



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

Applicant:	Mr Ian Power
Agency:	Murrumbidgee Local Health District
OIC reference:	11-162
Date review request received:	31 May 2011
Date of this report:	21 May 2012

Summary of this report

1. Mr Power, an employee of Murrumbidgee Local Health District (MLHD), has requested access to a copy of an investigation report (referred to as the Investigation Report), prepared following an investigation into allegations of bullying and harassment at Griffiths Base Hospital.
2. We have considered the Notice of Decision prepared by MLHD and the information to which access was refused. We agree that there are relevant public interest considerations against disclosure of parts of the Investigation Report.
3. However, the Notice of Decision does not:
 - a) consider the attachments to the Investigation Report;
 - b) contain findings of fact or reference the sources of information relied on;
 - c) identify any public interest considerations in favour of disclosure of the Investigation Report; or
 - d) provide sufficient detail regarding the application of the identified public interest considerations against disclosure or detail which parts of the Investigation Report these considerations apply to (rather, it applies the public interest test to the Investigation Report as a whole).
4. MLHD also offered to provide conditional access to the Investigation Report, contrary to the requirement for access to be unconditional (per section 73(1) of the GIPA Act) and without undertaking any consultation (as required by section 54 of the GIPA Act).
5. Under section 93 of the GIPA Act, we recommend that MLHD:
 - a) make a new decision about Mr Power's access application, within 15 working days of the date of this report (subject to any permissible extensions under the GIPA Act);

- b) consider the comments and recommendations in this report; and
 - c) provide Mr Power with a new notice of decision (in accordance with section 61 of the GIPA Act) and release any information for which there is no overriding public interest against disclosure.
6. We ask that MLHD let Mr Power, and us, know of any actions it intends to take in response to our recommendations by **29 May 2012**.

Background

7. On 30 March 2011, the NSW Department of Health (**Health**) received an access application under the *Government Information (Public Access) Act 2009 (GIPA Act)* from Mr Power (**Access Application**), for access to the following:

Report ... into allegations of Bullying & Harassment at Griffith Base Hospital (November 2010) [**Investigation Report**]. The applicant has been the subject of negative management action as a result of this report but has been denied procedural fairness by not being allowed to view evidence/allegations made. A request to the Murrumbidgee Local Health Network for access has been denied.

8. On 6 April 2011, Health transferred the Access Application to the Murrumbidgee Local Health Network (**MLHN**) (now the Murrumbidgee Local Health District), because the information sought by Mr Power was not held by Health and was considered to relate more closely to the functions of MLHD.
9. By letter dated 20 April 2011, MLHD offered to provide Mr Power access to the Investigation Report, if he agreed to certain conditions. The letter stated as follows:

As a condition of, and in consideration for, MLHN granting you access to the Investigation Report, you agree that:

- 1. the Investigation Report is confidential to MLHN and is provided to you personally for reference and for the purposes of obtaining legal and industrial advice (**Permitted Purpose**) only;
- 2. you must do everything necessary to keep the Investigation Report confidential and must not use it except to the extent necessary for the Permitted Purpose;
- 3. you must not copy or allow anyone else to copy the Investigation Report;
- 4. you must not, directly or indirectly, disclose any part of the Investigation Report to anyone else; and
- 5. you must return the Investigation Report to GSAHS [Greater Southern Area Health Service] as soon as you are asked to do so.

Any breach of the conditions listed above in relation to the Investigation Report would be regarded by MLHN as a breach of your employment obligations.

10. Mr Power responded by letter dated 2 May 2011. He stated that he was unable to agree to the conditions imposed on access to the Investigation Report and requested that he be provided with a copy of the Investigation Report.
11. The Right to Information Officer (**RIO**) at MLHD notified Mr Power of his decision in relation to the Access Application, on 9 May 2011 (**Notice of Decision**). The RIO refused to provide Mr Power with access to the Investigation Report, on the basis the

he considered there to be an overriding public interest against disclosure of the Investigation Report, for the reasons outlined in the Notice of Decision.

12. On 31 May 2011, we received a request for assistance from Mr Power, requesting review of the Notice of Decision. The decision to refuse to provide access to the Investigation Report is a reviewable decision under section 80(d) of the GIPA Act.

