



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

Applicant: Anonymous
Agency: Department of Family and Community Services
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Summary

1. The Applicant applied for information from the Department of Family and Community Services (the Agency) under the *Government Information (Public Access) Act 2009* (GIPA Act).
2. The Agency released some information to the Applicant and refused access to information contained in a large number of documents.
3. The Information Commissioner recommends that the Agency reconsider its decision regarding the following pages:
 - 100-102,
 - 188-191, and
 - 197-198.
4. The Information Commissioner is satisfied that the Agency's decision regarding the rest of the information is justified.

Decision under review

5. The decision under review is the Agency's decision to refuse to provide access in response to the Applicant's access application, as set out in the Agency's internal review decision dated 28 May 2013. This is a reviewable decision under section 80(d) of the GIPA Act.

The public interest test

6. 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.
7. 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.
8. 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.
9. 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.
10. The Agency must apply the public interest test in accordance with the principles set out in section 15 of the GIPA Act.

Public interest considerations in favour of disclosure

11. 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).

Public interest considerations against disclosure

12. Schedule 1 to the GIPA Act lists information for which there is a conclusive presumption of a public interest consideration against disclosure.
13. The only other considerations against disclosure that an agency can consider are those set out in the table to section 14 of the GIPA Act.
14. The Agency raised a conclusive presumption from schedule 1 to the GIPA Act and a number of considerations from the table in section 14.

Conclusive presumption – schedule 1, clause 10

15. Clause 10 of schedule 1 to the GIPA Act provides that it is to be conclusively presumed that there is an overriding public interest against disclosure of information contained in a report to which section 29 of the *Children and Young Persons (Care and Protection) Act 1998* (CYPCP Act) applies.
16. Section 29 of the CYPCP Act provides protection for people who make reports or provide certain information, in good faith, to the relevant Director-General. Section 29(1)(f) provides that the identity of the person who made a report about children who may be at risk of harm, and any information which could identify them, must not be disclosed, except with the consent of the person who made the report.
17. While section 54 of the GIPA Act requires an agency to consult with third parties under certain circumstances, this does not apply to information that falls within the scope of schedule 1. There is no requirement on an agency to consult before claiming this conclusive presumption against disclosure.
18. I have reviewed the information that the Agency withheld because it decided that it falls under this conclusive presumption. I am satisfied on the face of the documents that the Agency's decision is justified.

Other considerations against disclosure

19. Other than the conclusive presumptions in schedule 1 to the GIPA Act, the only other considerations against disclosure that an Agency can raise are those set out in the table to section 14 of the GIPA Act.
20. 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.
21. 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.

22. In its notice of decision the Agency raised two public interest considerations against disclosure of the information, which are found in clauses 1(d) and 1(g) of the GIPA Act.
23. In the schedule of documents the agency also referred to the considerations against disclosure in clauses 3(g), 4(c), and 4(d) of the table to section 14 of the GIPA Act.

Consideration 1(d) – prejudice the supply to an agency of confidential information that facilitates the effective exercise of that agency functions

24. Clause 1(d) 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 supply to an agency of confidential information that facilitates the effective exercise of that agency's functions (whether in a particular case or generally).

25. In order for this to be a relevant consideration against disclosure, the following elements must be satisfied:
 - a. the information was obtained in confidence;
 - b. disclosure of the information could reasonably be expected to prejudice the supply of such information to the Agency in future; and
 - c. the information facilitates the effective exercise of the Agency's functions.
26. Although the GIPA Act does not use the phrase "future supply", the nature of the prejudice that this consideration deems to be contrary to the public interest, is implicit. This future effect is one aspect of the abstract nature of the enquiry. The other abstract element is supply in a general sense and whether disclosure will impact supply of similar information by persons to the agency in the future.
27. It is commonly understood that information will have a confidential quality if the person was not bound to disclose the information but did so on the basis of an express or inferred understanding that the information would be kept confidential.

Consideration 1(g) – found an action against an agency for breach of confidence or otherwise result in the disclosure of information provided to an agency in confidence

28. Clause 1(g) 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 found an action against an agency for breach of confidence or otherwise result in the disclosure of information provided to an agency in confidence (whether in a particular case or generally).

29. To show that this is a relevant consideration against disclosure, the following elements must be satisfied:
 - a. the information was obtained in confidence; and
 - b. disclosure of the information could reasonably be expected to found an action against an agency for breach of confidence; or
 - c. otherwise result in the disclosure of information provided.

