

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

Applicant: The Applicant  
Agency: NSW Police Force  
Report date: 22 November 2013  
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## Summary

1. The Applicant applied for access to information from the NSW Police Force (the Agency) under the *Government Information (Public Access) Act 2009* (GIPA Act).
2. The Agency decided that there was an overriding public interest against providing access to the information in the way requested and offered to provide access to the information in a different way to that requested by the Applicant.
3. The Information Commissioner makes the following recommendations in relation to the Agency's decision:
  - a. that the Agency make a new decision, by way of internal review within 15 working days, pursuant to section 93 of the GIPA Act.
  - b. that the Agency revise its procedures for information access requests so that future notices of decision comply with the requirements of section 72 of the GIPA Act, pursuant to section 95 of the GIPA Act.

## Background

4. On 27 February 2012, the Applicant applied under the GIPA Act to the Agency for access to a copy of certain Agency radio recordings.
5. In its decision issued on 7 November 2012, the Agency offered to provide access to the information in a way other than that requested by the Applicant. The Applicant requested a copy of the recordings. The Agency offered to allow the Applicant to listen to the recordings at a police station.
6. In seeking a review of the decision by the Information Commissioner, the Applicant confirmed that they were seeking a copy of the recording.

## Decision under review

7. The decision under review is the Agency's decision that there is an overriding public interest against disclosing information in the way requested by the Applicant.
8. This is a reviewable decision pursuant to subsection 80(i) of the GIPA Act.

## The public interest test

9. 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.
10. 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.
11. 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.

12. 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.
13. The Agency must apply the public interest test in accordance with the principles set out in section 15 of the GIPA Act.
14. The Agency decided to provide access to the information. The issue is the way access is provided.
15. The Agency must still apply the public interest test found at section 13 of the GIPA Act and do so in the context of the way of providing access rather than the context of whether to disclose the information. The Agency's application of the public interest test is discussed below.

### **Form of access**

16. Section 72 of the GIPA Act details how access to information is allowed to be provided. Section 73 provides that conditions may be imposed as to how a right of access may be exercised.
17. Subsection 72(1) lists the ways an applicant can access information. The Applicant requested a copy of the recording. This is allowed under subsection 72(1)(b). The Agency refused to provide the Applicant with a copy of the recording but offered to allow them the opportunity to inspect the record. This way of accessing information is allowed under subsection 72(1)(a).
18. Subsection 72(2) states that an agency must provide access in the way requested unless disclosure in that way would have certain effects. It then lists the effects that provide an agency the opportunity to provide access to information in a way other than that requested by an applicant (subsections 72(2)(a)- (d)).
19. In the notice of decision the Agency did not specify which subsection of section 72(2) it was relying on to provide access to the information in a way other than that requested by the Applicant.
20. It did, however, imply that it was relying on subsection 72(2)(d). This subsection allows an agency to provide access in a way other than that requested, if there is an overriding public interest against disclosure of the information in the way requested.

### **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. The statutory presumption in favour of the disclosure of government information.
  - b. The general right of the public to have access to government information held by agencies.
  - c. Any information in the documents that includes the applicant's personal information.
23. Although personal information relating to the Applicant contained in the information requested is mentioned as a consideration in favour of disclosure, no personal information of the Applicant is identified in the notice of decision. Therefore it is not clear how much personal information of the Applicant is contained in the information, if any. This might affect the weight attributed to the consideration and consequently affect the determination of where the balance lies between the public interest considerations for and against disclosure in the way requested.

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

24. 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.
25. 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.
26. In its notice of decision the Agency raised two public interest considerations against providing a copy of the information to the Applicant, deciding that doing so could reasonably be expected to:
- a. prejudice the prevention, detection or investigation of a contravention or possible contravention of the law or prejudice the enforcement of the law (clause 2(b) of the table to section 14 of the GIPA Act); and
  - b. reveal an individual's personal information (clause 3(a) of the table to section 14 of the GIPA Act)
27. I will discuss each of these considerations in turn.

### **Consideration 2(b) – prejudice the prevention, detection or investigation of a contravention or possible contravention of the law or prejudice the enforcement of the law**

28. Clause 2(b) of the table at section 14 states:
- There is a public interest consideration against disclosure if disclosure of the information could reasonably be expected to prejudice the prevention, detection or investigation of a contravention or possible contravention of the law or prejudice the enforcement of the law.*
29. In order for this to be a relevant consideration against disclosure, the Agency must be satisfied that:
- a. disclosure of the information could reasonably be expected to prejudice the enforcement of the law generally; or

- b. the information relates to a contravention or possible contravention of the law; and
  - c. the disclosure of the information could reasonably be expected to prejudice the prevention, detection or investigation of that contravention or possible contravention of the law.
30. Clause 2(b) is comprised of three elements that provide two different ways of satisfying the consideration. The first element, point a, stands alone as a consideration of broad circumstances. It does not rely on also satisfying the second and third elements, points b and c, in order for the consideration to be relevant. Points b and c work in conjunction with one another and both must be met in order for the consideration to be relevant.
31. In its notice of decision, the Agency states that there is information not released pursuant to section 14 Table 2(b) because it relates to ‘the lawful method and technique employed by the NSW Police Force in carrying out its functions to detect and investigate contraventions of the criminal law’ and ‘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’. Although not specifically stated it appears that the Agency is relying on point a, that the disclosure of the information would prejudice the enforcement of the law generally.
32. The Agency does not explain why providing access in the form of a recording would prejudice the enforcement of the law and create an overriding public interest against disclosure. Further, the Agency does not discuss why allowing access in the alternative form presents less of a risk of prejudicing the enforcement of the law than providing a copy of the recordings to the Applicant.

