



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

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<b>Applicant:</b>	<b>The Applicant</b>
<b>Agency:</b>	<b>NSW Police Force</b>
<b>OIC reference:</b>	<b>11-027</b>
<b>Date request received:</b>	<b>2 February 2011</b>
<b>Date of this report:</b>	<b>19 March 2012</b>

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**Summary of this report**

1. The applicant made an access application to NSW Police Force (**Police**) under the *Government Information (Public Access) Act 2009 (GIPA Act)*, seeking access to information about complaints made against her late husband in the course of his employment with Police and his subsequent dismissal (the **complaint file**).
2. Police decided to release one document to the applicant but refused the applicant's access to the complaint file because Police decided that there was an overriding public interest against disclosure of this information.
3. For the reasons contained in this report, we recommend that:
  - a. under section 93 of the GIPA Act, Police make a new decision by way of internal review, within 15 working days from the date of this report;
  - b. Police exercise its discretion under section 127 of the GIPA Act and waive the fee payable for the internal review under section 93(6) of the GIPA Act;
  - c. Police confirm the scope of the application with the applicant, that is, confirm that the applicant does not seek access to third party information;
  - d. Police undertake consultation with a close relative of the applicant and third parties as required by section 54 of the GIPA Act; and

- e. in making a new decision, Police consider providing alternative forms of access to complaint file under sections 72 – 75 of the GIPA Act.
4. We ask that Police contact the applicant and us by 28 March 2012 to advise of the actions it intends to take in response to our recommendations.
5. In order to assist Police in its future decisions under the GIPA Act, we attach the following resources to this report:
  - a. Guideline 4: Personal information as a public interest consideration under the GIPA Act; and
  - b. Guideline 5: Consultation on public interest considerations under section 54 of the GIPA Act.

## **Background**

6. On 14 December 2010 Police received an access application from the applicant, requesting the complaint file, specifically stating:

My husband was a NSW Police officer until August 2008 when he was accused of sexual harrassment and given a 181D. I would like a copy/original of the complaint file against him.
7. In its notice of decision dated 20 January 2011, Police refused access to the complaint file because Police decided that there was an overriding public interest against disclosure of this information.

## **Our review**

8. On 2 February 2011, the applicant requested that we review Police's decision, which is a reviewable decision under section 80(d) of the GIPA Act.
9. We have discussed this review with the applicant, reviewed an unredacted copy of the complaint file, and consulted with the NSW Privacy Commissioner as required under 94(2) of the GIPA Act.
10. This report addresses the following issues:
  - a. whether Police correctly applied the public interest considerations against disclosure (from the table to section 14 of the GIPA Act) to the information it identified as falling within the applicant's application; and
  - b. alternative forms of access to information that would avoid an overriding public interest against disclosure under section 72 – 75 of the GIPA Act.

## The public interest test

11. A person who makes an access application for government information has a legally enforceable right to access the information requested unless there is an overriding public interest against disclosing the information.
12. Before deciding whether to release or withhold information, Police must apply the public interest test under section 13 of the GIPA Act, in accordance with the principles outlined under section 15 of the GIPA Act, and decide whether or not an overriding public interest against disclosure applies to the information.
13. The public interest test requires that Police undertake the following steps:
  - Step 1** identify the public interest considerations in favour of disclosure;
  - Step 2** identify the public interest considerations against disclosure; and
  - Step 3** determine the weight of the public interest considerations in favour of and against disclosure and where the balance between those interests lies.
14. These steps are discussed in further detail below.

## Public interest considerations in favour of disclosure

15. Section 12(1) of the GIPA Act provides that there is a general public interest in favour of the disclosure of government information. This consideration must always be weighed in the application of the public interest test.
16. In its notice of decision, Police considered:

the reasons provided by the applicant in seeking the documents, and the involvement of the applicant's former partner in the incidents recorded in the documentation

as public interest considerations in favour of disclosure.
17. We note that the personal factors of the applicant's application are relevant considerations in favour of disclosure under section 55 of the GIPA Act, including:
  - a. The applicant is her late husband's next of kin;
  - b. The applicant's husband committed suicide on 15 July 2010. The applicant believes that her late husband's "downward spiral commenced soon after" being discharged from Police, and seeks the information to understand the circumstances surrounding her late husband's dismissal from Police.
18. We consider that there is a strong public interest in disclosing the personal information of a deceased person to a family member. This consideration has also been listed as a consideration in favour of disclosure under clause 9 of schedule 4 to the *Right to Information Act 2009* (QLD).

