



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

Applicant: The Hon Greg Donnelly
Agency: Department of Education and Communities
Report date: 25 November 2016
IPC reference: IPC16/R000576
Keywords: Government information – has the information been disclosed -
expose a person to risk of harm – best interests of the child

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Summary

1. The Hon Greg Donnelly (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 refused to provide access to the information requested.
3. The Information Commissioner recommends, under section 93 of the GIPA Act, that the Agency make a new decision, by way of internal review. In making a new decision, the Agency is to have regard to the matters raised and guidance given in this report.

Background

4. The Applicant applied under the GIPA Act to the Agency for access to information relating to the Safe Schools Coalition Australia (SSCA) in the following terms:
 - a. *A list of public primary schools in NSW participating in the Safe Schools Coalition Australia (SSCA) program as at 26th July 2016.*
 - b. *A list of public secondary schools in NSW participating in the safe schools Coalition Australia program as at 26th July 2016.*
5. In its decision issued on 05 September 2016, the Agency decided to refuse access to the information requested.
6. In seeking a review of the decision by the Information Commissioner, the Applicant pressed for access to the information refused. The Applicant also submits:
 - a. that the information was in the public domain until it was removed from the Safe Schools website; and
 - b. that parents should have access to information relating to programs used in NSW schools.

Decisions under review

7. The decision under review is the Agency's decisions to refuse to provide access to information in response to an access application. This is a reviewable decision under section 80(d) of the GIPA Act.

Has the information been disclosed?

8. In order to address the Applicant's submission that the information was previously in the public domain, and before the public interest test can be considered, it is relevant to consider whether the information has yet to be disclosed.
9. The SSCA is an optional national program that schools can access voluntarily. The SSCA has a website which has in the past included a list of member schools in NSW. The website does not currently include a list of member schools from NSW.
10. In correspondence provided to us for the purpose of the review the Agency states:

- a. the department became aware of inaccuracies in the published list on the Safe Schools Website;
 - b. the Department has obligations to maintain confidentiality and privacy in relation to individual students who could potentially be identified along with disclosure of the names of the registered schools; and
 - c. some principals of registered schools have reported aggressive contact as a result of being identified as a registered school.
11. As part of our review we contacted the Agency in relation to this issue. The Agency confirmed that the list provided to us for the purpose of the review was the result of a survey of school principals. While conducting the survey it became apparent to the Agency that there were inaccuracies in the list published on the SSCA website. For this reason the Agency had the list removed from the SSCA website.
 12. As the list compiled from the survey and provided to us and the list that had been published on the SSCA website differ we are satisfied that the information has not already been disclosed.
 13. For the purposes of this review, we undertook our own internet research which identified websites that have been established to identify schools participating in the SSCA program. These websites do contain lists of schools allegedly participating in the program. However, based on the information provided to us by the Agency, the lists that appear on these unofficial websites have not been compiled through formal channels. Therefore we are unable to reach conclusions regarding their reliability or accuracy.
 14. We have also considered whether the schools have chosen to identify themselves as members of the SSCA. Our research has not found this to be the case.
 15. For these reasons we do not consider the information to have been disclosed and consider that providing the information in response to the application would constitute disclosure of the information by the Agency.

The public interest test

16. The Applicant has a legally enforceable right to access the information requested, unless there is an overriding public interest against disclosing the information (section 9(1) of the GIPA Act). 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.
17. 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.
18. 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.
19. Section 13 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.
20. 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

21. 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 (s12(2) GIPA Act).
22. 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 the disclosure of government information; and
 - b. disclosure of the information could reasonably be expected to contribute to positive and information debate on important issues or matters of serious interest.
23. In applying for the external review the Applicant submitted an additional public interest consideration in favour of disclosure that: *Parents should have ready access to information relating to programs used in NSW public schools.*
24. We agree that the considerations identified by both the Agency and the Applicant are relevant public interest considerations in favour of disclosure.

Public interest considerations against disclosure

25. The only public interest considerations against disclosure that can be considered are those in schedule 1 and section 14 of the GIPA Act.
26. In order for the considerations against disclosure set out in the table to section 14 of the GIPA Act 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.
27. The words “could reasonably be expected to” should be given their ordinary meaning. This requires a judgment to be made by the decision-maker as to whether it is reasonable, as distinct from irrational, absurd or ridiculous, to expect the effect outlined.
28. In its notice of decision the Agency raised two public interest considerations against disclosure of the information, deciding that its release could reasonably be expected to:
- a. expose a person to a risk of harm or of serious harassment or serious intimidation (clause 3(f) of the table to section 14 of the GIPA Act); and
 - b. in the case of the disclosure of personal information about a child – the disclosure of information that it would not be in the best interests of the child to have disclosed (clause 3(g) of the table to section 14 of the GIPA Act).
29. I will discuss each of these considerations in turn.

Consideration 3(f) – expose a person to risk of harm

30. Clause 3(f) of the table at section 14 as a public interest consideration against disclosure states:

There is a public interest consideration against disclosure of information if disclosure of the information could reasonably be expected to expose a person to a risk of harm or of serious harassment or serious intimidation.

