



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

Applicant:	BR Turner AM
Agency:	Department of Education
Report date:	31 January 2023
IPC reference:	IPC22/R000549
Agency reference	GIPA-22-1126
Keywords:	Government information – information not held – reasonableness of searches
Legislation cited:	<i>Government Information (Public Access) Act 2009</i> ; <i>Government Information (Information Commissioner) Act 2009</i>
Cases cited:	<i>CLT v Secretary, Department of Education</i> [2022] NSWCATAD 34; <i>Crewsdon v Central Sydney Area Health Service</i> [2002] NSWCA 345; <i>Pedestrian Council of Australia v North Sydney Council</i> [2014] NSWCATAD 80; <i>Raven v The University of Sydney</i> [2015] NSWCATAD 104; <i>Robinson v Commissioner of Police (NSW)</i> [2014] NSWCATAP 73; <i>Wojciechowska v Commissioner of Police (NSW)</i> [2020] NSWCATAP 173

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

Summary

BR Turner AM (the **Applicant**) applied for information from the Department of Education (the **Agency**) under the *Government Information (Public Access) Act 2009* (**GIPA Act**). The information sought by the Applicant was a copy of a report into a HSC cheating incident at Penrith Selective High School in 2015.

The Agency decided that the information was not held by the Agency.

The Applicant applied for external review on 20 October 2022. The reviewer obtained information from the Agency including the notice of decision and the Agency's search declaration.

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

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

Background

1. The Applicant applied under the GIPA Act to the Agency for access to the following information:

“[c]opy of a report into a HSC cheating incident at Penrith Selective High School in 2015”, (Access Application).
2. In its decision at first instance issued on 27 September 2022, the Agency decided that, under section 58(1)(b) of the GIPA Act, the information sought by the Applicant in the Access Application is not held by the Agency (**Notice of Decision**).
3. In seeking a review of the decision by the Information Commissioner (**Review Application**), the Applicant identified that:

“[i]t does not make sense to me that there is no report on the 2015 HSC cheating incident at Penrith High School within the records of the DoE nor NESAs (Board of Studies).

This possible [sic] means to me that (one or more):

 - *The DoE search of records was too narrow, and therefore not considered reasonable.*
 - *The DoE / NESAs response to the media in 2015 about an 'investigation' was misleading (whether deliberate or otherwise).*
 - *There was no such event (unlikely given the wide media reporting across the print, television and social media).*
 - *The DoE / NESAs is non-compliant with its statutory responsibilities for records and archival management.*
 - *The DoE is not fulfilling its transparency obligations under the GIPA legislation.”*

Decision under review

4. The Information Commissioner has jurisdiction to review the decision made by the Agency pursuant to section 89 of the GIPA Act.
5. The decision under review is the Agency’s decision, under section 58(1)(b) of the GIPA Act, that the information is not held by the Agency.
6. This is a reviewable decision under section 80(e) of the GIPA Act.
7. The issue that arises in this review is whether the Agency’s decision satisfies the requirements of the GIPA Act, specifically section 53 which concerns searches for information held by the Agency.

Issues out-of-scope

8. In relation to certain other concerns raised by the Applicant in the Review Application, I have assessed those issues to be out of the scope of this review and the IPC’s review function. Those issues are:
 - a. the Agency’s provision of information to the media in 2015 being misleading
 - b. the Agency’s non-compliance with statutory responsibilities for records and archival management

- c. the Agency not fulfilling its transparency obligations under the GIPA Act.
9. In arriving at this position, my consideration has included the Tribunal's decision in *Raven v The University of Sydney* [2015] NSWCATAD 104, which held that, citing the decision of *Crewsdon v Central Sydney Area Health Service* [2002] NSWCA 345, proceedings under the GIPA Act should not be used as a "vehicle for the collateral review of the merits or validity of official action" (at [45]).
10. If the Applicant wishes to provide further information to the Information Commissioner about the issue at sub-paragraph (c), the Information Commissioner may consider, at their discretion, a complaint made under the *Government Information (Information Commissioner) Act 2009*. Further information about this IPC function can be found within the IPC's *Fact Sheet - Complaints about the actions of agencies*.¹

Information not held – reasonableness of searches

11. Section 53(2) provides that (emphasis added):

*"[a]n agency must undertake such **reasonable searches** as may be necessary to find any of the government information applied for that was held by the agency when the application was received."*

The facts

12. In the Notice of Decision, the Agency provided the following information in relation to its searches for records:

"[u]nder section 53 of the GIPA Act, the department must undertake reasonable searches as may be necessary to find any of the government information applied for that was held by the agency when the application was received, using the most efficient means reasonably available to the department.

