

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

Applicant: Mr Richard McDonald
Agency: NSW Police Force
Report date: 23 June 2015
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Contents

Summary	2
Background.....	2
Decisions under review	2
The public interest test.....	3
Public interest considerations in favour of disclosure.....	3
Public interest considerations against disclosure	4
File number LMI 1304072.....	4
Consideration 3(a) – reveal an individual’s personal information.....	4
Consideration 1(f) – prejudice the effective exercise by an agency of the agency’s functions .	5
Balancing the public interest test (LMI 1304072)	6
File numbers LMI 1304058 and 1303776.....	7
Recommendations.....	8
Review rights	8
Completion of this review	9

Summary

1. NSW Police Force (the Agency) conducted an internal review of a decision it made under the *Government Information (Public Access) Act 2009* (GIPA Act) in response to an application made by Mr Richard McDonald (the Applicant).
2. The Agency decided to release some information in full, release some information in part and to refuse access to some information in full.
3. The Information Commissioner makes the following recommendations in relation to the Agency's decision:
 - a. under section 93 of the GIPA Act, that the Agency make a new decision, by way of reconsideration, in relation to all the information that was refused access; and
 - b. under section 95 of the GIPA Act, that the Agency take steps to ensure that decision makers of GIPA Act applications have access to all the relevant information about which they are making decisions.

Background

4. On 18 December 2013 the Applicant applied under the GIPA Act to the Agency for access to the following complaint files:
 - a. LMI1301231
 - b. LMI1304072
 - c. LMI1304058
 - d. LMI1303780
 - e. LMI1303776
5. In its decision issued on 16 January 2014, the Agency decided to provide access to all the information contained in LMI1303780 and provide access to some information and refuse access to some information in the other files.
6. Dissatisfied with the Agency's decision the Applicant requested an external review by the Information Commissioner. The Information Commissioner recommended that the Agency reconsider the decision.
7. The Agency conducted an internal review of the decision. The internal review was decided on 20 February 2015. The decision was to:
 - a. provide access to the information in LMI 1301231 in full;
 - b. provide access to some information in LMI 1304072 and refuse access to other information in that file: and
 - c. to refuse access to the information in LMI 1304058 and LMI 1303776 full.

Decision under review

8. The decision under review is the Agency's decision, made on 20 February 2015, to refuse access, either in part or in whole, to information contained in files LMI 1304072, LMI 1304058 and LMI 1303776.
9. This is a reviewable decision under section 80(d) of the GIPA Act.

The public interest test

10. 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.
11. 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.
12. 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.
13. 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.
14. 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

15. 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).
16. In the notice of decision the Agency listed the following as public interest considerations in favour of disclosing the information:
 - a. the statutory presumption in favour of the disclosure of government information; and
 - b. the general right of the public to have access to government information held by agencies.
17. These appear to be references to sections 5 and 12(1) of the GIPA Act respectively.
18. The notice of decision does not identify any other considerations in favour of disclosure.
19. The Agency does not appear to have turned its mind to other appropriate and relevant considerations in favour of disclosure. The information requested relates to the fitness of police officers to hold their position and disciplinary matters. Example considerations in favour of disclosure contained in the notes to section 12 of the GIPA Act (see points (a), (b) and (e)) appear to be considerations that could apply to the information requested.

Public interest considerations against disclosure

20. The only public interest considerations against disclosure that can be considered are those in schedule 1 and section 14 of the GIPA Act.
21. 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.
22. 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.
23. In its notice of decision the Agency raised five public interest considerations against disclosure of the information, deciding that its release could reasonably be expected to:
 - a. reveal a deliberation or consultation conducted, or an opinion, advice or recommendation given, in such a way as to prejudice a deliberative process of government or an agency (clause 1(e) of the table to section 14 of the GIPA Act); and
 - b. prejudice the effective exercise by an agency of the agency’s functions (clause 1(f) of the table to section 14 of the GIPA Act);
 - c. prejudice the conduct, effectiveness or integrity of any audit, test, investigation or review, conducted by or on behalf of an agency by revealing its purpose, conduct or results (whether or not commenced and whether or not completed) (clause 1(h) of the table to section 14 of the GIPA Act);
 - d. prejudice the prevention, detection or investigation of a contravention or possible contravention of the law or prejudice the enforcement of the law (clause 2(b) of the table to section 14 of the GIPA Act); and
 - e. reveal an individual’s personal information (clause 3(a) of the table to section 14 of the GIPA Act).
24. The notice of decision states that considerations 1(f) and 3(a) apply to the information contained in file number LMI 1304072 that was refused access.
25. The notice of decision states that considerations 1(e), 1(h) and 2(b) apply to the information in file numbers LMI 1304058 and 1303776. Access was refused to all information in those files.
26. The decision in relation to the information contained in file number LMI 1304072 is discussed immediately below.
27. The decision in relation to the information contained in file numbers LMI 1304058 and 1303776 is discussed later in this report (see paragraphs 50 to 56).

File number LMI 1304072

Consideration 3(a) – reveal an individual’s personal information

28. 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.

29. 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]
30. 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.
31. 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.
32. The word 'reveal' is defined in schedule 4 to the GIPA Act as

reveal information means to disclose information that has not already been publicly disclosed (otherwise than by unlawful disclosure).
33. 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.
34. A review of the relevant information (pages 223 – 229 and 274 – 276 as listed in the notice of decision) confirms that it contains personal information of people who are not the Applicant. The first element of the consideration is satisfied.
35. The notice of decision states that the information is treated as confidential information by the Agency and there is no evidence to indicate that it has previously been revealed within the meaning of reveal in the GIPA Act. Therefore the second element of the consideration is satisfied.
36. Both elements of the consideration having been established the use of consideration 3(a) is justified in relation to information in file number LMI 1304072 that was refused access.
37. The notice of decision also states that consultation was undertaken with the relevant individuals and they objected to the disclosure of their personal information. Those objections were taken into account when the decision was made. The objections could go to the weight attributable to consideration 3(a). However, this is not discussed in the notice of decision.