19. We consider that there is a public interest in disclosing information about misconduct investigations in order to afford persons the right to procedural fairness, especially in circumstances where subsequent disciplinary action was taken by an agency. Additionally, there is a public interest in agencies being accountable for how they have conducted misconduct investigations and why they have taken subsequent actions. These considerations must, however, be balanced against any 'relevant' public interest considerations against disclosure. The applicant, as her late husband's next of kin, seeks access to the complaint file in order to understand the circumstances leading to her late husband's dismissal from the force, how Police conducted the investigation, and Police's reasons for dismissing her late husband from the Police.
20. We recommend that in making a new decision, Police consider the above public interest considerations in favour of disclosure when applying the public interest test to the information under section 13 of the GIPA Act.

### **Public interest considerations against disclosure**

21. In order for the considerations against disclosure set out in the table to section 14 of the GIPA Act to be raised as relevant considerations, Police must establish that the disclosure of the information "...could reasonably be expected to have...the...effect" outlined in the table. The words "reasonably expected to have the effect" have their ordinary meaning: whether it is reasonable, as opposed to irrational, absurd or ridiculous, to expect that the effect would be the one Police has decided is relevant.
22. In its notice of decision, Police raised five public interest considerations against disclosure of the information from the table at section 14 of the GIPA Act, deciding that the disclosure of this information could reasonably be expected to:
  - a. reveal an individual's personal information (section 14 table clause 3(a) of the GIPA Act);
  - b. prejudice the supply of confidential information that facilitates the effective exercise of Police's functions (whether in a particular case or generally) (section 14 table clause 1(d) of the GIPA Act);
  - c. prejudice the effective exercise of Police's functions (whether in a particular case or generally) (section 14 table clause 1(f) 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 (whether in a particular case or generally) (section 14 table clause 1(h) of the GIPA Act);
  - e. contravene an information protection principle (whether in a particular case or generally) (section 14 table clause 2(b) of the GIPA Act);
23. However, Police has not shown how the elements of some of these considerations apply to the complaint file or how these considerations (whether individually or collectively) override the public interest considerations in favour of disclosure.

## What is personal information (section 14 table 3(a))

24. The consideration at clause 3(a) of the table to section 14 of the GIPA Act will apply where disclosing information could reasonably be expected to reveal an individual's personal information (in this case, information relating to persons other than the applicant).
25. Clause 4 of schedule 4 to the GIPA Act defines personal information:
- (1) In this Act, **personal information** means information or an opinion...about an individual...whose identity is apparent or can reasonably be ascertained from the information or opinion.
26. In its notice of decision, Police relied on the public interest consideration against disclosure listed at clause 3(a) of the table to section 14 of the GIPA Act and in doing so said that:
- a. the material is highly sensitive and that such information has the potential to cause embarrassment and damage to your late husband's reputation...your late husband could have shared all the details of this matter with you and as he did not do so, this displays his wishes and tends to indicate his desire to keep the information private and confidential; and
  - b. releasing the complaint file:  
  
would intrude on the personal information of any other persons involved
27. We have dealt with the application of this public consideration against disclosure of the information in two parts:
- a. personal information of the applicant's late husband; and
  - b. personal information of third parties.

## Personal information of the applicant's late husband

28. Personal information includes information about an individual who has been dead for less than 30 years.
29. In its notice of decision, Police reasoned that it has refused to release her late husband's personal information because:
- The material is highly sensitive and that such information has the potential to cause embarrassment and damage to your late husband's reputation...your late husband could have shared all the details of this matter with you and as he did not do so, this displays his wishes and tends to indicate his desire to keep the information private and confidential.
30. It is irrelevant to the application of clause 3(a) of the table to section 14 of the GIPA Act, that releasing the complaint file may embarrass or damage to her late husband's reputation. Clause 3(a) is confined only to whether the disclosure of the information could reasonably be expected to reveal an individual's personal information.

