



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

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<b>Applicant:</b>	<b>Linton Besser – Sydney Morning Herald</b>
<b>Agency:</b>	<b>Corrective Services NSW</b>
<b>OIC reference:</b>	<b>11-106</b>
<b>Date review request received:</b>	<b>18 April 2011</b>
<b>Date of final report:</b>	<b>17 January 2012</b>

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### **Summary of report**

1. Mr Linton Besser of the Sydney Morning Herald applied under the *Government Information (Public Access) Act 2009* (the GIPA Act) for information held by Corrective Services NSW. The request was for information regarding Corrective Services Industries contracts and agreements valued at over \$20,000 per annum. These are contracts where Corrective Services Industries is generating income by providing the manufacture/service, using inmate labour. The request specified client name, correctional centre, description of service, number of inmates employed, value per annum and contract period.
2. Corrective Services NSW created a table setting out the information sought. Some information was withheld as they considered that there is an overriding public interest against disclosure of the information in full, as it would found an action against them for breach of confidence.
3. Pursuant to section 80(d) of the GIPA Act, we have reviewed Corrective Services NSW decision to refuse access to some information. We recommend that it make a new decision, which applies the public interest test and considers releasing further information.
4. The reasons for our decision are discussed in this report.

### **Consultation**

5. Section 54 of the GIPA Act provides that an agency must take steps to consult with a person before it provides access to information, if that information concerns the person's business, commercial, professional or financial interests. In this case, Corrective

Services NSW consulted with all parties whose information fell within the scope of the application. This included both government agencies and private businesses.

6. We have reviewed all letters sent to parties as part of the consultation process, and the responses received. We have ensured that the table provided to Mr Besser accurately reflects the responses received in the consultation process. All information relating to government departments was disclosed. However, some private businesses objected to some or all of their information being released. One company did not want its name linked to the type of service identified in the table and provided a rationale for its concerns. Another relied upon confidentiality provided through their contract. Others did not provide a reason.
7. The letter of consultation that Corrective Services NSW has sent to affected parties does not, in our view, provide clear information on the provisions of the GIPA Act, and this may have a negative impact on the outcome of the consultation process. The letter does not clearly articulate what the considerations at the Table to section 14 of the GIPA Act are (it relies on the parties to find this out themselves). If not read carefully, it could also imply that there is a conclusive presumption that there is an overriding public interest against disclosure if any of the considerations are raised.
8. The reference to Schedule 1 of the GIPA Act may also be confusing to an affected party when the information that is subject to consultation is not of a nature that Schedule 1 refers to.
9. Corrective Services NSW advice to affected parties should also explain the process involved in considering the public interest. It should advise that Corrective Services NSW might still decide to release the information if the reasons for objecting do not outweigh the public interest considerations in favour of releasing the information. It should also provide information about the third party's rights should Corrective Services NSW decide to release the information.
10. The letter from Corrective Services also refers to 'records' while the GIPA Act refers to 'government information'. We have included a sample of a more appropriate letter of consultation that Corrective Services NSW may wish to use as a guide.

## **Breach of confidence**

11. The table to section 14, clause 1(g) of the GIPA Act provides that there is a public interest consideration against disclosure of information that could reasonably be expected to found an action against an agency for breach of confidence. Corrective Services NSW notice of decision states that *'If the deleted material were released, it would be a breach of confidence based on the agreements Corrective Services NSW has with the agencies concerned.'* No further information is provided as Corrective Services NSW is of the view that it would reveal information for which there is an overriding public interest against disclosure (Pursuant to section 126(1)(e) of the GIPA Act).
12. This section of the GIPA Act does not mean that no information can be provided. It is quite feasible to discuss the application of the public interest test (which we will talk about later) without revealing disputable information.
13. Similarly, we must not, in conducting this review, disclose any information for which Corrective Services NSW considers there to be an overriding public interest against disclosure (section 91 of the GIPA Act). However, we have viewed the information upon which Corrective Services NSW relies. Our view is that it is arguable that release of

some, but not all of the redacted information could reasonably be expected to found an action for breach of confidence.

