

Review report under the *Government Information (Public Access) Act 2009*

Applicant: Mr Nicholas McCallum
 Agency: Department of Education and Communities
 Report date: 01 May 2015
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 Keywords: Government information – supply of confidential information – effective exercise of agency’s functions – breach of confidence – prejudice the conduct, effectiveness or integrity of any investigation – personal information – contravention of information privacy principle – false or unsubstantiated allegations that are defamatory

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Summary

1. Mr Nicholas McCallum (the Applicant) applied for information from the Department of Education and Communities (the Agency) under the *Government Information (Public Access) Act 2009* (GIPA Act).
2. The Agency decided to refuse to provide access to the information.
3. The Information Commissioner recommends that the Agency make a new decision by way of an internal review.

Background

4. The Applicant applied under the GIPA Act to the Agency for access to the following information:
 - a. Information relating to investigations and reports conducted by the Employee Performance and Conduct Unit (EPAC) relating to the miscalculating or claim for overtime payments by teachers and related staff at the OTEN TAFE college in Western Sydney, part of the Western Sydney Institute.

The request should cover but not be restricted to individuals who have inappropriately claimed overtime hours for work done during their regular office hours or teaching hours.

It should also include but not be restricted to details of specific individuals being investigated if their misallocated amounts exceed \$5,000 as well as the amount the individual allegedly claimed.

The information request should relate to all investigations that have taken place- whether completed or ongoing- since January 2012.
5. In its decision issued on 29 August 2014, the Agency decided to refuse to provide access to the information because there is an overriding public interest against disclosure of the information.
6. In seeking a review of the decision by the Information Commissioner, the Applicant presses for the information to be released.

Decisions under review

7. The decision under review is the Agency's decision to refuse to provide access to government information in response to an access application.

The public interest test

8. According to section 9(1) of the GIPA Act, an access applicant has a legally enforceable right to access the information requested, unless there is an overriding public interest against disclosing the information. The public interest balancing test for determining whether there is an overriding public interest against disclosure is set out in section 13 of the GIPA Act.
9. The general public interest consideration in favour of access to government information set out in section 12 of the GIPA Act means that this balance is always weighted in favour of disclosure. Section 5 of the GIPA Act establishes a presumption in favour of disclosure of government information.

10. Before deciding whether to release or withhold information, the Agency must apply the public interest test and decide whether or not an overriding public interest against disclosure exists for the information.
11. Section 13 of the GIPA Act requires decision makers to:
 - a. identify relevant public interest considerations in favour of disclosure;
 - b. identify relevant public interest considerations against disclosure;
 - c. attribute weight to each consideration for and against disclosure; and
 - d. determine whether the balance of the public interest lies in favour of or against disclosure of the government information.
12. The Agency must apply the public interest test in accordance with the principles set out in section 15 of the GIPA Act.

Public interest considerations in favour of disclosure

13. Section 12(1) of the GIPA Act sets out a general public interest in favour of disclosing government information, which must always be weighed in the application of the public interest test. The Agency may take into account any other considerations in favour of disclosure which may be relevant (section 12(2) of the GIPA Act).
14. In its notice of decision, the Agency listed the following public interest considerations in favour of disclosure of the information in issue:
 - a. there is a general public interest in favour of disclosure;
 - b. disclosure of the information could reasonably be expected to reveal or substantiate whether an agency (or member of staff of an agency) has or has not engaged in misconduct or negligent, improper or unlawful conduct; and
 - c. the disclosure of 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.

Public interest considerations against disclosure

15. The only public interest considerations against disclosure that can be considered are those in Schedule 1 and in the table to section 14 of the GIPA Act.
16. In order for the considerations against disclosure set out in the table to be raised as relevant, the Agency must establish that the disclosure of the information “could reasonably be expected to have the effect” outlined in the table.
17. In its notice of decision, the Agency raised public interest considerations against disclosure of the information, deciding that its release could reasonably be expected to:
 - a. prejudice the supply to an agency of confidential information that facilitates the effective exercise of that agency’s functions (clause 1(d) of the table to section 14 of the GIPA Act);
 - b. prejudice the effective exercise by an agency of the agency’s functions (clause 1(f) of the table to section 14 of the GIPA Act);

- c. found an action against an agency for breach of confidence or otherwise result in the disclosure of information provided to an agency in confidence (clause 1(g) of the table to section 14 of the GIPA Act);
- d. prejudice 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) (clause 1(h) of the table to section 14 of the GIPA Act);
- e. reveal an individual's personal information (clause 3(a) of the table to section 14 of the GIPA Act);
- f. contravene an information protection principle under the *Privacy and Personal Information Protection Act 1998* or a Health Privacy Principle under the *Health Records and Information Privacy Act 2002* (clause 3(b) of the table to section 14 of the GIPA Act); and
- g. reveal false or unsubstantiated allegations about a person that are defamatory (clause 3(e) of the table to section 14 of the GIPA Act).