### **Consideration 3(a) – reveal an individual’s personal information**

33. Clause 3(a) 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 reveal an individual’s personal information.*
34. Personal information is defined in the GIPA Act as being:
- ...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]*
35. Section 15(b) of the GIPA Act provides that agencies must have regard to any relevant guidelines issued by the Information Commissioner when determining whether there is an overriding public interest against disclosure.
36. The Information Commissioner has published *Guideline 4 – Personal information as a public interest consideration under the GIPA Act* in December 2011. This Guideline sets out what is meant by ‘personal information’ in the GIPA Act and includes (in paragraph 1.2) examples of what should be considered personal information. Specifically, the Guideline notes that employment information, including details of salaries is personal information.
37. In order to establish that this consideration applies, the Agency has to:

- a. identify whether the information is personal information; and
  - b. consider whether the information would be revealed by disclosing it under the GIPA Act.
38. In evaluating this consideration the Agency stated that the information contains third party personal information (personal information that relates to people other than the Applicant) but does not provide further description of the nature of the information or the amount of personal information contained in the recording.
  39. The Agency notes that the personal information was supplied and collected in the context of police investigations and that there is no evidence to suggest that the people who provided the information consented to its disclosure.
  40. Similar to the discussion of clause 2(b), the Agency does not discuss why allowing access in the alternative way presents less of a risk of revealing personal information than providing a copy to the Applicant.

### **Application of the public interest test and the notice of decision**

41. The notice of decision does not contain an adequate explanation of the weight attributed to each public interest consideration, both for and against disclosure. As a consequence there is not an adequate explanation of how the Agency determined where the balance lies between the public interest considerations for and against disclosure in the way requested by the Applicant.
42. To correctly apply subsection 72(2)(d) the Agency must demonstrate that there is an overriding public interest against provision of the information in the way requested by the Applicant.
43. It follows that the notice of decision should contain an explanation of why the disclosure of the information in the alternate way does not create an overriding public interest against disclosure.
44. As noted above, the notice of decision does not contain a discussion of the effects of providing the information in the way requested by the Applicant or the way the Agency offered. There is no examination of the risks or potential for harm that providing a copy of the recordings creates. Nor is there an examination of the mitigating factors support the Agency's decision to offer an alternative way of accessing the information.

### **Findings**

45. The Agency has decided that there is an overriding public interest against disclosing the information in the way requested and offered to provide access in a way other than that requested by the Applicant. It relies on clauses 2(b) and 3(a) of the table at section 14 of the GIPA Act to establish the overriding public interest.
46. We are not persuaded the Agency has not satisfied its obligation under section 97(1) of the GIPA Act because it has not justified its decision that there is an overriding public interest against disclosure of the information in the way requested by the Applicant.
47. I find that the Agency did not correctly apply section 72 of the GIPA Act because it;

- a. did not clearly identify the reason for not providing access to the information in the way the Applicant requested as required by subsection 72(2) of the GIPA Act.
- b. did not correctly apply the test found in subsection 72(2)(d) of the GIPA Act. Specifically, when applying the public interest test found at section 13 of the GIPA Act the Agency did not:
  - i. clearly attribute weight to each of the public interest considerations and consequently did not demonstrate how it weighed the public interest considerations for and against disclosure against one another.
  - ii. demonstrate that there is an overriding public interest against disclosing the information in the way requested by the Applicant.

## Recommendations

48. The Information Commissioner recommends under section 93 of the GIPA Act that the Agency make a new decision, by way of internal review within 15 working days.
49. In making a new decision, the Agency should have regard to the matters raised and guidance given in this report.
50. The Information Commissioner recommends under section 95 of the GIPA Act that the Agency revise its procedures for information access requests so that future notices of decision comply with the requirements of section 72 of the GIPA Act.
51. We ask that the Agency advise the Applicant and us by **6 December 2013** of the actions to be taken in response to our recommendations.

## Review rights

52. 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.
53. If the Applicant is dissatisfied with our recommendations or the Agency's response to our recommendations, the Applicant may ask the ADT to review the Agency's decision.
54. An application for ADT review can be made up to 20 working days from the date of this report. 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>

55. 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 Information and Privacy Commission or ADT.

### **Closing our file**

56. This file is now closed.
57. If you have any questions in relation to this report please contact the IPC on 1800 472 679