



information
and privacy
commission
new south wales

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

Applicant: Anonymous
Agency: Department of Education and Communities
Report date: 22 January 2014
IPC reference: IPC13/R000291
Keywords: Government information – information not held - searches

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Summary

1. The Applicant applied for information from the Department of Education and Communities (the Agency) under the *Government Information (Public Access) Act 2009* (GIPA Act).
2. The information requested is information about the Applicant covering the period 1966 to 2013.
3. The Agency decided that it does not hold the information requested in item (a) and provided information in response to item (b) of the access application.

Decision under review and finding

4. The decision under review is the Agency's decision that it does not hold the information requested in item (a) of the access application.
5. Pursuant to section 97 of the GIPA Act, in this review the burden of establishing that the decision is justified lay on the Agency.
6. The Information Commissioner is satisfied that the Agency's decision is justified and does not make any recommendations as a result of this review.

Reasons

7. Clause 12 of schedule 4 to the GIPA Act says:

12 Government information held by agency

(1) A reference in this Act to government information held by an agency is a reference to:

(a) information contained in a record held by the agency, or

(b) information contained in a record held by a private sector entity to which the agency has an immediate right of access, or

(c) information contained in a record in the possession or custody of the State Records Authority (or that the Authority has in the custody or possession of some other person) to which the agency has an immediate right of access, other than a record that is withheld from public access under section 59 of the State Records Act 1998, or

(d) information contained in a record that is in the possession, or under the control, of a person in his or her capacity as an officer or member of staff of the agency (including, in the case of a Minister, the personal staff of the Minister).

(2) Information that would be regarded as government information held by an agency because the agency has access to a record that contains the information is not to be regarded as government information held by the agency if the public generally has access to the record (for example, because the record is available on the Internet).

(3) Information contained in a record that genuinely forms part of the library material held by an agency is not government information held by the agency.

8. Section 53 of the GIPA Act sets out the requirement to conduct searches:

53 Searches for information held by agency

(1) *The obligation of an agency to provide access to government information in response to an access application is limited to information held by the agency when the application is received.*

(2) *An agency must undertake such reasonable searches as may be necessary to find any of the government information applied for that was held by the agency when the application was received. The agency's searches must be conducted using the most efficient means reasonably available to the agency.*

(3) *The obligation of an agency to undertake reasonable searches extends to searches using any resources reasonably available to the agency including resources that facilitate the retrieval of information stored electronically.*

(4) *An agency is not required to search for information in records held by the agency in an electronic backup system unless a record containing the information has been lost to the agency as a result of having been destroyed, transferred, or otherwise dealt with, in contravention of the State Records Act 1998 or contrary to the agency's established record management procedures.*

(5) *An agency is not required to undertake any search for information that would require an unreasonable and substantial diversion of the agency's resources.*

9. The expression 'government information' is defined in section 4 of the GIPA Act as 'information contained in a record held by an agency.'

10. Before deciding that it does not hold information, an agency must comply with the requirements of section 53(2) of the Act. The requirements are:

- a. undertake such reasonable searches as necessary to locate the information requested; and
- b. use the most efficient means reasonably available to the agency.

11. In *Smith v Commissioner of Police [2012] NSWADT 85*, Judicial Member Isenberg said at paragraph 27:

In making a decision as to the sufficiency of an agency's search for documents which an applicant claims to exist, there are two questions:

(a) are there reasonable grounds to believe that the requested documents exist and are the documents of the agency; and if so,

(b) have the search efforts made by the agency to locate such documents have been reasonable in all the circumstances of a particular case.

12. When considering whether there are reasonable grounds to believe that information exists and whether searches to locate information were reasonable, the facts, circumstances and context of the application is relevant. Key factors in making an assessment about reasonable searches include "the clarity of the request, the way the agency's recordkeeping system is organised and the ability to retrieve any documents that are the subject of the request, by reference to the identifiers supplied by the applicant or those that can be inferred reasonably by the agency from any other information supplied by the applicant" (*Miriani v Commissioner of Police, NSW Police Force [2005] NSWADT 187* at [30]).
13. In the course of this review the Agency provided us with a copy of decisions that relate to earlier requests by the Applicant for information about the applicant under the GIPA Act and the *Freedom of Information Act NSW 1989* (now repealed).

14. From a review of these decisions and related material we are satisfied that the Agency has previously searched its record management system using the Applicant's current and former names. This search was conducted in response to a previous access application. The Agency has also searched for records with the Employee Performance and Conduct Directorate (EPAC), however no matches were identified on the relevant database and no files were ever created by EPAC in respect of the Applicant or her employment. These searches were also conducted in response to a previous access application. Information provided to the applicant at that time included information from her personnel file, employee history, report of casual employment and salary cards.
15. The information that the Applicant asked for in this application differs from previous requests because the relevant time period is different. However, having reviewed the record of searches in the previous notices of decision provided by the Agency, I am satisfied that the Agency's decision is justified.
16. The GIPA Act does not require an agency to include details of its searches in a notice of decision. However, our view is that it is good practice for written decisions to clearly explain what the search processes were, what was found, an explanation if no records were found, what was released and what was held back. Details of searches should include where and how the agency searched, a list of any records found – and if appropriate a reference to the business centre holding the records, the key words used to search digital records (including alternative spellings used) and a description of the paper records that were searched. I am satisfied that the Agency's reference to its earlier notice of decision is sufficient to set out the reason that the Agency decided that it does not hold the information requested.

Review rights

17. Our reviews 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 and Equal Opportunity Division of the NSW Civil and Administrative Tribunal (NCAT) for a review of that decision.
18. If the Applicant is dissatisfied with our review, she may ask the NCAT to review the Agency's decision. An application for NCAT review can be made up to 20 working days from the date of this report. After this date, the NCAT can only review the decision if it agrees to extend this deadline. The NCAT's contact details are:

NSW Civil and Administrative Tribunal
Administrative and Equal Opportunity Division
John Maddison Tower
86-90 Goulburn Street
Sydney, NSW, 2000
Phone: 1300 006 228
TTY: 9377 3859

Website: <http://www.ncat.nsw.gov.au>

Completion of this review

19. This review is now complete.
20. If you have any questions in relation to this report please the information and Privacy Commission on 1800 472 679.

Elizabeth Tydd

Information Commissioner