Offer to provide conditional access to the Investigation Report

13. Under section 73(1) of the GIPA Act, an agency is not entitled to impose any conditions on the use or disclosure of information when the agency provides access to information in response to an access application.
14. Section 73(2) of the GIPA Act allows a condition to be imposed as to how a right of access may be exercised (such as a condition that prevents an applicant making notes from or taking a copy of a record), to avoid there being an overriding public interest against disclosure of the information.
15. MLHD's offer to provide Mr Power with conditional access to the Investigation Report did not demonstrate that it was to avoid there being an overriding public interest against disclosure of the information (as required by section 73(2) of the GIPA Act).
16. Further, the conditions sought to be imposed by MLHD went beyond the scope of section 73(2) of the GIPA Act and attempted to restrict the purpose for which Mr Power may use the Investigation Report.
17. We note that an agency may release information in response to an informal request subject to any reasonable conditions the agency thinks fit (per section 8(2) of the GIPA Act). However, in this instance, Mr Power made a formal access application.
18. MLHD could have asked Mr Power to withdraw his formal access application and instead make an informal request for the information, subject to explaining the effect of this to him. However, this does not seem to have occurred. In any event, Mr Power has refused to agree to the conditions sought to be imposed by MLHD and insisted that he wants access to a copy of the Investigation Report. Therefore, informal release subject to the conditions sought to be imposed by MLHD would not satisfy Mr Power.

MLHD Notice of Decision

19. Under section 61 of the GIPA Act, notice of an agency's decision to refuse to provide access to information because there is an overriding public interest against disclosure of the information must state the following:
 - a) The agency's reasons for its decision;
 - b) The findings on any material questions of fact underlying those reasons, together with a reference to the sources of information on which those findings are based; and
 - c) The general nature and the format of the records held by the agency that contain the information concerned.
20. The Notice of Decision does not contain findings of fact or reference the sources of information, in support of all of the reasons relied on.

21. The Notice of Decision also does not refer to the attachments to the Investigation Report. The attachments should have been considered as part of the Investigation Report.
22. We encourage MLHD to make use of the template notice of decision, available on the OIC website (www.oic.nsw.gov.au).

The public interest test

23. Mr Power has a legally enforceable right to access the information he requested, unless there is an overriding public interest against disclosing the information (section 9(1) of the GIPA Act).
24. In making such a determination, MLHD must apply the public interest test under section 13 of the GIPA Act, which states 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.

25. MLHD is to apply the public interest test under section 13 of the GIPA Act as follows:

- a) Identify the public interest considerations in favour of disclosure that apply to the Investigation Report;
- b) Identify the public interest considerations against disclosure of the Investigation Report; and
- c) Determine where the balance lies.¹

26. The MLHD must apply the public interest test in accordance with the following principles set out in section 15 of the GIPA Act:

- a) agencies must exercise their functions so as to promote the object of the GIPA Act;
- b) agencies must have regard to guidelines issued by the Information Commissioner;
- c) it is irrelevant if the disclosure of information might cause embarrassment to, or loss of confidence in, the agency;
- d) it is irrelevant that information disclosed might be misinterpreted or misunderstood; and
- e) disclosure, in response to a formal access application, cannot be made subject to any conditions on the use of the information.

¹ *Flack v Commissioner of Police, New South Wales Police* [2011] NSWADT 286, at [19]. This approach was followed by the Tribunal in the later case of *Hurst v Wagga Wagga City Council* [2011] NSWADT 307.

Public interest considerations in favour of disclosure

27. The Notice of Determination did not identify any considerations in favour of disclosure of the Investigation Report to Mr Power.
28. As well as the general presumption in favour of disclosure of government information (section 5 of the GIPA Act), there is also a general public interest in favour of disclosing government information (section 12(1) of the GIPA Act). This consideration must always be weighed in the application of the public interest test.
29. The GIPA Act does not limit the other public interest considerations in favour of disclosure of information that may be taken into account in applying the public interest test (section 12(2) of the GIPA Act).
30. The notes to section 12(2) of the GIPA Act set out some examples of public interest considerations in favour of disclosure. We consider the following public interest considerations to be relevant considerations to the disclosure of the Investigation Report to Mr Power:
 - a) disclosure of the 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; and
 - b) some of the information is personal information of Mr Power.
31. We encourage agencies to also consider other public interest considerations beyond the examples in section 12(2) of the GIPA Act. We consider the release of the Investigation Report could reasonably be expected to:
 - a) reveal the reason for a government decision and any background or contextual information that informed the decision;
 - b) allow or assist inquiry into possible deficiencies in the conduct or administration of an agency or official;
 - c) advance the fair treatment of individuals in their dealings with agencies; and
 - d) contribute to the administration of justice generally, including procedural fairness.
32. Certain personal factors of the application may also be taken into account as factors in favour of providing Mr Power with access to the Investigation Report (per section 55 of the GIPA Act). The personal factors are:
 - a) Mr Power's identity and relationship with any other person;
 - b) Mr Power's motives for making the access application; and
 - c) any other factors particular to Mr Power.
33. Insofar as some of the information contained in the Investigation Report relates to Mr Power, we consider there is a strong public interest in favour of the release of this information to Mr Power.

