

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

Applicant: ABC
Agency: Medical Council of NSW
Report date: 13 February 2015
IPC reference: IPC14/R000422
Keywords: Government information – conclusive presumptions against disclosure – overriding secrecy laws – excluded information of particular agencies

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Summary

1. The Applicant applied for information from the Medical Council of NSW (the Agency) under the *Government Information (Public Access) Act 2009* (GIPA Act).
2. The Agency decided to provide access to some of the information and refused to provide access to some other information on the basis of an overriding interest against its disclosure.
3. The Information Commissioner:
 - a. finds the decisions of the Agency are justified; and
 - b. makes procedural recommendations pursuant to section 95 of the GIPA Act that the Agency, in dealing with future GIPA applications for which conclusive presumptions are claimed, follow the guidance contained in this report at paragraphs 9 and 26.

Background

4. The Applicant applied under the GIPA Act to the Agency for access to the following information:
 - a. All matters/records including but not limited to documents, diaries, electronic communications, fax transmissions, transactions, information including that generated by information systems, pertaining to all information from the Medical Council of NSW and the complaint regarding Dr XYZ relating to the Applicant.
5. In its decision issued on 09 May 2014, the Agency decided:
 - a. to provide access to some information, that is items numbered 11, 12, 15, 17, 18 and 20 in the schedule of documents attached to the notice of decision;
 - b. not to provide access to the information in items numbered 1 through 9 inclusive, 14, 16 and 19 in the schedule of documents on the basis of two conclusive presumptions against its disclosure; and
 - c. not to provide access to the information in items numbered 10 and 13 in the schedule of documents on the basis of two public interest considerations against its disclosure.
6. In seeking a review of the decision by the Information Commissioner, the Applicant asserts that the decision appears not to be in keeping with the objectives of the GIPA Act and that it failed to provide the requested information. The Applicant is of the view that Dr XYZ “...*provided factually invalid information to the [Health Care Complaints] Commission*” and that it would constitute “*procedural unfairness not to supply [him] with the information relevant to the GIPA request.*”

Decisions under review

7. The two decisions under review are the Agency's decisions to:

- a. not provide access to the information in items numbered 1 through 9 inclusive, 14, 16 and 19 on the basis of two conclusive presumptions against its disclosure from Schedule 1 to the GIPA Act, which are
 - i. Clause 1 – Overriding secrecy laws; and
 - ii. Clause 6 – Excluded information and
 - b. not provide access to the information in items numbered 10 and 13 on the basis of two public interest considerations against disclosure, that its release could reasonably be expected to:
 - i. found an action against an agency for breach of confidence or otherwise result in the disclosure of information provided to an agency in confidence (clause 1(g) of the table to section 14 of the GIPA Act) and
 - ii. reveal an individual’s personal information (clause 3(a) of the table to section 14 of the GIPA Act).
8. I will firstly consider the information to which conclusive presumptions are claimed to apply, before turning to the balance of the information in items 10 and 13.

Schedule 1 – Information for which there is a conclusive presumption of overriding interest against disclosure

9. Section 14(1) of the GIPA Act provides that government information described in Schedule 1 to the GIPA Act is to be conclusively presumed to give rise to an overriding public interest against disclosure. For information for which a conclusive presumption is established, there is no requirement to apply the public interest test set out in section 13 of the GIPA Act.
10. We note that the Agency has applied the public interest test with regard to all items identified as relevant to the GIPA application. We recommend that in future notices of decision, with respect to information for which a conclusive presumption is established, the Agency follow the guidance in paragraph 9 above.

Overriding secrecy laws – clause 1 of Schedule 1

11. Clause 1(1) of Schedule 1 to the GIPA Act deals with information covered by secrecy laws in other legislation. To rely on this clause to refuse access to government information the Agency must establish that disclosure of the information is prohibited by legislation listed in the clause.
12. It relevantly states:

*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.
13. The relevant secrecy provision in the *Health Care Complaints Act 1993* (HCC Act) is section 99A(1), which provides for an offence by a person for improper

disclosure of information obtained in exercising a function under this Act, unless one or more of the exceptions in paragraph 99A(1)(a) to (d) applies.

14. The word 'person' is defined in subsection 2(1) of the *Interpretation Act 1987*, to include 'an individual, a corporation and a body corporate or politic'. Subsection 41B(3)(a) of Schedule 1 of the *Health Practitioner Regulation (Adoption of National Law) Act 2009* provides that the Agency is a body corporate.
15. The Agency submits that in some instances, information requested by the Applicant was obtained by the Health Care Complaints Commission (HCCC) in exercising its complaints-handling functions and that it is held on the Agency's file because the HCCC consulted with the Agency regarding the action it took.
16. Having examined the information in question, we are satisfied that the Agency has established its reliance on this conclusive presumption for the information contained in items 1-9, 14, 16 and 19.
17. A recent decision of the New South Wales Civil and Administrative Tribunal¹ held that subsection 99A(1) of the HCC Act applies to the Agency to the extent of any disclosure of information obtained in the exercise of a function under that Act. Principal Member Higgins noted that the Agency obtaining a medical practitioner's response in the course of its consultation role under the HCC Act when dealing with a complaint constituted information obtained in its complaint handling role under that Act. She was therefore satisfied that the overriding secrecy provision in the HCC Act applied to the information in the medical practitioner's report and was also satisfied that the conclusively presumed overriding public interest against disclosure in clause 1(1) of Schedule 1 to the GIPA Act applied to the information in the doctor's response.
18. Following this decision, we are satisfied that the information contained in items 10 and 13 also fall within this conclusive presumption.
19. As we find that the Agency's decisions to not provide access to all information which is the subject of this review are justified on the basis of this conclusive presumption alone, there is no need for reliance on the other conclusive presumption or considerations against disclosure. However, in order to complete our review and provide further guidance to the Agency we address these matters below.

