



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

Applicant: Dr Brendan O'Sullivan  
Agency: Medical Council of NSW  
Report date: 25 September 2014  
IPC reference: IPC13/R000410  
Keywords: Government information – Conclusive presumptions of overriding public interest against disclosure – reveal personal information – reveal false or unsubstantiated allegations that are defamatory – refuse to deal with an application – information already available

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## Summary

1. On 5 June 2013 Dr Brendan O'Sullivan (the Applicant) requested an internal review of a decision made by the Medical Council of NSW (the Agency) on 21 May 2013. The decision was made under the *Government Information (Public Access) Act 2009* (the GIPA Act).
2. The decisions in the internal review, made on 19 July 2013, were to provide access to some information, refuse access to some information, to refuse to deal with part of the application and that some of the information was already available to the Applicant.
3. The Applicant applied for an external review, by the Information Commissioner, of the decision on 28 August 2013.
4. The Information Commissioner recommends, under section 93 of the GIPA Act, that the Agency reconsider its decisions in relation to Items 1, 3, 5 and 11 within 15 working days of the issuing of this review.

## Background

5. On 6 March 2013 the Applicant applied for information from the Agency under the GIPA Act. After being asked to re-scope his application, the Applicant made a valid application on 1 May 2013.
6. In the access application of 1 May 2013, the Applicant applied for access to information relating to:
  - the authorship of a document previously provided consequent to an access application;
  - alleged complaints made about him; and
  - alleged complaints made by him.
7. The request was comprised of 15 parts. The request is reproduced in its entirety in the notice of decision issued by the Agency on 21 May 2013.
8. The Applicant applied for an internal review of the decision on 5 June 2013. He requested a review of all decisions in the original application.
9. In its internal review decision issued on 19 July 2013, the Agency decided to:
  - provide access to some information in full;
  - provide access to some information in part;
  - refuse access to some information in full; and
  - refuse to deal with some parts of the application.
10. A total of 11 items of information were considered in the internal review. The information considered in the internal review and the decision made in relation to each piece of information is summarised at **Attachment A** to this report.

## Decisions under review

11. The decisions under review are the Agency's decisions to:
  - a. refuse access to items 2, 4, 6 and 7 in part;
  - b. refuse access to the enclosures to items 1, 5, and 8;

- c. refuse access to part of item 11; and
  - d. refuse to deal with other items of information requested; and
  - e. that some of the information was already available to the Applicant.
12. The decisions are reviewed below.

### **The public interest test**

13. 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.
14. 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.
15. 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.
16. 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.
17. The Agency must apply the public interest test in accordance with the principles set out in section 15 of the GIPA Act.

### **Conclusive presumptions against disclosure**

18. If information falls within the scope of one of the clauses in Schedule 1 to the GIPA Act, then it is conclusively presumed that it is not in the public interest to release the information. This means that the agency is not required to balance the public interest considerations for and against disclosure before refusing access to the information.
19. The Agency decided that the information contained in items 2, 4, 6, 7 and the enclosure to item 8 of the internal review are subject to overriding secrecy laws and there is an overriding public interest against disclosure. The Agency relies on clause 1 of Schedule 1 of the GIPA Act.
20. Clause 1 of schedule 1 to the GIPA Act says:
- (1) *It is to be conclusively presumed that there is an overriding public interest against disclosure of information the disclosure of which is prohibited by any of the following laws (which are referred to in this Act as **overriding secrecy laws**), whether or not the prohibition is subject to specified qualifications or exceptions and whether or not a breach of the prohibition constitutes an offence:*

...

*Health Care Complaints Act 1993*

...

21. Section 99A (1) of the Health Care Complaints Act 1993 (HCC Act) says:
- (1) *if a person discloses information obtained in exercising a function under this Act and the disclosure is not made:*
    - a) *With the consent of the person to whom the information relates, or*
    - b) *In connection with the execution and administration of this Act, or*
    - c) *For the purposes of any legal proceedings arising out of this Act or of any report of any such proceedings, or*
    - d) *With other lawful excuse,*

*The person is guilty of an offence.*
22. After considering the nature of the information contained in items 2, 4, 6, 7 and the enclosure to item 8, the function in which the information is used, and the circumstances in which the Agency obtained that information, I am satisfied the Agency has justified its decision to refuse access to the information on the basis that there is a conclusive presumption against disclosure.

**Information considered under the public interest test**

23. The information that was not released in full or subject to a conclusive presumption of an overriding public interest against disclosure is the enclosures to items, 1, 3 and 5 and part of item 11. This information is discussed below.