Public interest considerations against disclosure

34. The conclusive presumptions of an overriding public interest against disclosure contained in Schedule 1 of the GIPA Act are not relevant to the Investigation Report.
35. Therefore, the only public interest considerations against disclosure which may be taken into account by MLHD in deciding whether to release the Investigation Report to Mr Power, are those set out in the table to section 14 of the GIPA Act.
36. MLHD identified the following public interest considerations from the table in section 14 of the GIPA Act and decided that release of the information in the Investigation Report could reasonably be expected to:
- a) clause 1(d) prejudice the supply to an agency of confidential information that facilitates the effective exercise of the agency's functions (whether in a particular case or generally);
 - b) clause 1(h) prejudice the conduct, effectiveness or integrity of any audit, test, investigation or review conducted by or on behalf of the agency by revealing its purpose, conduct or results (whether or not commenced and whether or not implemented);
 - c) clause 3(a) reveal an individual's personal information;
 - d) clause 3(d) prejudice the fair trial of any person, the impartial adjudication of any case or a person's right to procedural fairness;
 - e) clause 3(e) reveal false or unsubstantiated allegations about a person that are defamatory;
 - f) clause 3(f) expose a person to a risk of harm or of serious harassment or serious intimidation.
37. It appears from the Notice of Decision that MLHD applied the public interest test, in particular the public interest considerations against disclosure, to the Investigation Report as a whole and not to the information it contains. The GIPA Act defines "government information" as information contained in a record held by an agency (section 4(1) of the GIPA Act). The public interest test must therefore be applied to the information in the record and not to the record itself.
38. We agree that the consideration contained in Item 1(d) to the Table in section 14 of the GIPA Act may be relevant to the release of the Investigation Report, but MLHD has not provided sufficient detail regarding this.
39. In order for this to be a relevant consideration against disclosure, MLHD 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 MLHD in future; and
 - c) the information facilitates the effective exercise of MLHD's functions.
40. MLHD has not provided details in its Notice of Determination as to whether the investigation which led to the Investigation Report was conducted on a confidential basis, or its usual approach to investigations. We understand that MLHD's usual

approach is to conduct such investigations on a confidential basis and we note that the Investigation Report is marked confidential.

41. MLHD has not provided details in its Notice of Determination as to how the disclosure of the Investigation Report could reasonably be expected to prejudice the supply of such information to MLHD in future. We acknowledge that disclosure of information obtained in an investigation may discourage staff from assisting or making full and frank disclosure in future.
42. Based on the material available to us, we do not see how the consideration contained in Item 1(h) of the Table to section 14 of the GIPA Act is relevant. We understand that the executive summary and findings of the Investigation Report have been provided to Mr Power and therefore we do not see how the disclosure of the balance of the Investigation Report could any further reveal the purpose, conduct or results of the investigation which led to the Investigation Report.
43. We agree that the consideration contained in Item 3(a) of the Table to section 14 of the GIPA Act is relevant, as the Investigation Report contains personal information of third parties.
44. However, that does not necessarily mean that there is an overriding public interest against disclosure of the information, or that other information contained in the Investigation Report should not be released. Also, as outlined at paragraph 56 below, we consider that parts of the Investigation Report could be deleted, so as to mask the personal information of third parties. We refer MLHD to the OIC's guideline on personal information as a public interest consideration under the GIPA Act.²
45. We also refer MLHD to the consultation obligations contained in section 54 of the GIPA Act and to the OIC's Guideline regarding consultation on public interest considerations under section 54 of the GIPA Act.³
46. We understand that MLHD did not consider it necessary to undertake consultation in relation to the personal information contained in the Investigation Report, as it was satisfied that there was an overriding public interest against disclosure of the Investigation Report.
47. We acknowledge that consultation is only required if an agency intends to provide access to information and in some circumstances it may not be necessary (or appropriate, if there are particular sensitivities). However, we consider that it would have been helpful for MLHD to have consulted with the relevant third parties in this case.
48. The Notice of Determination does not provide sufficient details regarding the application of Items 3(d) and (e) of the Table to section 14 of the GIPA Act. Given that the executive summary and findings of the Investigation Report have been provided to Mr Power, we query whether much weight can be placed on these considerations.
49. Also, as outlined at paragraph 56 below, we consider that parts of the Investigation Report can be masked so as to remove or reduce the strength of these public interest considerations against disclosure.