The department keeps records electronically (in shared drives and an Electronic Documents Management System), in physical files (hard copy) and in individuals' email accounts. All relevant systems were searched by the area holding the information as outlined below.

I consider that reasonable searches have been undertaken in response to your application in accordance with section 53 of the GIPA Act.

...

Searches were conducted by Penrith High School and Penrith Principal Network who notified Right to Access that records are not held relating to your request."

13. In the Review Application, the Applicant identified that, after receiving the Notice of Decision, they emailed the Agency on 12 October 2022 seeking clarification of the decision as it did not "make sense" that there is no report within the Agency. The Applicant's email set out several media excerpts referring to an investigation conducted by the Agency into the cheating incident, as follows:

"- Daily Telegraph 11 September 2015, "Any allegation that is made to BOSTES is taken seriously, and a comprehensive investigation is

¹ <https://www.ipc.nsw.gov.au/fact-sheet-making-privacy-complaint-about-nsw-public-sector-agency>

underway. Penrith High School has taken appropriate disciplinary action against a small number of students who accessed the computer systems using a teacher's login."

- Sydney Morning Herald 11 September 2015, "A spokesman for the department said the Board of Studies, Teaching and Educational Standards had received an allegation about assessment marks at Penrith High School. "Penrith High School has taken appropriate disciplinary action against a small number of students who accessed the computer systems using a teacher's log-in," the spokesman said. "The school is looking into the matter and is working with the [board of studies] ..."

- SBS September 2015, "The Department of Education confirmed it had launched a comprehensive investigation with the help of Penrith High School, which has assured the correct and true marks would be submitted to BOSTES."

- Western Weekender 11 September 2022, "The Board of Studies has confirmed it is investigating the situation.""

14. As part of this external review, the Information and Privacy Commission (IPC) contacted the Agency and requested further information relating to the Agency's searches, including a Search Declaration. The Search Declaration provides details of the searches conducted by the Agency, including systems searched, search terms used, and time spent on searches. I note that the Search Declaration outlines that a single search term was used and a total time of one hour was spent searching the Agency's electronic records management systems and hard copy files.

The law

15. Under section 97(1) of the GIPA Act, the burden of establishing that the decision is justified lies on the Agency, except as otherwise provided by that section.
16. Under section 53(2) of the GIPA Act, the Agency is required to undertake "reasonable searches".
17. In *Robinson v Commissioner of Police (NSW)* [2014] NSWCATAP 73, the Appeal Panel held that the focus of the enquiry required by section 53 is the administrative steps taken by the agency's search officers, with particular regard to the matters set out in sections 53(2) to 53(5). Furthermore, the agency bears a strict onus of proof in relation to its reviewable decision under section 105, as access applicants will rarely be in a position to have any direct knowledge or evidence as to what steps were taken to search for the information they seek (at [26]–[36]).
18. The case of *Wojciechowska v Commissioner of Police (NSW)* [2020] NSWCATAP 173 explains (at [44]) that in considering whether a decision is correct at review, it is necessary to "consider any evidence that may have emerged since the agency made its decision, which might tend to prove that the requested information is held by the agency".
19. In *CLT v Secretary, Department of Education* [2022] NSWCATAD 34, the Tribunal held that section 53 imposes a standard of "reasonableness" in relation to the searches required to be undertaken, rather than any absolute or strict standard. Searches must be "logical", "sensible", "appropriate" and "fair", but are not required to be "extreme" or "excessive". The Tribunal observed that the reasonableness standard is an objective one, that is, what a fair minded person possessing reasonable knowledge of the agency's obligations and the

circumstances of the case would consider reasonable, not the standard of an “obsessive, mistrustful, perseverative or belligerent observer” (at [40]).

20. A key question is whether further searches will locate other documents, see *Pedestrian Council of Australia v North Sydney Council* [2014] NSWCATAD 80 (at [51]).

