



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

Applicant: Applicant  
Agency: Fire and Rescue NSW  
Report date: 15 July 2015  
IPC reference: IPC15/R000144  
Keywords: Government information – public interest test – personal information – confidential information – exercise of the agency’s functions – breach of confidence

### Contents

Summary .....	2
Background.....	2
Decision under review .....	2
The public interest test.....	3
Public interest considerations in favour of disclosure.....	3
Public interest considerations against disclosure .....	4
Consideration 3(a) – reveal an individual’s personal information.....	5
Consideration 1(d) – supply of confidential information .....	5
Consideration 1(f) – effective exercise of the agency’s functions .....	7
Consideration 1(g) – breach of confidence .....	7
Third party consultation .....	8
Redacting information under the GIPA Act .....	9
Balancing the public interest test.....	9
Recommendations.....	10
Review rights .....	10
Completion of this review .....	11

## Summary

1. The Applicant applied for information from Fire and Rescue NSW (the Agency) under the *Government Information (Public Access) Act 2009* (GIPA Act).
2. The Agency provided access to some information and withheld other information, in particular some personal information of third parties and two referee checks.
3. The Information Commissioner recommends under section 93 of the GIPA Act that the Agency make a new decision, by way of internal review, about the two referee checks.

## Background

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

*Part time [redacted] Position No: [redacted]. All documents related to my application including but not limited to selection committee report, referee checks, emails, file notes, records of conversation, recommendations, post interview feedback, assessments (excel) + telephone interview role play. Selection Committee member's note, background checks, police checks, conflict of interest declaration.*
5. In its decision issued on 10 February 2015, the Agency decided to provide access to some information and to refuse access to some information.
6. In seeking a review of the decision by the Information Commissioner, the Applicant advised that he specifically seeks a review of the Agency's decision to withhold the referee checks. The Applicant's request for review states "As an external applicant I have no rights of appeal so therefore I am seeking to know what I need to do to be successful in the future to gain employment."
7. In his request for review the Applicant also set out his views with respect to the decision made by the Agency, and raised some of his concerns about the recruitment process that he participated in. The Applicant's concerns include the process for obtaining the referee checks, the number of referees contacted and allegations that the Public Service Commission's Recruitment and Selection Guide was not followed during the recruitment process. The recruitment process itself does not fall within the scope of this review, and we are unable to comment on the concerns raised by the Applicant in this regard. This review only considers whether the Agency's decision to refuse access to certain information was justified.

## Decision under review

8. The decision under review is the Agency's decision to refuse to provide access to information in response to an access application. This is a reviewable decision under section 80(d) of the GIPA Act.
9. In accordance with section 97 of the GIPA Act, in this review the Agency bears the burden of establishing that its decision is justified.
10. In conducting this review we have taken into account information provided by both the Agency and the Applicant, including the notice of decision and a copy of the withheld information.

## The public interest test

11. 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.
12. 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.
13. 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.
14. 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.
15. 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

16. 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 (section 12(2) of the GIPA Act).
17. In its notice of decision, the Agency identified the following public interest consideration in favour of disclosure of the information in issue:
  - a. there is a public interest in favour of obtaining information concerning the workings of government agencies, particularly those processes that assist panel members determine the outcome of a job selection exercise.
18. In his request for review the Applicant also raised the following public interest considerations in favour of disclosure:
  - a. disclosure of the information could reasonably be expected to promote open discussion of public affairs, enhance Government accountability or contribute to positive and informed debate on issues of public importance;
  - b. disclosure of the information could reasonably be expected to inform the public about the operations of agencies and, in particular, their policies and practices for dealing with members of the public;
  - c. the information is personal information of the person to whom it is to be disclosed; and

- d. disclosure of the information could reasonably be expected to reveal or substantiate whether an agency (or a member of an agency) has engaged in misconduct or negligent, improper or unlawful conduct.
19. Some of the public interest considerations in favour of disclosure raised by the Applicant relate to his concerns about the recruitment process generally, rather than the requested information. Regardless, we are satisfied that the requested information is the personal information of the Applicant, and that its disclosure would enhance accountability around the Agency's recruitment processes and in particular its referee checks.
20. With respect to the referee reports, the Information Commissioner's *Guideline 4 – Personal information as a public interest consideration under the GIPA Act* includes, at paragraph 1.3, the report of a referee about an applicant for public sector employment as an example of personal information. Further, paragraph 1.4 suggests that the personal information conveyed by an opinion is that of the subject rather than the person who gives the opinion. The Guideline gives the example of an opinion in a referee report, stating that the personal information is that of the person being refereed, rather than of the referee. Nevertheless, in offering an opinion about someone else, personal information about the provider of an opinion may also be revealed. There is a public interest consideration in favour of providing individuals with their own personal information.

### **Public interest considerations against disclosure**

21. The only public interest considerations against disclosure that can be considered are those in schedule 1 and section 14 of the GIPA Act.
22. 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.
23. 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.
24. In its notice of decision the Agency raised four 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. prejudice the supply to an agency of confidential information that facilitates the effective exercise of that agency's functions (clause 1(d) of the table to section 14 of the GIPA Act);
  - c. 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); and
  - d. 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).
25. The first public interest consideration against disclosure was applied to the names of third parties, and the other three considerations were applied to the

requested referee reports. I will discuss the elements of each of these considerations in turn.

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

26. 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.*

27. Personal information is defined in Schedule 4 to the GIPA Act as:

*...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.*

28. 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.

29. The Information Commissioner has published *Guideline 4 – Personal information as a public interest consideration under the GIPA Act*. 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. These examples include the names of individuals and recruitment information.