Sampling the information

- 18. To inform this external review we attended the Agency's premises to inspect the information withheld from disclosure.
- 19. After the inspection, we obtained a representative sample of the withheld information to assess whether or not the Agency has established the public interest considerations against disclosure of the information raised in its notice of decision.
- 20. We consider that this sample is representative of the entirety of the information.

Consideration 1(d) – prejudice the supply of confidential information to an agency

- 21. Clause 1(d) of the table at section 14 states:

There is a public interest consideration against disclosure if disclosure of the information could reasonably be expected to 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).
- 22. In order for this to be a relevant consideration against disclosure, the Agency must be satisfied that:
 - a. the information was obtained in confidence;
 - b. disclosure of the information could reasonably be expected to prejudice the supply of such information to the Agency in future; and
 - c. the information facilitates the effective exercise of the Agency's functions.
- 23. The Agency stated in its notice of decision that information obtained through its misconduct investigations is kept confidential, and that if this is made public it would result in a reluctance from people to come forward in the future and provide sensitive information relating to the Agency's investigative, complaint handling and child protection functions.

Consideration 1(f) – prejudice the effective exercise by an agency of the agency's functions

24. Clause 1(f) of the table at section 14 states:

There is a public interest consideration against disclosure if disclosure of the information could reasonably be expected to prejudice the effective exercise by an agency of the agency's functions.

25. To show that this is a relevant consideration against disclosure, the agency must establish:

- a. the relevant function of the agency; and
- b. that is or would be prejudiced by release of the information.

26. The Agency stated in its notice of decision that information obtained through its misconduct investigations is kept confidential, and that if this is made public it would result in a reluctance from people to come forward in the future and provide sensitive information relating to the Agency's investigative, complaint handling and child protection functions.

Consideration 1(g) – breach of confidence or disclosure of information provided in confidence

27. Clause 1(g) of the table at section 14 states:

There is a public interest consideration against disclosure if disclosure of 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 (whether in a particular case or generally).

28. To show that this is a relevant consideration against disclosure, the agency must establish:

- a. the information was obtained in confidence; and
- b. disclosure of the information could reasonably be expected to found an action against an agency for breach of confidence; or
- c. otherwise result in the disclosure of information provided.

29. The Agency stated in its notice of decision that the people involved are notified that the information they provide is confidential that it will not be revealed except in the context of legal proceedings.

Consideration 1(h) – prejudice the conduct, effectiveness or integrity of any audit, test, investigation or review

30. Clause 1(h) of the table at section 14 states:

There is a public interest consideration against disclosure if disclosure of information could reasonably be expected to prejudice 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).

31. To show that this is a relevant consideration against disclosure, the agency must establish:
 - a. the audit, test, investigation or review conducted (whether or not commenced and whether or not completed);
 - b. the purpose, conduct or results that would be revealed; and
 - c. the prejudice to the conduct, effectiveness or integrity of the audit, test, investigation or review resulting from the release of the information.
32. The Agency stated in its notice of decision that the information relates to investigations conducted and reports prepared by EPAC, and that the Agency's process for investigating allegations of misconduct is confidential.

Consideration 3(a) – reveal an individual's personal information

33. Clause 3(a) of the table at section 14 states:

There is a public interest consideration against disclosure of information if disclosure of the information could reasonably be expected to reveal an individual's personal information.
34. Therefore, in order to establish that this consideration applies, the Agency has to:
 - a. identify whether the information is personal information (defined in clause 4(1) of Schedule 4); and
 - b. consider whether the information would be *revealed* by disclosing it under the GIPA Act (defined in clause 1 of Schedule 4).
35. Agencies must also have regard for the Information Commissioner's *Guideline 4 – Personal information as a public interest consideration under the GIPA Act* in accordance with section 15(b) of the GIPA Act.
36. The Agency stated in its notice of decision that to consult with third parties would be reasonably impracticable due to the number of third parties involved, and that consultation would compromise the Agency's investigation process.

