(ii) V8SC will carry out the NCC Works and Destination NSW will pay V8SC the NCC Works Funding on the terms set out in this Agreement;

(iii) V8SC will carry out the Event Works and Destination NSW will pay V8SC the Event Works Funding on the terms set out in this Agreement;

(iv) there will be a process of notifying and coordinating any variations required to the NCC Works, and funding the costs of any such variations.

1. It is apparent from these recitals that there are two kinds of works to be carried out: NCC Works and Event Works. The NCC Works are works that the Council wished to be carried out at the same time as the Event Works. The agreement was that V8SCA would do all the Works. Council would pay for the NCC Works and Destination NSW would pay for the Event Works.
2. As well as the general public interest in favour of disclosure, the Council acknowledges that disclosure of the information could reasonably be expected to promote open discussion of public affairs, enhance Government accountability and contribute to positive and informed debate on issues of public importance: GIPA Act, s 12(2)(a). Another public interest consideration in favour of disclosing this information is that “disclosure of the information could reasonably be expected to ensure effective oversight of the expenditure of public funds”. Public funds are being expended to pay for the NCC Works. There is a significant public interest in favour of the public knowing the nature and extent of those Works.
3. The evidence about the effect of disclosing this information is set out at [98] to [102] above. Disclosure of the information about the Event Works would give competitors information about the nature and extent of those Works. However, that information is of no value in relation to future negotiations by V8SCA and Destination NSW because it is not known how much the NSW Government, through Destination NSW, is paying for the Event Works to be carried out. Nor is it known how much the Council is paying for the NCC Works.
4. Without that information, disclosure could not reasonably be expected to undermine the competitive neutrality of the Council or Destination NSW or put either of those bodies at a competitive disadvantage in the market for such Events. Nor could disclosure reasonably be expected to prejudice V8SCA’s legitimate commercial or financial interests. As there are no public interest considerations against disclosure, the information should be disclosed.

Orders

1. In relation to the disputed information, referred to in Note 2 below, the internal appeal is to be dealt with by way of a new hearing.
2. In relation to the “disputed information”, the appellant’s decision to withhold that information is set aside and, in substitution for that decision, a decision is made to give the respondent access to that information.
3. In relation to Annexure 2 to the Newcastle 500 Civil Works Tripartite Agreement, which is information about which the Tribunal made no decision, the internal appeal is to be dealt with by way of a new hearing.
4. The appellant’s decision to refuse to give access to Annexure 2 to the Newcastle 500 Civil Works Tripartite Agreement is set aside. In substitution for that decision, a decision is made to give the respondent access to that information.

Notes

1. There is no appeal from the Tribunal’s decision to refuse to give access to the following information in the Newcastle 500 Civil Works Tripartite Agreement between Destination NSW, the Newcastle City Council and V8 Supercars Australia Ltd dated May 2017:
2. the dollar amount in the definition of “Event Works Funding” on p 4;
3. the dollar amount in the definition of “Event Works Limitation Amount” on p 4;
4. the dollar amount in the definition of “NCC Works Funding” on p 5;
5. the dollar amount in the definition of NCC Works Limitation Amount” on p 5;
6. the information in Annexure 1 – Cash flow/payment schedule for Government Funding.
7. There is no appeal from the Tribunal’s decision to give access to all the remaining information in each of the four documents apart from the “disputed information”. The disputed information is:
8. some text under the heading “Entire agreement” and an email address on p 23 of the Newcastle 500 Civil Works Tripartite Agreement
9. general information about the role of Destination NSW in the Memorandum of Understanding and the letter of commitment; and
10. information about the rights and obligations of V8SCA and the Council in relation to the Event in the Services Deed.

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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

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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