**Public interest considerations in favour of disclosure**

24. 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).
25. In its notice of decision, the Agency stated that it considered the general public interest in favour of disclosing government information and that it took into consideration personal factors of the access application (which is allowed under section 55 of the GIPA Act).
26. The personal factors of the application were that the Applicant:
- a. is writing a book and wishes for it to be factually accurate; and
  - b. is motivated to ensure 'proper public transparency of process and procedural fairness'.
27. With specific reference to items 3 and 5, the Agency considered the fact that the enclosures were authored by the Applicant.

**Public interest considerations against disclosure**

28. The only public interest considerations against disclosure that can be considered are those in schedule 1 and section 14 of the GIPA Act.
29. 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.

30. 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.
31. In its notice of decision the Agency raised three public interest considerations against disclosure of the information, deciding that its release could reasonably be expected to:
  - a. reveal an individual’s personal information (clause 3(a) of the table to section 14 of the GIPA Act);
  - b. reveal false or unsubstantiated allegations about a person that are defamatory (clause 3(e) of the table to section 14 of the GIPA Act); and
  - c. expose a person to a risk of harm or of serious harassment or serious intimidation (clause 3(f) of the table to section 14 of the GIPA Act).
32. Consideration 3(a) applies to item 1 only.
33. Consideration 3(e) applies to items 3 and 5 only.
34. Consideration 3(f) applies to item 11 only.
35. I will discuss each of these considerations in turn.

### **Consideration 3(a) – reveal an individual’s personal information – Item 1**

36. 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.*
37. 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]*
38. 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.
39. 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.
40. 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.

41. The Agency did not specifically address this item of information and consideration 3(a) in the notice of decision. The only reference to item 1 is in the Schedule of documents attached to the notice of decision.
42. Without an examination of the consideration and explanation of why it is relevant the Agency's reliance on the consideration is not justified.

**Consideration 3(e) – reveal false or unsubstantiated allegations about a person that are defamatory – Items 3 and 5**

43. Clause 3(e) 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 ... reveal false or unsubstantiated allegations about a person that are defamatory*
44. In order for clause 3(e) to apply, the Agency must establish that disclosing the information could reasonably be expected to 'reveal':
  - (a) false or unsubstantiated allegations about a person; and
  - (b) those allegations are defamatory.
45. The term 'reveal' is defined in schedule 4, clause 1 of the GIPA Act to mean:

*To disclose information that has not already been publicly disclosed (otherwise than by lawful means).*
46. The provision of reasons for decisions is integral to proper decision making. The challenges associated with describing the factual circumstances that give rise to a claim under 3(e) are also recognised. These circumstances require an agency to describe the facts and information sufficiently to make the claim without revealing the information that attracts the claim. The notice of decision does not provide sufficient evidence of the information that if disclosed would reveal the false or unsubstantiated allegations that are defamatory. Therefore the decisions in relation to items 3 and 5 are not justified.

**Consideration 3(f) – expose a person to a risk of serious harm or of serious harassment or serious intimidation – Item 11**

47. Clause 3(f) 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... expose a person to a risk of harm or of serious harassment or serious intimidation.*
48. The Agency applied consideration 3(f) to Item 11 which contains information about the properties (including author, date of creation, last date saved) of 'Document 8' (a document previously released to the Applicant as a result of a GIPA Act application). The Agency redacted two pieces of information from Item 11.
49. To show that this is a relevant consideration against disclosure, the Agency must establish that each element of the consideration is satisfied. This involves an objective consideration of the severity or level of the consequences that must be reasonably expectable.
50. A review of the Applicant's correspondence referred to and relied on by the Agency to demonstrate the relevance of consideration 3(f) shows that the Applicant appears determined to gain access to the information requested,

uses direct and emotive language (e.g. the accusation of cowardice in the letter to the Agency of 16 June 2013).

51. This behaviour and correspondence appears to be disrespectful and discourteous towards Agency staff. However, clause 3(f) requires the threshold of serious harm; serious harassment or serious intimidation to be met. In the current circumstances the information relied upon by the Agency does not demonstrate 'serious' harassment, harm or intimidation.
52. Nor does it appear to indicate that future behaviour of the Applicant would escalate to the point of being serious harassment or intimidation. Similarly it does not indicate what risk of harm would be reasonably expectable if the information were disclosed and the severity of that harm. It does not appear that the Agency has demonstrated that consideration 3(f) applies. Therefore the decision in relation to item 11 is not justified.
53. Guidance about the requirements of consideration 3(f) can be found in *AEZ v Commissioner of Police (NSW) [2013] NSWADT 90*. In that case the Tribunal examined the definitions of key terms in the consideration and the issue of objective measure of the reasonably expected consequences.