Consideration 3(b) – contravene an information protection principle

37. Clause 3(b) of the table at section 14 states:

There is a public interest consideration against disclosure of information if disclosure of the information could reasonably be expected to contravene an information protection principle under the Privacy and Personal Information Act 1998 or Health Privacy Principle under the Health Records and Information Privacy Act 2002.
38. The Agency did not appear to identify the relevant information protection principle and describe the contravention in its notice of decision.
39. We note in this case the Agency's failure to identify the relevant information protection principle impedes the Agency's ability to demonstrate a breach of that principle.

Consideration 3(e) – false or unsubstantiated allegations about a person that are defamatory

40. Clause 3(e) of the table at section 14 states:

There is a public interest consideration against disclosure of information if disclosure of the information could reasonably be expected to reveal false or unsubstantiated allegations about a person that are defamatory.

41. In order for clause 3(e) to apply, the Agency must establish that disclosing the information could reasonably be expected to reveal:
 - a. false or unsubstantiated allegations about a person; and
 - b. those allegations are defamatory.
42. The term reveal is defined in clause 1 of Schedule 4 to mean “to disclose information that has not already been publicly disclosed”.
43. The Agency’s notice of decision did not sufficiently appear to identify the allegation which is false or unsubstantiated.

Is the Agency’s decision justified?

44. We have reviewed the information and agree that the considerations relied upon to withhold information applies to some of the sampled individual pieces of information.
45. In our view, it appears that the Agency has applied the considerations to the EPAC investigation generally.
46. We were unable to ascertain through the notice of decision how the Agency applied these considerations to the government information that was identified as subject to the access application and discharged its onus to justify its decision.
47. While we accept that paragraph 126(1)(e) of the GIPA Act is intended to prevent inadvertent disclosure within the notice of decision of information for which there is an overriding public interest against disclosure, agencies must still discharge the onus to justify its decision under subsection 97(1) in relation to the government held information or record.
48. In order to justify its decision, agencies are required to determine whether there is an overriding public interest against disclosure of the withheld information which requires consideration of whether, on balance, the public interest considerations against disclosure outweigh those in favour of disclosure.
49. The Tribunal applied this methodology in *McInnes v NSW Department of Education and Communities* (2013) in relation to the information contained in various folios that were identified as subject to the access application. The identified information is detailed in paragraph 15 of the decision.
50. The distinction between the approach taken in *McInnes* and in this current matter is that the Agency did not appear to have identified, within the notice of decision, the information that is subject to the access application and applied the public interest test to that information.
51. While we recognise the confidential nature and volume of the information which falls within the scope of this access request, the Agency’s general application of the considerations to the investigation as a whole is insufficient to discharge its GIPA Act obligations with respect to the information identified as relevant to the Applicant’s request for information.
52. As a result, we are not satisfied that the decision was justified.

Recommendations

53. We are not satisfied that the decision to refuse to provide access to the information because there are overriding public interests against disclosure was justified.
54. The Information Commissioner recommends, under section 93 of the GIPA Act, that the Agency make a new decision by way of an internal review.
55. The Agency is to have regard to the matters raised and guidance given in this report when making a new decision.
56. We ask that the Agency advise the Applicant and us by **21 April 2015** of the actions to be taken in response to our recommendation.

Review rights

57. Our reviews are not binding and are not reviewable under the GIPA Act. However a person who is dissatisfied with a reviewable decision of an agency may apply to the NSW Civil and Administrative Tribunal (NCAT) for a review of that decision.
58. The Applicant has the right to ask the NCAT to review the Agency's decision.
59. An application for a review by the NCAT can be made up to 20 working days from the date of this report. After this date, the NCAT can only review the decision if it agrees to extend this deadline. The NCAT's contact details are:

NSW Civil and Administrative Tribunal
Administrative and Equal Opportunity Division
Level 10, John Maddison Tower
86-90 Goulburn Street,
Sydney NSW 2000

Phone: 1300 006 228
Website: <http://www.ncat.nsw.gov.au>
60. If the Agency makes a new reviewable decision as a result of our review, the Applicant will have new review rights attached to that new decision, and 40 working days from the date of the new decision to request an external review at the IPC or NCAT.

Completion of this review

61. This review is now complete.
62. If you have any questions about this report please contact the Information and Privacy Commission on 1800 472 679.

Elizabeth Tydd
Information Commissioner