Consideration 1(f) – prejudice the effective exercise by an agency of the agency's functions

38. Clause 1(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 prejudice the effective exercise by an agency of the agency's functions.

39. To show that this is a relevant consideration against disclosure, the agency must establish:
 - a. the relevant function of the agency;
 - b. that is or would be prejudiced by release of the information.
40. The meaning of the word prejudice is to 'cause detriment or disadvantage'.
41. The notice of decision identifies the monitoring and maintenance of the integrity of police officers as an essential and substantial function of the Agency. The first element of the consideration is satisfied.
42. The notice of decision states that the release of the information could reasonably be expected to prejudice the aforementioned function because it would cause officers undertaking that function in the future to be less likely to be full and frank in their written assessments knowing that the assessments could be released under the GIPA Act at a later date. This in turn would compromise the quality of assessments and impact negatively on the monitoring and maintenance of police officer integrity.
43. Both elements of the consideration having been established the use of consideration 1(f) is justified in relation to information in file number LMI 1304072 that was refused access.

Balancing the public interest test (LMI 1304072)

44. The GIPA Act does not provide a set formula for weighing individual public interest considerations or assessing their comparative weight. Whatever approach is taken, these questions may be characterised as questions of fact and degree to which different answers may be given without being wrong, provided that the decision-maker acts in good faith and makes a decision available under the GIPA Act.
45. Agencies should:
 - a. set out the considerations in favour of disclosure, identify the evidence that affects the weight to be given to each consideration, and give weight to each consideration; and
 - b. set out the considerations against disclosure, identify the evidence that affects the weight to be given to each consideration, and give weight to each consideration; and
 - c. make a decision about which way the balance lies, in light of the weight in favour and against
46. If at this stage the agency considers that there is an overriding public interest against disclosing the information, the GIPA Act contains a number of provisions that may apply to mitigate the effect of, or reduce the weight of, public interest considerations against disclosure or even avoid an overriding public interest consideration against disclosure altogether. These provisions are found in sections 72 to 78 of the GIPA Act.
47. The notice of decision does not demonstrate that the public interest test was properly conducted. It appears that there are public interest considerations in favour of disclosure that are relevant to the information requested but were not

raised. Also, the notice of decision does not attribute weight to considerations in favour of disclosure.

48. The notice of decision does establish that two public interest considerations against disclosure are relevant. However, it states that they outweigh the considerations in favour of disclosure without actually attributing weight to the considerations against disclosure or explaining why the considerations are weighty. Therefore it is unclear how those considerations can outweigh the considerations in favour of disclosure.
49. The decision to refuse access to information contained in file number LMI 1304072 is not justified.

File numbers LMI 1304058 and 1303776

50. In relation files LMI 1304058 and LMI 1303776, the notice of decision, states:

I note that LMI files 1304058 and 1303776 were at the time that the application was received on 18/12/13 still under investigation.

Section 84(1) of the Act states that an internal review is to be done by making a new decision that is made as if it were being made when the application to which the review relates was originally received.

Because this application was received in December 2013 when this matter was under investigation I have applied the public interest test as if the matters were still under investigation and decided that for the reasons above, the release of the information requested would be so strongly against the public interest that the public interest in favour of release would be abrogated.

51. During the course of this review the Agency stated that when the original decision was made the Information Access and Subpoena Unit (IASU) of the Agency (which has responsibility for the Agency's GIPA Act functions) did not have access to files LMI 1304058 and LMI 1303776. This was because the matters contained in those files were under investigation by the Professional Standards Command (PSC) of the Agency.
52. The Agency also confirmed that the decision maker of the internal review did not view the files LMI 1304058 and LMI 1303776 during the course of the internal review.
53. The notice of decision for the internal review states that three considerations against disclosure, 1(e), 1(h) and 2(b), apply to the information in files LMI 1304058 and LMI 1303776.
54. Without having viewed the information contained in files LMI 1304058 and LMI 1303776 it is unclear how the decision maker in the internal review could reasonably form the view that considerations 1(e), 1(h) and 2(b) are relevant to the information or conduct the public interest test.
55. The general nature and circumstances of the information (that it relates to complaints that were under investigation by PSC) is not sufficient grounds to be satisfied that considerations against disclosure apply and that they outweigh the considerations in favour of disclosure. The decision to refuse access to the information in files LMI 1304058 and LMI 1303776 is not justified.
56. With regards to the Agency's interpretation of section 84(1) of the GIPA Act, the fact sheet *Internal reviews under the GIPA Act* issued by the Information

Commissioner in January 2015, offers guidance about how internal reviews should be conducted. The fact sheet is available on the IPC's website.

Recommendations

57. The Information Commissioner recommends, under section 93 of the GIPA Act, that the Agency make a new decision in relation to all the information that was refused access, by way of reconsideration.
58. In making a new decision, have regard to the matters raised and guidance given in this report.
59. The Information Commissioner recommends, under section 95 of the GIPA Act, that the Agency take steps to ensure that decision makers of GIPA Act applications have access to all the relevant information about which they are making decisions.
60. We ask that the Agency advise the Applicant and us by **6 July 2015** of the actions to be taken in response to our recommendations.

Review rights

61. 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.
62. The Applicant has the right to ask the NCAT to review the Agency's decision.
63. 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>

64. 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

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

Elizabeth Tydd
Information Commissioner