



Report on review under section 89 of the *Government Information (Public Access) Act 2009 (GIPA Act)*

Access applicant: Mr Kelvin Bissett
Agency: NSW Police
OIC reference: 11-127
Date of report: 28 September 2011

A Summary of report

1. Mr Bissett made an application to NSW Police for information about glassings that occurred in NSW during 2010. NSW Police gave him some of the information that he asked for, but decided that there is an overriding public interest against disclosing the names of the hotels in which the glassings took place.
2. We have reviewed the decision made by NSW Police and are not satisfied that there is an overriding public interest against the release of the names of the hotels.
3. The Information Commissioner therefore recommends:
 - a. pursuant to section 94 of the GIPA Act, that there is no overriding public interest against the disclosure of the information; and
 - b. pursuant to section 93 of the GIPA Act, NSW Police should make a new decision and release the information or show why the information should not be released.
4. Reasons for these recommendations are set out below.

B The access application and decision

5. Mr Bissett made a formal access application to the NSW Police on 30 March 2011. He asked for the following information:
 - 1 "All crime reports handled by police of "glassings" in NSW in the 2010 calendar year.
 - 2 Where charges were proceeded with, please indicate.
 - 3 Where the incidents took place on licensed premises, the name of the licensed premises."

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6. NSW Police gave Mr Bissett a spreadsheet that shows glassing incidents that took place on licensed premises in NSW in 2010 and general statistics about glassings and related charges. The spreadsheet shows the date of each incident and the time that it occurred (within a 3 hour range).
7. The spreadsheet does not show the names of the licensed premises where the incidents took place. The name of each venue has been replaced by the name of the Local Area Command in which it is situated. NSW Police decided that there is an overriding public interest against the release of the names because it could prejudice the legitimate business, commercial, professional or financial interests of the venues and may undermine competitive neutrality. Notice of this decision was given to Mr Bissett on 28 April 2011.

C OIC review

8. On 5 March 2011, Mr Bissett requested an external review by the Information Commissioner under section 89 of the GIPA Act. In conducting this review we spoke with Mr Bissett and with NSW Police, who provided further information about the decision and the information that was withheld.
9. The focus of this review is the decision not to release the names of the licensed premises. It is a reviewable decision under section 80(d) of the GIPA Act.
10. The review also raised questions about the way in which NSW Police processes access applications. It appears from the file kept by NSW Police and provided to us that the decision maker did not see the names of the venues and did not make the decision that there is an overriding public interest against their disclosure. We will not comment further on this issue in this report, however we have noted this practice and may investigate the NSW Police delegations under the GIPA Act as part of our broader functions.

D 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 disclosure of the information, pursuant to section 9(1) of the GIPA Act.
12. Section 13 of the GIPA Act sets out the public interest test as follows:

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.
13. When applying the public interest test, an agency should begin with the general presumption in favour of disclosure of government information provided for at section 5 of the GIPA Act.

14. The agency must then:
 - a. identify further public interest considerations in favour of disclosure;
 - b. identify any public interest considerations against disclosure;
 - c. determine the weight of the public interest considerations in favour of and against disclosure; and
 - d. determine where the balance between those interests lies.
15. In applying the public interest test agencies must follow the principles set out in section 15 of the GIPA Act.

E Public interest considerations in favour of disclosure

16. The GIPA Act does not limit the public interest considerations in favour of disclosure of information that may be considered when applying the public interest test.
17. NSW Police identified Mr Bissett's right to access government information under section 9(1) of the GIPA Act. We agree with NSW Police that there is a public interest in favour of disclosure of the information as it "...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" (section 12(2)(a) of the GIPA Act).
18. Glassings and alcohol-fuelled violence are ongoing issue of public debate. In recent years the NSW Government has made attempts to curb such violence and impose stricter licensing and regulations on the liquor and gaming industry. The disclosure of the names of venues where glassings took place could increase the accountability of licensed premises and of the Government in its response to issues of public safety. There is a public interest in favour of giving members of the public access to information that enables them to contribute to the ongoing discussion surrounding these issues and to make informed choices about the venues that they visit.
19. NSW Police also considered that there was a public interest in favour of release of the information as it is the personal information of Mr Bissett (section 12(2)(d) of the GIPA Act). The information is not his personal information and we do not agree that this is a consideration in favour of disclosure.

F Public interest considerations against disclosure

20. The only public interest considerations against disclosure that may be taken into account when applying the public interest test are those listed in the table at section 14 of the GIPA Act. NSW Police identified two public interest considerations against disclosure of the names of the licensed premises. We have looked at both of these considerations and whether or not they apply.

Section 14 table 4(a)

21. NSW Police considered that the disclosure of the venue names could reasonably be expected to:

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 (section 14 table 4(a) of the GIPA Act)

22. The venues that would be named are not agencies (an agency is defined in section 4 of the GIPA Act) and the release of the information does not post a risk to the competitive neutrality of NSW Police. Therefore, this consideration does not apply to the information and should not be considered when applying the public interest test.