31. Further to our discussions with the applicant, we understand that her late husband discussed this investigation with her. The applicant is aware of the nature of the allegations made against her late husband, and is aware of other specifics, including code names of witnesses involved in the investigation.
32. Section 54(3) provides:

If consultation is required concerning the release of personal information about a deceased person, that consultation is to be done by consultation with a close relative of the deceased.
33. We have identified that there is sensitive and non-sensitive personal information about her late husband contained within the complaint file. Under section 54(3) of the GIPA Act, consultation with a close relative of her late husband may be necessary under the GIPA Act.
34. We understand that the applicant is the next of kin however further to consultation with the NSW Privacy Commissioner under section 94(b) of the GIPA Act, we note that Police may choose to consult a close relative other than the applicant over the release of this personal information if Police consider it appropriate to do so. The applicant has advised us that her late husband's parents are aware of, and support, her application to Police. We consider that consultation with her late husband's parents would satisfy the consultation requirements under section 54(3) of the GIPA Act.

### **Personal information of third parties**

35. In its notice of decision, Police identified that some of the information contained within the complaint file is personal information of third parties, specifically witnesses who assisted Police in its investigation of her late husband's conduct.
36. Under section 54 of the GIPA Act Police must take such steps (if any) that are "reasonably practicable" to consult with third parties if:
  - a. the information is of a kind that requires consultation; and
  - b. the third party may "reasonably be expected" to have concerns about the information being released; and
  - c. those concerns may "reasonably be expected" to be relevant to whether or not there is a public interest against disclosure.
37. As discussed in 'Part 3: Is consultation mandatory under section 54' of our 'Guideline 5: Consultation on public interest considerations under section 54 of the GIPA Act', our view is that third party consultation is relevant to both the existence of the public interest considerations against disclosure, and to the appropriate weight to given to those considerations:

For an agency to decide that third party views are not expected to be reasonably relevant to whether there is a public interest consideration against disclosure, the agency must be certain

that the consideration does or does not apply, and be able to attribute appropriate weight to that consideration, without needing the views of the third party. [Guideline 5]

38. However, the applicant has advised us that she does not seek access to the personal information of third parties and is happy for the names, addresses and any identifying information of witnesses involved in Police's investigation into the conduct of her late husband to be deleted.
39. We have consulted with the NSW Privacy Commissioner regarding this matter who agrees that all identifying information (including witness names and official functions) should be redacted, particularly if the applicant does not seek access to this information.
40. We recommend that before making a new decision, Police consult with the applicant to confirm the scope of the application and whether it is acceptable to remove all identifying information of other parties.

#### **Prejudice the supply to an agency of confidential information (section 14 table 1(d))**

41. The consideration at clause 1(d) of the table to section 14 of the GIPA Act will apply where disclosing information could reasonably be expected to prejudice the supply to an agency of confidential information (whether in a particular case or generally).
42. In applying this consideration against disclosure, Police must show that:
  - a. the information is of a confidential nature;
  - b. information of this nature facilitates the effective exercise of Police's functions, that is, its statutory law enforcement functions; and
  - c. disclosure of such information could reasonably be expected to prejudice the 'future' supply of such information.
43. In its notice of decision, Police relied on the consideration at clause 1(d) of the table to section 14 of the GIPA Act as a public interest consideration against disclosure of information supplied by persons that assisted Police in its investigation into the conduct of her late husband.
44. In relying on clause 1(d) of the table to section 14 of the GIPA Act, Police must show that the information is confidential:

...this can be inferred from the circumstances in which the information was provided. (Flack v Commissioner of Police, New South Wales Police [2011] NSWADT 286 at [51])
45. We understand that information, including, but not limited to the witness statements, given to Police during the course of their investigation was given in confidence.
46. We accept that witnesses may be less forthcoming or candid with information if they believe that their statements would be disclosed in circumstances other than before a court. However, as discussed above, the applicant does not seek access to any information that would identify the witnesses. As such, disclosure of the substance of

the statements (with all identifying information redacted) may not prejudice the future supply of similar information in future internal misconduct investigations.

47. We recommend that Police consider alternative forms of access to information for which there is no overriding public interest against disclosure as provided for under sections 72 – 75 of the GIPA Act. This is discussed in further detail in paragraphs 63 – 68 of this report.

