



information
and privacy
commission
new south wales

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

Applicant:

Agency: NSW Department of Communities and Justice

Report date: 17 October 2019

IPC reference: IPC19/R000470

Agency reference:

Keywords: Government information – refuse to deal – applicant is party to current proceedings and is able to apply to the court for the information

Legislation cited: *Government Information (Public Access) Act 2009*

Cases cited: *AFW v WorkCover Authority of New South Wales* [2012] NSWADT 136; *Danis v Commissioner of Police (NSW)* [2017] NSWCATAD 144; *Commissioner of Police v Danis* [2017] NSWCATAP 7

This review has been conducted under delegation by the Information Commissioner pursuant to section 13 of the *Government Information (Information Commissioner) Act 2009*.

Summary

The Applicant applied for information from the NSW Department of Communities and Justice (the Agency) under the *Government Information (Public Access) Act 2009* (GIPA Act). The information sought by the Applicant relates to the Applicant's personal information held by the Agency.

The Agency decided to refuse to deal with the application because it believed the Applicant was a party to current proceedings before the court and was able to apply to that court for the information requested.

The Applicant applied for external review on 30 July 2019. The reviewer obtained information from the Agency including the notice of decision.

The review of the Agency's decision concluded that its decision is not justified.

The reviewer recommends under section 93 that the Agency make a new decision by way of internal review.

Further the reviewer also recommends under section 92 that in reconsidering its decision, the Agency gives particular consideration to the discretionary nature of section 60 of the GIPA Act in the making of any new decision.

Background

1. The Applicant was a defendant in criminal proceedings before the District Court of New South Wales.
2. On 23 May 2019 a representative applied under the GIPA Act on behalf of the Applicant to the Agency for access to the following information:

From 1 January 2018 to Present:

- *Case note reports and all documents relating to case planning and classification (including documents prepared by the Serious Offenders Review Committee – if client is designated a ‘serious offender)’;*
- *All psychologists’ reports and drug and alcohol reports;*
- *All reports relating to offers and/or participation in programs to address offending behaviour;*
- *All work reports;*
- *All educational reports, certificates, enrolment notices and attendance notices;*
- *All documents relating to any periods spent in protection during the period covered by this request (Inmate Profile document and protections orders for SMAP/PRLA/PRNA);*
- *All misconduct reports, inmate discipline action forms, incident reports and any related memorandums or notes.*

3. In making the application, the representative noted:

I act for the above named in criminal law proceedings before... District Court.

The request for documents is primarily for the purpose of providing legal advice and assistance, including in respect of current legal proceedings and to facilitate assessment of legal merit in respect of other legal services, as required under the Legal Aid Commission Act 1979 (NSW).

I am not presently instructed to seek the material requested via a subpoena or court order.

4. On 27 May 2019, the Agency wrote to the Applicant to acknowledge receipt of the application. The Agency also referred to the recent amendments to the GIPA Act and to section 60(1)(e) specifically. The Agency invited the Applicant to respond within five working days to advise whether he wished to withdraw the access application and request that the GIPA application fee is allocated towards the conduct money required for issuing a subpoena to the Agency.
5. Based on the information before the IPC, the Applicant did not respond to this letter.
6. In its decision issued on 4 June 2019, the Agency decided to refuse to deal with the application under section 60(1)(e) of the GIPA Act.
7. On 5 June 2019, the Applicant wrote to the Agency disagreeing with the application of section 60(1)(e), and sought access to the information from the Agency under the *Privacy and Personal Information Protection Act 1998* (PPIP

Act). On 15 July 2019, the Applicant was provided with access to certain information under the PPIP Act by email.

8. In seeking a review of the decision by the Information Commissioner, the Applicant submits that the Agency did not correctly exercise its discretion pursuant to section 60(1)(e) of the GIPA Act.
9. The outcomes sought by the Applicant are:
 - a. general recommendations to the Agency, pursuant to sections 92 and/or 95 of the GIPA Act, about refusal decisions under section 60(1)(e), including a recommendation as to the broader range of considerations the Department should take into account; and/or
 - b. a recommendation that the decision be reconsidered pursuant to section 93 of the GIPA Act.