30. In raising this public interest consideration against disclosure the Agency needs to ensure the information is in fact confidential.
31. Once satisfied that the information is confidential information, the agency should then turn its mind to what constitutes a breach of confidence. A breach of confidence arises out of an unauthorised disclosure of, or other use of information, which is subject to an obligation of confidentiality.

Consideration 3(g) – best interests of a child

Clause 3(g) of the table to section 14 of the GIPA Act provides:

Individual rights, judicial processes and natural justice

There is a public interest consideration against disclosure of information if disclosure of the information could reasonably be expected to – in the case of the disclosure of personal information about a child—the disclosure of information that it would not be in the best interests of the child to have disclosed.

32. In order for this to be a relevant consideration against disclosure, the following elements must be satisfied:
 - a. the information is the personal information of a child; and
 - b. it could reasonably be expected that disclosure would not be in the best interest of the child.

Consideration 4(c) - diminish the competitive commercial value of any information to any person

33. Clause 4(c) of the table to section 14 of the GIPA Act provides:

4 Business interests of agencies and other persons

There is a public interest consideration against disclosure of information if disclosure of the information could reasonably be expected to diminish the competitive commercial value of any information to any person

34. In order for this to be a relevant consideration against disclosure, the following elements must be satisfied:
 - a. the information has a competitive commercial value; and
 - b. that value could reasonably be expected to diminish if the information was disclosed.
35. In particular the Agency must be able to identify how that value would be adversely affected if the information was disclosed.

Consideration 4(d) – prejudice any person’s legitimate business, commercial, professional or financial interests

36. Clause 4(d) of the table to section 14 of the GIPA Act provides:

4 Business interests of agencies and other persons

There is a public interest consideration against disclosure of information if disclosure of the information could reasonably be expected to prejudice any person’s legitimate business, commercial, professional or financial interests

37. In order for this to be a relevant consideration against disclosure, the following elements must be satisfied:

- a. the information relates to a person's legitimate business, commercial, professional or financial interests; and
 - b. disclosure of the information could reasonably be expected to prejudice one or more of those interests.
38. In order to justify the application of the consideration, an Agency must demonstrate the causal nexus between the disclosure of the information and the prejudice to that interest.

Requirement to give reasons

39. Section 61 of the GIPA Act provides that a notice of an agency's decision to refuse to provide access to information because there is an overriding public interest against disclosure 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,
 - c. the general nature and the format of the records held by the agency that contain the information concerned.

Was the decision justified?

40. The Agency's decision did not provide sufficient reasons for all of the information that it withheld, particularly with respect to the considerations against disclosure in clauses 3(g), 4(c) and 4(d) of the table to section 14 of the GIPA Act. However, for almost all of the documents, I am satisfied that the decision to withhold the information is justified either by the reasons in the notice of decision or on the face of the information.
41. The exception to this is the information withheld from pages 100-102, 188-191, and 197-198.
42. Section 91 of the GIPA Act prohibits the Information Commissioner from disclosing information for which there is, or for which an agency claims there is, an overriding public interest against disclosure. Accordingly I am not able to discuss the information in explaining why I am not satisfied that the information in pages 100-102 is confidential. However it is my view that this is apparent from the nature of the information in this document.
43. With respect to pages 188-191 and 197-198, I am not satisfied that the Agency has shown that this information has competitive commercial value that would be diminished if it was disclosed, or that its disclosure would prejudice any person's business, commercial, professional or financial interests. I am also not satisfied that, in the absence of relevant third party consultation, the weight of these considerations would outweigh the considerations in favour of disclosure.

Recommendations

44. The Information Commissioner recommends that the Agency reconsider its decision regarding the following pages:
- 100-102,
 - 188-191, and
 - 197-198.

45. In making a new decision, have regard to the matters raised and guidance given in this report.
46. We ask that the Agency advise the Applicant and us by **14 February 2014** of the actions to be taken in response to our recommendations.

Review rights

47. 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 NSW Civil and Administrative Tribunal (NCAT) for a review of that decision.
48. The Applicant has the right to ask the NCAT to review the Agency's decision.
49. An application for a review by the NCAT 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
Level 10, John Maddison Tower
86-90 Goulburn Street,
Sydney NSW 2000

Phone: 1300 006 228

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

50. 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 IPC or the NCAT.

Completion of this review

51. This review is now complete.
52. If you have any questions in relation to this report or the review process please contact the Information and Privacy Commission on 1800 472 679.