**Prejudice the effective exercise by an agency of the agency’s functions (section 14 table 1(f))**

48. In order for the consideration at clause 1(f) of the table to section 14 of the GIPA Act to apply, Police must show how the disclosure of the information could reasonably be expected to prejudice the effective exercise by Police of its functions. That is, Police should identify the affected functions and explain how the disclosure of the information would prejudice the effective exercise of those functions (whether in a particular case or generally).

49. In its notice of decision, Police reasoned that disclosure of the information would be prejudicial to the internal investigation process followed by Police and that:

it is inherent that members of the New South Wales Police Force discharge the responsibilities of their office effectively...the effective discharge of these duties could be prejudiced if every document formulated in the course of deliberations in the decision making process was liable to be made public.

50. In making decision about releasing information under the GIPA Act, Police must start with the presumption in favour of disclosure under section 5 of the GIPA Act. This means that all documentation Police creates and holds may be released subject to an overriding public interest consideration against disclosure. Effectively, every document formulated, created, received, or otherwise held by Police is subject to the GIPA Act and could be released to the public unless:

- a. it is excluded information under the GIPA Act; or
- b. there is an overriding public interest against disclosure of the information.

51. If Police claim that clause 1(f) of the table to section 14 of the GIPA Act applies to the complaint file, and misconduct investigations generally, then Police must balance this public interest consideration against disclosure with the public interest considerations in favour of disclosure, including, among other things, that it is in the public interest to:

- a. be transparent about the way in which it handles and conducts enquiries into the suitability of its officers;
- b. reveal the reasons for its decision and any background or contextual information that informed the decision; and
- c. contribute to the administration of justice generally, including procedural fairness.

**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) (section 14 table 1(h))**

52. In order for the consideration at clause 1(h) of the table to section 14 of the GIPA Act to apply, Police must show how the conduct, effectiveness or integrity of the investigation could be prejudiced if its purpose, conduct or results were disclosed (whether in a particular case or generally).
53. In its notice of decision, Police has not shown how this public interest consideration against disclosure applies to the information because Police have not identified how the conduct, effectiveness or integrity of the investigation would be prejudiced if the information was released to the applicant.
54. We understand that the investigation into the conduct of her late husband was completed on or around 14 August 2008 and that the NSW Police Commissioner subsequently removed her late husband from service with Police. The purpose and outcome of this investigation are known by the applicant. That is, the applicant knows that her late husband was investigated for misconduct arising from improper conduct, and that as a result, her late husband was removed as a police officer of Police.
55. In our view, the consideration at clause 1(h) of the table to section 14 of the GIPA Act does not apply to the information.

**Prejudice the prevention, detection or investigation of a contravention of the law, or prejudice the enforcement of the law (section 14 table 2(b))**

56. The consideration at clause 2(b) of the table to section 14 of the GIPA Act will apply if Police can show that the release of information will prejudice the prevention, detection or investigation of a contravention of the law, or prejudice the enforcement of the law (whether in a particular case or generally).
57. In its decision, Police explained that it has applied this consideration against disclosure to the complaint file because:  
  
...the effectiveness of any law enforcement agency depends heavily on the use of such investigative techniques and those details must remain confidential to ensure its continuing value for law enforcement purposes.
58. Clause 2(b) of the table to section 14 of the GIPA Act, may apply if the investigative techniques, methods or procedures have some element of secrecy about them. Otherwise, if the techniques are already publicly available, the information will not be 'disclosed'. Therefore, this consideration against disclosure relates to information that if released would disclose Police's processes and subsequently prejudice the prevention, detection or investigation of a contravention of the law. Publicly available information, including NSW Police Force Complaint Handling Guidelines', detail the management and investigation of criminal and non-criminal allegations against a Police officer. Therefore, to the extent that the investigative techniques, methods and procedures are already publicly available, releasing this information to the applicant cannot constitute disclosure.

59. We recommend that in making a new decision in this matter, Police consider whether clause 2(b) of the table to section 14 of the GIPA Act applies, that is how releasing the complaint file could prejudice investigations generally. If Police identifies that this consideration against disclosure does apply to the complaint file, Police should work out the weight that should be attributed to this public interest consideration against disclosure in this particular case.