Consideration

21. The focus of an enquiry into section 53 is the administrative steps taken by the Agency’s Search Officer, see *Robinson v Commissioner of Police* cited above.
22. Overall, the information in the Notice of Decision and Search Declaration relating to the searches that were conducted is limited. The Notice of Decision and Search Declaration lack some information that would improve the robustness of the Agency’s search, including:
- a. an explanation of what the Agency understands the Applicant’s request for information to be;
 - b. how the Agency identified the systems that were to be searched and systems that did not need to be searched;
 - c. how the Agency identified the search terms to be used;
 - d. a description of the hardcopy records that were searched; and
 - e. the process used by the Search Officer to conduct the searches.
23. The IPC’s *Fact Sheet - Reasonable searches under the GIPA Act*² contains guidance on clearly explaining the search process in an agency’s notice of decision. The benefit of providing this information is that it assists with establishing that the Agency has conducted reasonable searches.
24. The only search term used by the Agency is the first and last name of an individual student. The Agency has not provided an explanation for the use of this search term, including the use of no other search terms. I note that it does not appear that the Applicant provided this search term to the Agency.
25. The Agency has indicated in the Search Declaration that there are privacy obligations owed to the individual student. This raises a concern that, if an investigation of the cheating incident occurred, whether measures were taken to anonymise student names during the investigation and any subsequent report, such that the student names would not appear in relevant records. This may diminish the effectiveness of any searches of electronic systems using names as search terms.
26. In my view, insufficient information has been provided by the Agency to satisfy me that the search term used by the Agency would result in reasonable searches being undertaken by the Agency. On its face, the search term used may result in a narrow search. There is no reason to believe that it is not reasonable to conduct a broader search relating to the identification or notification of the cheating incident and any investigation conducted into it.
27. Similarly, there is no information indicating that searches of employees’ emails have been undertaken by the Agency, including any time was spent on searches of employees’ emails. This suggests that the Agency has not conducted any searches of relevant employees’ emails in relation to the Access Application. If any searches were conducted, the Agency has not recorded

² <https://www.ipc.nsw.gov.au/fact-sheet-reasonable-searches-under-gipa-act>

- these actions in the Search Declaration. If employees' emails are not relevant, the Agency has not provided any information supporting this position.
28. However, in the Notice of Decision, the Agency says that it keeps its records electronically in various systems including "*individual's email accounts*". It goes on to say that "*all relevant systems*" were searched by the area holding the information. It is difficult to reconcile the Search Declaration and the Notice of Decision in respect of searches of employees' email accounts.
29. The Applicant, whilst not required to do so, has indicated in the Review Application that he informed the Agency after the Notice of Decision of several media reports that identify the cheating incident the subject of the Access Application. Those reports identify the following matters relevant to the incident:
- a. a Department of Education spokesman confirmed that the Board of Studies, Teaching and Education Standards (BOSTES) had received an allegation about assessment marks and any allegation made to BOSTES is taken seriously;
 - b. the Department of Education confirmed that it had launched a comprehensive investigation with the help of Penrith High School;
 - c. the Department of Education confirmed that, if the allegation is substantiated, BOSTES will act to ensure no student is disadvantaged and the examination process remains fair; and
 - d. a Department of Education spokesman confirmed that Penrith High School has taken disciplinary action against a small number of students who accessed the computer systems using a teacher's login.
30. The Tribunal's decision in *Wojciechowska v Commissioner of Police* (cited above) supports the position that consideration can be given to evidence arising after the decision that might prove the information is held by the Agency.
31. In my view, the media reports identified by the Applicant provide support for the existence of information sought in the Access Application being held by the Agency. In particular, I note the statements made by a Department of Education spokesman of a comprehensive investigation being launched and that action will be taken if the allegation received is substantiated. It is reasonable to expect that a report, whether formal or informal or in other forms such as a file or briefing note, would arise from an investigation and in the course of determining if an allegation is substantiated. It is also reasonable to expect that any report may have been attached to an email or taken the form of an email.
32. In my view, the searching of relevant employees' emails, as well as the use of broader search terms relating to the identification of the cheating incident and any investigation, are "*logical*", "*sensible*", "*appropriate*", "*fair*" and reasonable searches that should be undertaken in relation to the information sought by the Applicant (see *CLT v Secretary, Department of Education* cited above).
33. Further, I am of the view that, if such searches were undertaken by the Agency, there is a possibility that those searches will locate records relevant to the Access Application if any such records exist (see *Pedestrian Council of Australia v North Sydney Council* cited above).

Conclusion

34. On the information before me and for the reasons considered above, I am not satisfied that the Agency has conducted reasonable searches in accordance with section 53(2) of the GIPA Act.
35. I am therefore satisfied that the Agency's decision that information is not held by the Agency is not justified, based on the available evidence.

Recommendation

36. I recommend under section 93 of the GIPA Act that the Agency make a new decision, by way of internal review within 15 working days.
37. 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

38. 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.
39. The Applicant has the right to ask the NCAT to review the Agency's decision.
40. 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>
41. 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

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

Thomas Marin

Regulatory Officer