Decision under review

10. The Information Commissioner has jurisdiction to review the decision made by the Agency pursuant to section 89 of the GIPA Act.
11. On 1 July 2019, because of machinery of government changes, the Department of Justice was abolished and its functions were devolved to the Department of Communities and Justice. With reference to schedule 4 clause 14 of the GIPA Act, I am satisfied that the decision under review can be taken to have been made by the Department of Communities and Justice.
12. The decision under review is the Agency's decision to refuse to deal with the access application under section 60(1)(e) of the GIPA Act.
13. This is a reviewable decision under section 80(c) of the GIPA Act.

Refuse to deal with an access application

14. Section 60 of the GIPA Act provides agencies with a discretion to decide to refuse to deal with an access application (in whole or in part) if any of the circumstances prescribed in subsection (1) exist.
15. Section 60(1)(e) provides that an agency may refuse to deal with an access application when:

The agency reasonably believes the applicant, or a person acting in concert with the applicant, is:

 - (i) a party to current proceedings before a court, and*
 - (ii) able to apply to that court for the information.*
16. In addition to being satisfied that the pre-conditions set out in section 60(1)(e) of the GIPA Act exist, the discretionary (as opposed to conclusive or mandatory) nature of section 60 requires an agency to consider whether it is appropriate to exercise the discretion conferred by that section to decide to refuse to deal with the application. An example of the NSW Civil and Administrative Tribunal exercising the discretionary power under section 60 can be found in *Commissioner of Police v Danis* [2017] NSWCATAP 7 at [47]:

The agency is correct in its submission that factors (b) and (c) are of no relevance to the exercise of the s 60(1)(d) discretion. They are factors that will always be present when s 60(1)(d) is relied upon by an agency. They are mere factual predicates to the exercise of the discretion; they are pre-

conditions. They do not, of themselves, inform the exercise of the discretion. Parliament clearly gave agencies a discretion not to proceed with an access application, even though the applicant may well have seen the information, and therefor necessarily it could be said not to 'new' information when GIPA Act access application is made [sic].

Although this decision related to section 60(1)(d) (information subject to a subpoena or court order) and predates the insertion of section 60(1)(e), I consider it provides relevant guidance on the types of considerations that may be relevant to decision-making under section 60 (1)(e).

17. Guidance on making discretionary decisions is also provided by module 8 of the NSW Ombudsman's *Good Conduct and Administrative practice – Guidelines for State and Local Government* (3rd ed, March 2017).
18. Section 60(1)(e) was inserted into the GIPA Act following consideration of whether section 60(1)(d) should be expanded to address the potential that the GIPA Act was being used to circumvent the inherent jurisdiction of the court to control its own processes and lead to duplication of work for agencies, and provision of the same information multiple times (*Statutory Review of the Government Information (Public Access) Act 2009 and the Government Information (Information Commissioner) Act 2009* [5.42]-[5.46]).
19. In its notice of decision, the Agency states:

... this access request relates to current proceedings. It is therefore reasonable to believe that you are able to apply for an order for the records within the scope of this application. This is because you have stated that your client is named in criminal law proceedings before the district court.
20. Based on the information before the IPC, it appears that the Applicant was a party to current proceedings before a court. However, I cannot be satisfied from the Agency's notice of decision that the relevant criminal proceedings traverse the relevant issues as required to satisfy the second limb of section 60(1)(e). If I am correct in my assessment of the justification provided by the Agency in its notice of decision I also turn to the application for external review.
21. In the external review application, the Applicant submits that the Agency failed to properly exercise the discretion under section 60 in deciding to refuse to deal with the application.
22. In summary, the Applicant submits that in addition to being satisfied that the pre-conditions of section 60(1)(e) exist, the Agency should have taken into account other relevant considerations before deciding whether to exercise the discretion under section 60 to refuse to deal with the application, specifically:
 - a. the objects of the GIPA Act in section 3
 - b. the purposes of section 60(1)(e) with regard to the Statutory Review which gave rise to the amendment and the second reading speeches in relation to the amendment
 - c. other relevant considerations, including:
 - i. the nature of the current proceedings and the access applicant's role in them
 - ii. the fact that, if a subpoena is issued, any other party to the proceedings may have the right to access the documents produced