Section 14 table 4(d)

23. NSW Police also considered that the disclosure of the venue names could reasonably be expected to:

Prejudice any person's legitimate business, commercial, professional or financial interests (section 14 table 4(d) of the GIPA Act)

24. NSW Police decided that the release of this information could adversely affect the business interests of the venues that are named. However, NSW Police did not show a direct link between the release of the names and the possible adverse effect.
25. It is possible that naming the venues in connection with the glassing incidents could deter customers from attending those premises, which may in turn affect their business and financial interests. We are therefore satisfied that this consideration may be taken into account against disclosure of the information. However, we do not believe that it holds significant weight when balanced against the presumption and public interest considerations in favour of disclosure.
26. Consultation with the businesses that would be named would allow NSW Police to make a more informed assessment of the likelihood of prejudice and the weight that should be given to the consideration.

Consultation

27. Section 54 of the GIPA Act requires an agency to consult with a person before providing access to information if:
- a. the information to be released concerns that person's business, commercial, professional or financial interests (see sections 54(1)(a) and 54(2)(b)); and
 - b. the person may reasonably be expected to have concerns about the release of the information (section 54(1)(b)); and

- c. those concerns may reasonably be expected to be relevant to the question of whether there is a public interest consideration against disclosure (section 54(1)(c)).
28. In this instance, we are satisfied that the public interest consideration at section 14 table 4(d) does apply to the release of the names of the venues. A strict reading of section 54(1)(c) of the GIPA Act suggests that the requirement to consult is therefore not enlivened, as concerns expressed by third parties would not be relevant to the question of whether or not the consideration at section 14 table 4(d) of the GIPA Act applies to the information. The consideration has already been established without consultation.
29. However, consultation becomes relevant when looking at the weight that should be given to that consideration. NSW Police did not consult with anyone about the release of the venue names because it decided that it was unreasonable to do so. Without consulting with the business owners about possible reasons for objection and the likelihood of prejudice to their business and financial interests, NSW Police cannot show that consideration bears such weight as to override the public interest in favour of the release of the names.
30. If NSW Police consult with the business owners and they object to the information being released, then those objections must be taken into account when applying the public interest test (section 54(5) of the GIPA Act). The fact that there is an objection does not mean that the information cannot be released. An objection is only a consideration against disclosure and not a conclusive presumption against release of the information.
31. It is not acceptable for NSW Police to say, without clear reason, that consultation would be unreasonable and that they therefore cannot release the information. Mr Bissett has a right to access the information unless there is an overriding public interest against its disclosure. NSW Police have not established that there is an overriding public interest against disclosure of the names of the licensed premises. If NSW Police believe that consultation with the venue owners would show that there is in fact an overriding public interest against the release of the names then they should consult. It is up to NSW Police to satisfy themselves that they have enough evidence to properly apply the public interest test. This is consistent with section 97 of the GIPA Act which provides that the burden of establishing that a decision is justified lies on the agency.

G Should the information be disclosed?

32. We have applied the public interest test based on the information provided by both parties and found that there is an overriding public interest in favour of the disclosure of the names of the licensed premises. We have taken into account the fact that the release of the names could have an adverse affect on the business interests of the venues. However, we are not satisfied that this consideration outweighs the presumption and the identified public interest considerations in favour of disclosure of the names. The disclosure of this information could promote open public debate about recognised problems with alcohol and violence in NSW. Members of the public have a right to contribute to the ongoing discussion about these issues and the proposed

response actions of the NSW Government. They also have a right to make informed choices about the venues that they attend.

33. As discussed in this report, NSW Police must satisfy themselves that they have enough evidence to properly attribute weight to the consideration against disclosure and then apply the public interest test. They should release the information to Mr Bisset unless they can show, in the way required by sections 61 and 97 of the GIPA Act, that there is an overriding public interest against disclosure.

H Recommendations

34. The Information Commissioner recommends that:
 - a. There is no overriding public interest against the disclosure of the names of the licensed premises (pursuant to section 94 of the GIPA Act).
 - b. NSW Police should make a new decision within 15 working days of this report (pursuant to section 93 of the GIPA Act).
 - c. NSW Police should release the names of the licensed premises to Mr Bissett, unless they can show that there is an overriding public interest against disclosure.
 - d. NSW Police should exercise its discretion to waive the internal review fee of \$40.00 (pursuant to section 127 of the GIPA Act).

I Further information

35. This review is now closed.
36. The Information Commissioner's recommendations are not binding and are not reviewable under the GIPA Act. If Mr Bissett is dissatisfied with the Information Commissioner's recommendations or with the agency's response to the recommendations, he can ask the Administrative decisions tribunal (ADT) to review the original decision of the agency. An application for ADT review can be made within four weeks from the date of this letter. The ADT can be contacted at:

Administrative Decisions Tribunal
Level 15, 111 Elizabeth Street
Sydney NSW 2000
Phone: (02) 9223 4677
Fax: (02) 9233 3283

J Questions?

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