### **Balancing the public interest test**

60. The GIPA Act does not provide a set formula for:
- a. working out the weight of public interest considerations for or against disclosure, or
  - b. deciding if one set of considerations outweighs the other.
61. Whatever approach is taken, this is a questions of fact and degree to which different answers may be given without being wrong (as long as the decision maker acts in good faith and makes a decision available to them under the GIPA Act).
62. We recommend that in making a new decision, Police:
- a. identify the public interest considerations in favour of disclosure of the information to the applicant, including any personal factors of her application, as discussed in paragraphs 15 – 20 of this report;
  - b. consult with third parties as required by section 54 of the GIPA Act;
  - c. ensure that all elements of the public interest considerations against disclosure applies to all information contained within the complaint file; and
  - d. attribute weight to all the public interest considerations for and against disclosure that it has raised, and balances these considerations in order to make its new decision.

### **Alternative forms of access**

63. If Police decides that there is an overriding public interest against disclosing some or all of the information requested by an applicant, it should then go on to consider whether there are other ways in which access can be provided which would overcome the overriding public interest against disclosure. Other forms of access allowed under the GIPA Act include:
- a. deleting information from a copy of a record if there was an overriding public interest against disclosing that information (section 74); and
  - b. imposing a condition on how the applicant can exercise a right of access to the information, such as allowing the applicant to inspect the information but not to take notes or to make a copy (section 73(2)).

64. In this case, Police did not consider redacting the complaint file in order to facilitate disclosure of information for which there is no overriding public interest against disclosure.
65. Similarly, the Police did not consider allowing the applicant an opportunity to inspect the complaint file, in addition to, or as an alternative to providing the applicant with a copy. Police should have considered these options.
66. We encourage agencies to explore alternative forms of access, particularly where there are strong public interest considerations on both sides. We also encourage applicants seeking access to information to accept an offer of viewing information to which they would not otherwise be given access. However, if Police decided there is no overriding public interest against disclosure of information, the applicant should be given a copy of this information.
67. We consider that there is a considerable amount of information in the complaint file which could be provided to the applicant.
68. We recommend that in reconsidering this application, and in its future decisions, Police consider sections 72 – 75 of the GIPA Act in order facilitate disclosure of information that is in the public interest.

## Recommendations

69. We recommend that:
  - a. under section 93 of the GIPA Act, Police make a new decision by way of internal review, within 15 working days from the date of this report;
  - b. Police exercise its discretion under section 127 of the GIPA Act and waive the fee payable for the internal review under section 93(6) of the GIPA Act;
  - c. Police confirm the scope of the application with the applicant, that is, confirm that the applicant does not seek access to third party information;
  - d. Police undertake consultation with a close relative of the applicant and third parties as required by section 54 of the GIPA Act;
  - e. in making a new decision, Police consider providing alternative forms of access to the complaint file under sections 72 – 75 of the GIPA Act.
70. We ask that Police advise us and the applicant by 28 March 2012 of the actions it intends to take in response to our recommendations.

## Review rights

71. Our recommendations 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 Administrative Decisions Tribunal (**ADT**) for a review of that decision.

72. If the applicant is dissatisfied with our recommendations or Police's response to our recommendations, the applicant may ask the ADT to review Police's decision
73. An application for ADT review can be made up to four weeks from the date of this report (that is by **16 April 2012**). After this date, the ADT can only review the decision if it agrees to extend this deadline. The ADT's contact details are:

**Administrative Decisions Tribunal**

**Level 10, 86 Goulburn Street,**

**Sydney, NSW, 2000**

**Phone:** (02) 9377 5711

**Facsimile:** (02) 9377 5723

**Website:** <http://www.lawlink.nsw.gov.au/adt>

**Email:** [ag\\_adt@agd.nsw.gov.au](mailto:ag_adt@agd.nsw.gov.au)

74. If Police makes a new reviewable decision as a result of our review, the applicant will have new review rights attached to that new decision, and eight weeks from the date of the new decision to request an external review at the OIC or ADT.

### **Closing our file**

75. This file is now closed. If you have any questions regarding this report please contact the IPC 1800 472 679.