- iii. whether the access applicant has previously or intends to seek access to and/or production of the material pursuant to court processes
 - iv. the nature of the information sought by the access applicant
 - v. the costs and procedural technicalities involved with issuing a subpoena compared to making an access application under the GIPA Act
 - vi. the costs and resource implications for the Department itself
 - vii. the fact that material provided under the GIPA Act could be used for a number of proceedings or purposes, whereas the use to which documents produced in current proceedings could be generally limited.
23. The Applicant also notes that following the Agency's decision to refuse to deal with the application, he was able to access certain information under the *Privacy and Personal Information Protection Act 1998* (PPIP Act) and that due to the interaction between the GIPA Act and PPIP Act, this is a relevant consideration in considering whether the discretion was properly exercised in deciding to refuse to deal with the access application under section 60 of the GIPA Act.
24. Based on my consideration of the Agency's notice of decision, it appears that factors relevant to the exercise of the discretionary power to refuse to deal with the application were not considered by the Agency in its notice of decision.
25. The application made under the PPIP Act was made subsequently to the application under the GIPA Act. The Agency's decision in providing personal information is at odds with the Agency's decision in response to the application made under the GIPA Act. This issue was explored in *AFW v WorkCover Authority of New South Wales* [2012] NSWADT 136, and the Tribunal made the following observation at [46]:
- It is common ground that AFW previously sought access under the GIPA Act to the same documents that are the subject of these applications. I agree with the submission that an access application made under the PPIPA or the HRIPA should not yield to a different outcome to an application made under the GIPA Act where the facts and circumstances are not materially different.*
26. It is unclear whether the Agency took into account the information provided by the Applicant in the access application about the purposes of the access application and weighed systemic considerations such as the efficient administration of the GIPA Act and the avoidance of wasteful deployment of limited resources (see *Danis v Commissioner of Police* [2017] NSWCATAD 144 [10], [23]-[40]).
27. For these reasons, I am not satisfied that the Agency's decision under section 60(1)(e) of the GIPA Act is justified.

Conclusion

28. On the information available, I am satisfied that the Agency's decision under review is not justified in relation to section 60(1)(e).

Recommendations

29. I recommend under section 93 of the GIPA Act that the Agency make a new decision by way of internal review.

30. On external review the applicant sought general recommendations under section 92 and/or section 95 of the GIPA Act. I have had regard to these powers and with reference to section 92 I recommend that the agency have regard to the requirements of administrative law principles in respect of making a discretionary decision. The Agency may wish in this regard to consider the NSW Ombudsman's Good Conduct and Administrative Practice - Guidelines for State and Local Government and in particular that part which relates to the exercise of discretionary powers and requirements for decision-makers. In doing so the Agency should also have regard to section 3(2)(b) of the GIPA Act.
31. Accordingly, under section 92, I recommend that in reconsidering its decision, the Agency gives particular consideration to the discretionary nature of section 60 of the GIPA Act.
32. I have considered the applicant's representative's request that the Information Commissioner make a recommendation under section 95 in relation to what it identifies as systemic issues relating to the Agency's approach to section 60(1)(e).
33. Section 95 allows the Commissioner to 'make a recommendation that any general procedure of an agency in relation to dealing with access applications be changed to conform to the requirements of' the GIPA Act or to further the object of the GIPA Act. Whilst the application for external review cites other examples of a pattern of practice in relation to the Agency's decisions which rely upon this new provision (section 60(1)(e)), I am not satisfied on the basis of the information available to me that a general recommendation is justified. However, this issue may inform the IPC's regulatory program broadly. I do not consider the discretionary decision-making process under section 60 of the GIPA Act is a general procedure that could be changed to conform to the requirements or objects of the GIPA Act. Accordingly, I do not propose to make a recommendation under section 95.
34. I ask that the Agency advise the Applicant and the IPC **within 10 working days** of the actions to be taken in response to our recommendations.

Applicant review rights

35. This review is not binding and is 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.
36. The Applicant has the right to ask the NCAT to review the Agency's decision.
37. 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>

38. 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

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