31. The definition of the phrase ‘could reasonably be expected to’ means more than a mere possibility, risk or chance and must be based on real and substantial ground and not be purely speculative, fanciful, imaginary or contrived.
32. In the context of the GIPA Act, ‘harm’, ‘serious harassment’ and ‘serious intimidation’ requires an objective assessment of the impact of the conduct on the individual concerned.
33. Guidance about the requirements of consideration 3(f) can be found in *AEZ v Commissioner of Police* [2013] NSWADT 90, in which the NCAT provided:

Harm should be confined to a real and substantial detrimental effect on a person...A detrimental effect may be to a person’s physical, psychological or emotional wellbeing.

The requirement that the intimidation or harassment be serious means the decision maker must be satisfied that release of the government held information may reasonably be expected to expose the person to intimidation or harassment that is weighty or grave and not trifling or transient.

34. The notice of decision needs to establish on what basis a risk of harm, serious harassment or serious intimidation would reasonably be expected to occur if the information was disclosed. This may require a description of the context or environment that may give rise to this.
35. Agencies will then need to objectively consider whether the severity or level of the consequences has reached the requisite degree required in the consideration. This assessment should then be articulated in the notice of decision.
36. The notice of decision relies on the Agency’s submission that where schools have in the past been identified as a member of the SSCA they have been the recipient of aggressive contact from unknown parties and:

...identification of the schools has the potential to link to the students in schools registered with the SSCA and the disclosure of this information would expose a child to greater risk of harm than already in existence.

37. We are not satisfied that the Agency has justified the use of consideration 3(f) in the public interest test for the following reasons.
38. Consideration 3(f) is specifically concerned with the individual and the relevant context. In *AEZ v Commissioner of Police, NSW Police Force* [2013] NSWADT 90 at [89] it states:

All the definitions of harassment require a consideration of how the conduct complained of is experienced by the person alleged to be

harassed, and are concerned with whether that person was offended, worried, distressed or harassed by the conduct.

39. This position was further adopted more recently in *Salmon v Corrective Services NSW [2016] NSWCATAD 257*.
40. We also note that in *Australian Vaccination Network v Department of Finance and Services [2013] NSWADT 60* it was considered that clause 3(f) did not apply as disclosure of the information would not expose a person to any greater risk than already existed.
41. It could be considered that the publishing of a list of schools on third party websites, although inaccurate, already exposes students to a risk and that providing the official list would not expose the students to any greater risk than that which already exists.
42. The Agency claims that it is concerned about the potential for a child to be identified by the disclosure of the information and as a consequence of this identification suffer an increased risk of harm. However, satisfying consideration 3(f) requires an agency to specify the person to which the possibility of harm applies and substantiate the risk and that the risk is serious. In the notice of decision, however, the Agency claims only a general risk to students that may occur if a student is identified through release of the information.
43. For these reasons we are not satisfied that this is a relevant public interest consideration against disclosure and the Agency has justified its decision.

Consideration 3(g) – best interests of a child

44. Clause 3(g) of the table at section 14 states:

Individual rights, judicial processes and natural justice

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:

...

(g) in the case of the disclosure of personal information about a child – the disclosure of information that it would not be in the best interests of the child to have disclosed.

45. In order to rely on this clause as a consideration against disclosure, the Agency must demonstrate that:
 - a. the information contains personal information about a child; and
 - b. it would not be in the child's best interests to disclose the information.
46. For this consideration to apply the information must be personal information about a child and the Agency must demonstrate why disclosure would not be in the child's best interests.
47. This requires the Agency to sufficiently describe the nature of the information in question (for example, what about the child is being portrayed) in order to establish the relevance of, and weight attributed to this consideration against disclosure.

48. In the notice of decision the Agency has asserted that releasing the names of schools that are members of the program may lead to the identification of an individual child.
49. We recognise that other laws may contain protections to particular individuals in the community generally. However, for the purpose of clause 3(g) the GIPA Act requires agencies to consider the effect that disclosure of the particular information would have upon the best interests of the specific child in question.
50. In its notice of decision the Agency has not demonstrated how a school name alone constitutes personal information about an unspecified student. Personal information is defined in the GIPA Act as:

... information or an opinion (including information or an opinion forming part of a database and whether or not recorded in a material form) about an individual (whether living or dead) whose identity is apparent or can reasonably be ascertained from the information or opinion. [Schedule 4(4)(1) GIPA Act]
51. To satisfy this consideration the Agency would need to show how the list of schools satisfies the definition of personal information provided above.
52. The Agency has not satisfied the first element of the consideration 3(g) and therefore we are not satisfied that the Agency has justified the application of this consideration to the refused information being the school names.

The notice of decision

53. In the notice of decision the Agency applies public interest considerations against disclosure 3(f) and 3(g) of the table to section 14 of the GIPA Act. Clause 3 of the table to section 14 of the GIPA Act specifically addresses *Individual rights, judicial processes and natural justice*.
54. The notice of decision, however, applies considerations 3(f) and 3(g) generally to the list of schools identified as participants of the program. This generalised application of clauses 3(f) and 3(g) to justify the decision to refuse access is for the reasons outlined elsewhere in this report not justified.

Recommendations

55. The Information Commissioner recommends under section 93 of the GIPA Act that agency make a new decision, by way of internal review.
56. In making a new decision, have regard to the matters raised and guidance given in this report.
57. We ask that the Agency advise the Applicant and us within two weeks of this decision of the actions to be taken in response to our recommendations.

Review rights

58. 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.
59. The Applicant has the right to ask the NCAT to review the Agency's decision.

60. 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>

61. 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

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

Elizabeth Tydd
Information Commissioner