Excluded information – clause 6 of Schedule 1

20. 'Excluded information' is defined in clause 1 of the Dictionary in Schedule 4 to the GIPA Act as information that relates to a function of an agency specified in Schedule 2 of the Act. The HCCC is an agency included in Schedule 2 which relevantly provides:

Note. *Information that relates to a function specified in this Schedule in relation to an agency specified in this Schedule is **excluded information** of the agency. Under Schedule 1 it is to be conclusively presumed that there is an overriding public interest against disclosure of excluded information of an agency (unless the agency consents to disclosure). Section 43 prevents an access application from being made to an agency for excluded information of the agency.*

...

¹ Whyte v Medical Council of NSW [2014] NSWCATAD 190 at [38]

2 Complaints handling and investigative information

The Health Care Complaints Commission – complaint handling, investigative, complaints resolution and reporting functions (including any functions exercised by the Health Conciliation Registry and any function concerning the provision of information to a registration authority or a professional council (within the meaning of the Health Care Complaints Act 1993) relating to a particular complaint.

21. On page 2 of the notice of decision the Agency submits that most of the records located in response to this GIPA application contain information which is excluded pursuant to Schedule 2 of the GIPA Act.
22. We have examined the information in question and confirm that the majority of documents were provided to the Agency by the HCCC pursuant to legislative requirements under the HCC Act.
23. We draw the Agency's attention to clause 6(2) of Schedule 1 to the GIPA Act, which relevantly provides that:

Before an agency decides an access application by refusing to provide access to information on the basis that it is excluded information of another agency, the agency is required to ask the other agency whether the other agency consents to disclosure of the information.
24. During the course of this review, the Agency reviewed its relevant hard copy and email files and was unable to locate any record of having asked the HCCC whether it consents to disclosure of the information in question.
25. We are therefore not satisfied that the Agency has established that the conclusive presumption at clause 6 of Schedule 1 to the GIPA Act applies to the information in question.
26. We recommend that in future notices of decision which rely on this conclusive presumption against disclosure, the Agency take the step set out in clause 6(2) of Schedule 1 to the GIPA Act, before deciding to refuse to provide access to information on the basis of it being excluded information of another agency.

Items 10 and 13

27. Item 13 is correspondence from the Agency's Ms DEF to Dr XYZ dated 20 September 2013, marked "Confidential".
28. Item 10 is Dr XYZ's 4 page correspondence in reply with covering email, dated 11 October 2013.
29. The Agency applied the public interest test in the following way.
 - a. On page 3 of the notice of decision, the Agency identified relevant public interest considerations in favour of disclosure of all information the subject of the GIPA application.
 - b. On pages 5-6, the Agency identified two considerations against disclosure of the information in items 10 and 13 from the table to section 14 of the GIPA Act, that the release of this information could reasonably be expected to:
 - i. found an action against an agency for breach of confidence or otherwise result in the disclosure of information provided to an agency in confidence (clause 1(g)) and
 - ii. reveal an individual's personal information (clause 3(a)).

- c. The Agency described the nature and content of the information in terms of these considerations against disclosure, stating that it includes the opinions, thoughts, personal movements and actions of Dr XYZ, which were provided to the Agency on the basis that his personal information be kept confidential.
 - d. The Agency consulted with Dr XYZ about whether to release the information and took into account his views, which is a step the Agency is required to take pursuant to section 54 of the GIPA Act. On examination of the information in question, we confirm it is of a kind that requires consultation, as it includes personal information about the person and the person may reasonably be expected to have concerns about its disclosure. Under section 54(5) of the GIPA Act, the Agency must take any objection to disclosure received during the course of consultation into account in deciding whether there is an overriding public interest against disclosure of the information.
 - e. Having weighed up the respective considerations, the Agency determined that the balance lies against disclosure of the information.
30. We are satisfied that the Agency has established the relevance of the respective considerations against disclosure to the information contained in items 10 and 13, and that its decision not to provide access is justified, notwithstanding the view articulated in paragraphs 17 and 18 above.

Recommendations

31. We find the decisions of the Agency are justified.
32. The Information Commissioner recommends pursuant to section 95 of the GIPA Act, that in future notices of decision for which conclusive presumptions against disclosure are claimed, the Agency follow the guidance contained in paragraphs 9 and 26 of this report.

Review rights

33. 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.
34. The Applicant has the right to ask the NCAT to review the Agency's decision.
35. 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>

Completion of this review

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

Elizabeth Tydd
Information Commissioner