² Guideline 4. Available at www.oic.nsw.gov.au.

³ Guideline 5. Available at www.oic.nsw.gov.au.

50. The public interest consideration against disclosure contained in Item 3(f) of the Table to section 14 of the GIPA Act is only relevant if there are reasonable grounds for believing that an individual may be exposed to a risk of harm or of serious harassment or serious intimidation. The Notice of Determination does not demonstrate this.
51. The personal factors referred to in paragraph 32 above may be taken into account as factors against disclosure of the Investigation Report, if they are relevant to the identified public interest considerations against disclosure, contained in Items 3(a), (d), (e) and (f) of the Table to section 14 of the GIPA Act (per sections 55(1) and (3) of the GIPA Act).

Balancing the public interest test

52. When weighing the public interest considerations in favour of disclosure against those against disclosure, an agency must simply balance the competing public interest factors for and against disclosure in each specific case, rather than apply some other test or mathematical calculation for determining whether there is an overriding public interest against disclosure of the information.⁴
53. The fact that a record may contain some information for which there is an overriding public interest against disclosure does not necessarily mean that other information in the same record should not be released. This is because different information will invoke different public interest considerations, and the weight attributable to them will not always be equal.
54. We consider that there is a strong public interest consideration in favour of disclosure of the information contained in the Investigation Report which relates to Mr Power. However, not all parts of the Investigation Report contain information relating to Mr Power and the public interest in favour of disclosure of those parts of the Investigation Report is not as strong.
55. We acknowledge that the public interest considerations against disclosure contained in Items 1(d) and 3(a) of the Table in section 14 of the GIPA Act are often strong considerations in matters involving workplace investigations.
56. However, we query the weight to be placed on these in the present circumstances, given that MLHD offered to provide conditional access to the Investigation Report. We do not see how the conditions sought to be imposed by MLHD reduced the strength of the public interest considerations against disclosure, as the information would still have been disclosed to Mr Power.
57. We suggest that MLHD consider whether parts of the Investigation Report can be deleted, to remove or reduce the strength of any public interest considerations against its disclosure. For example:
- a) consideration should be given to whether the parts of the Investigation Report which contain personal information of third parties can be masked so that the third party's identity is not revealed, but Mr Power can still obtain access to the information which relates to him; and

⁴ *Hurst v Wagga Wagga City Council* [2011] NSWADT 307.

- b) we consider that the parts of the Investigation Report which only contain information relating to third parties (for example, information relating solely to the allegations against another person) could be masked.

Review rights

- 58. 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.
- 59. Mr Power may ask the ADT to review MLHD's original decision if he is dissatisfied with:
 - a) our recommendations; or
 - b) MLHD's response to our recommendations.
- 60. An application for ADT review can be made up to 20 working days from the date of this report.
- 61. For information about the process and costs associated with a review by the ADT, please contact the ADT. The ADT's contact details are:

Administrative Decisions Tribunal
Level 10, 86 Goulburn Street
SYDNEY NSW 2000
Telephone: (02) 9377 5711
Facsimile: (02) 9377 5723
TTY (02) 9377 5859
Internet: <http://www.lawlink.nsw.gov.au/adt>
Email: ag_adt@agd.nsw.gov.au

- 62. If MLHD makes a new reviewable decision as a result of our review, Mr Power 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 OIC or ADT.

Closing our file

- 63. This review is now closed.
- 64. If you have any questions, please contact the IPC on 1800 472 679.