### **Refusing to deal with the application and information already available**

54. Under section 60(1)(a) of the GIPA Act, an agency may refuse to deal with an access application if the doing so would require an unreasonable and substantial diversion of the agency's resources.
55. The Applicant requested further information about 'Document 8' in addition to the information contained in Item 11 (discussed above). This request was in three parts. The second part was framed as:

*Any and all documents which evidence the distribution of this document, including all paper copies of all electronic records to those whom this document was published...*
56. In its decision of 21 May 2013 the Agency decided to refuse to deal with seven parts of the application under section 60(1)(a) of the GIPA Act. Included in that decision was a request for information relating to the distribution of Document 8 put in the same terms as reproduced above.
57. In the notice of decision issued on 19 July 2013 the decision maker considered the earlier decision in relation to information about the distribution of Document 8, including the reasons for that decision, and decided that they agreed with that decision and the reasons for it. Therefore the same decision was made under section 60(1)(a) of the GIPA Act in the internal review and the same reasons were given by way of reference to the initial notice of decision issued on 21 May 2013.
58. I am satisfied that the Agency has met the requirements of sections 60(1)(a) and 60(5) and the decision to refuse to deal with that part of the application.
59. The first and third parts of the request in relation to information about 'Document 8' were considered in the original decision and five pieces of information were identified as falling in the scope of the request.
60. In the internal review the Agency notes that all five of those pieces of information were either released to the Applicant as part of the original decision or were already available through other means. Therefore the Agency decided that the information was already available to the Applicant under section 59 of the GIPA

61. I am satisfied that the Agency's decision in respect to this information is justified.

### **Recommendations**

62. The Information Commissioner recommends, under section 93 of the GIPA Act, that the Agency reconsider its decisions in relation to Items 1, 3, 5 and 11 within 15 working days of the issuing of this review.
63. In making a new decision, have regard to the matters raised and guidance given in this report.
64. We ask that the Agency advise the Applicant and us by **18 September 2014** of the actions to be taken in response to our recommendations.

### **Review rights**

65. 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.
66. The Applicant has the right to ask the NCAT to review the Agency's decision.
67. 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>

68. 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 NCAT.

### **Completion of this review**

69. This review is now complete.
70. If you have any questions about this report please contact the Information and Privacy Commission on 1800 472 679.

Elizabeth Tydd  
**Information Commissioner**

## Attachment A

Document no. <sup>1</sup>	Description	Decision	Relevant public interest consideration
1	Letter from NSW Medical Board (the Board) to Health Care Complaints Commission (HCCC) 25/6/2008 (including enclosures)	Some information previously released under GIPA Act. Refused access to enclosures being patient clinical notes	3(a) to table at section 14 of the GIPA Act
2	HCCC complaint assessment sheet attaching letter from the Board to HCCC	Refused access	Schedule 1 – conclusive overriding public interest against disclosure (more detail)
3	Letter from Board to HCCC attaching email correspondence dated 22 & 25 August 2008 from Applicant, dated 27 August 2008	Refused access in part – enclosures to letter withheld	3(e) to table at section 14 of the GIPA Act
4	File note dated 1 September 2008 recording conversation with HCCC	Refused access	Schedule 1 – conclusive overriding public interest against disclosure (more detail)
5	Letter from the Board to HCCC 4 September 2008 attaching correspondence from Applicant dated 4 September 2008	Refused access in part – enclosures to letter withheld	3(e) to table at section 14 of the GIPA Act
6	Letter from HCCC to the Board dated 24 October 2008 attaching a draft investigation report dated	Refused access	Schedule 1 – conclusive overriding public interest against disclosure (more detail)

<sup>1</sup> The document numbers in this table are the document numbers from the Schedule to the Notice of Decision dated 19 July 2013. A different numbering system was used in the Notice of Decision issued for the original decision on 21 May 2013.

	24 October 2008		
7	Minutes of the Conduct Committee dated 11 November 2008	Refused access	Schedule 1 – conclusive overriding public interest against disclosure (more detail)
8	Letter from HCCC to the Board dated 27 November 2008 attaching investigation report dated 27 November 2008	Letter previously released under GIPA Act application. Refused access to attached investigation report	Schedule 1 – conclusive overriding public interest against disclosure (more detail)
9 <sup>2</sup>	Board document <i>I Drive procedures</i> dated 22 March 2007	Access provided	N/A
10	Board records management document <i>Doctors re a Particular Doctor/person</i> undated	Access provided	N/A
11	Properties summary printed 7 June 2013 with respect to <i>Document 8</i> <sup>3</sup> .	Refused access in part – some information redacted	3(f) to table at section 14 of the GIPA Act

<sup>2</sup> Documents 9, 10 and 11 are documents identified in searches conducted as part of the internal review. These documents were not considered as part of the original application.

<sup>3</sup> *Document 8* is a document provided to the Applicant as a result of an earlier access application.