### **Has Corrective Services NSW properly applied the public interest test?**

14. In considering whether or not to disclose information, Corrective Services must weigh the relevant public interest factors for and against disclosure. Section 5 of the GIPA Act says that there is a presumption in favour of disclosure of government information unless there is an overriding public interest against disclosure. Section 13 says there will be an overriding public interest against disclosure only if the public interest considerations against disclosure outweigh the public interest considerations in favour of disclosure.
15. This means that Corrective Services NSW should start with a presumption that information must be released, unless it can be shown that there are public interest considerations against disclosure that override or outweigh the presumption in favour of disclosure.
16. The object of the GIPA Act is to promote a system of responsible and representative democratic government that is open, accountable, fair and effective. Section 12 of the GIPA Act says that there is a general public interest in favour of the disclosure of government information. It gives some examples of relevant public interest factors, but it is not an exhaustive list.
17. Corrective Services NSW has not identified any public interest considerations in favour of disclosure. These should be identified and balanced with those public interest considerations against disclosure, in order to decide whether or not there is an overriding public interest against disclosure. Therefore Corrective Services NSW has failed to take an essential step in carrying out the public interest test.
18. We agree with Corrective Services NSW that clause 1(g) of the table to section 14 of the GIPA Act may apply to the information concerned. However, they have not explained how this consideration outweighs the public interest considerations in favour of disclosure. We also note that Corrective Services NSW hasn't relied on clause 4(d) of the Table to section 14, even though it is the reason they sought to consult.
19. When writing its decision in response to an access application, Corrective Services NSW should list the considerations for and against that it has taken into account and explain why the considerations identified apply to the information sought.
20. We have provided guidance to Corrective Services NSW in December 2011 on the application of the public interest test and they should refer to this when reconsidering this application.
21. There are nine pieces of information that have not been released (four client names, three description of service; one value of contract and one period of contract). In making its new decision, Corrective Services NSW must consider how the considerations at Table 14 apply to each individual piece of information. For example, it should consider whether revealing the value of the contract alone, or the period of the agreement alone, without identifying the client, would result in an overriding consideration against disclosure.
22. Additionally, the provisions of section 75 in relation to forms of access should be considered. For example, under the heading 'description' some of the information that has been redacted is very specific and could, by its nature, reveal the details of the clients who have objected to their information being released. However, if a more

generic description was used (as is the case with those un-redacted descriptions), there may no longer be an overriding public interest against disclosure.

23. It should also be noted that disclosure of government information under the GIPA Act cannot give rise to an action for breach of confidence because of the protection conferred by section 113 of the GIPA Act, provided the decision is made in good faith.
24. We are only able to provide advice in respect to the GIPA Act. Independent legal advice should be sought for concerns in relation to breach of contract.

### **Our recommendations**

25. We recommend Corrective Services NSW:
  - (a) in accordance with section 93 of the GIPA Act, make a new decision within 15 working days (subject to any permissible extensions under the GIPA Act) by way of internal review
  - (b) in doing this, waive the \$40 internal review fee
  - (c) advise us and Mr Besser of the actions it intends to take in response to our recommendations by 24 January 2012.

### **Review rights**

26. Our recommendations are not binding and are not reviewable under the GIPA Act. 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.
27. If Mr Besser is dissatisfied with our view, he can ask the ADT to review the original decision of Corrective Services NSW.
28. An application for ADT review can be made up to four weeks from the date of this report (that is by **14 February 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, John Maddison Tower  
86 Goulburn Street,  
Sydney, NSW, 2000**

<b>Telephone</b>	(02) 9377 5711
<b>Facsimile</b>	(02) 9377 5723
<b>TTY</b>	(02) 9377 5859
<b>Internet</b>	<a href="http://www.lawlink.nsw.gov.au/adt">http://www.lawlink.nsw.gov.au/adt</a>
<b>e-mail</b>	<a href="mailto:ag_adt@agd.nsw.gov.au">ag_adt@agd.nsw.gov.au</a>

## Questions?

29. This review is now closed.

30. If you have any questions about this report please contact us on 1800 472 679.