30. In order to establish that this consideration applies, the Agency has to:

- a. identify whether the information is personal information
- b. consider whether the information would be revealed by disclosing it under the GIPA Act.

31. The notice of decision stated that the Agency refused access to the names of other people in the requested information that was additional to the referee checks as it regards this information as personal information. This information was deleted from the released information.

32. We have reviewed the information redacted on this basis and are satisfied that the decision to apply this public interest consideration against disclosure is justified.

### **Consideration 1(d) – supply of confidential information**

33. Clause 1(d) 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 supply to an agency of confidential information that facilitates the effective exercise of that agency’s functions (whether in a particular case or generally).*

34. In order for this to be a relevant consideration against disclosure, the Agency must be satisfied that:

- a. the information was obtained in confidence;
- b. disclosure of the information could reasonably be expected to prejudice the supply of such information to the Agency in future; and

- c. the information facilitates the effective exercise of the Agency's functions.
35. Although the GIPA Act does not use the phrase "future supply", the nature of the prejudice that this consideration deems to be contrary to the public interest, is implicit. This future effect is one aspect of the abstract nature of the enquiry. The other abstract element is supply in a general sense and whether disclosure will impact supply of similar information by persons to the agency in the future.
  36. It is commonly understood that information will have a confidential quality if the person was not bound to disclose the information but did so on the basis of an express or inferred understanding that the information would be kept confidential.
  37. The Agency has identified the relevant function as "to conduct job selection processes in order to determine the person best able to fill the requirements of each position advertised."
  38. The notice of decision states that release of the information would make referees reluctant to provide the full facts or express their opinions on a matter relating to the job candidate if it was known that the information provided on a confidential basis would become public. The Agency has also informed the Information Commissioner that one of the referees asked the Agency during the reference check process for their comments to be kept confidential to the selection committee and not released.
  39. The Applicant makes a number of submissions in relation to this consideration against disclosure. These include:
    - a. the Agency did not substantiate their claims for the risk of referees not providing honest references if their identity is known;
    - b. the referees were or are NSW public servants and as such would be aware that the information could be subject to a GIPA application;
    - c. maintaining anonymity "suggests there is no openness or transparency to the recruitment process, no accountability for the referee, procedural fairness or natural justice for the applicant [and] it is questionable if the processes are effective";
    - d. withholding referee comments does not allow the Applicant to identify areas of improvement and take corrective action prior to seeking further employment;
    - e. the Applicant did not have the opportunity to respond to detrimental comments provided by a referee, or to provide additional referees;
    - f. information about the Applicant should not be withheld if the recruitment process was "above reproach"; and
    - g. the claim for anonymity "is in direct contradiction of the NSW Government's Public Service Commission – Recruitment and Selection Guide and is part of the recruitment pack on JobsNSW." This is on the basis that reference checking should be 360 degrees where possible, which the Applicant states "suggests the process does a complete circle returning to the applicant indicating they should receive the feedback from the interview panel and their referees."
  40. Some of the Applicant's submissions are relevant to his motives in asking for the information and may be relevant to the balance of the public interest test. On the whole, however, they do not support the Applicant's position that this public interest consideration against disclosure does not apply. With respect to

the Applicant's argument that a "360 degree" reference check indicates that the information will be provided back to the Applicant, we have reviewed the information provided by the Public Service Commission and are not persuaded that this is the process advocated. Where 360 degree reference checks are recommended, this is a reference to obtaining references from a variety of positions (including persons who report to the applicant and persons to whom the applicant reports), rather than to a process whereby opinions provided by referees are provided back to the applicant.

41. The Agency did not conduct third party consultation with the referees who provided the information. As noted above, one of the referees verbally asked during the reference check process that their comments be kept confidential to the selection committee, however the Agency has not provided any information that indicates that the other referee wished for their comments to be treated confidentially.
42. The Agency has not provided any evidence of a commitment to keep the referees' identities and comments confidential. In the absence of the third party consultation it is also difficult to establish whether the referee asked for confidentiality had concerns relating to the disclosure of their identity only, or also to the feedback provided.
43. For this reason we are not satisfied that the Agency has justified this consideration with respect to all the information in the two referee checks. We have provided further guidance about balancing the public interest test later in this report. This guidance follows our discussion of the other two public interest considerations against disclosure, third party consultation and redacting information under the GIPA Act.

#### **Consideration 1(f) – effective exercise of the agency's functions**

44. 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.*
45. 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.
46. The meaning of the word prejudice is to "cause detriment or disadvantage".
47. For the reasons set out above with respect to consideration 1(d), we are not satisfied that this consideration applies to all the information contained in the two referee checks.
48. If this public interest consideration does apply to the information, it will need to be balanced alongside considerations in favour of disclosure. This is discussed further, later in this report.

#### **Consideration 1(g) – breach of confidence**

49. Clause 1(g) 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... found an action*

*against an agency for breach of confidence or otherwise result in the disclosure of information provided to an agency in confidence (whether in a particular case or generally).*

50. To show that this is a relevant consideration against disclosure, the Agency must establish:
  - a. the information was obtained in confidence; and
  - b. disclosure of the information could reasonably be expected to found an action against an agency for breach of confidence; or
  - c. otherwise result in the disclosure of information provided.
51. In raising this public interest consideration against disclosure the Agency needs to ensure the information is in fact confidential.
52. Once satisfied that the information is confidential information, the agency should then turn its mind to what constitutes a breach of confidence. A breach of confidence arises out of an unauthorised disclosure of, or other use of information, which is subject to an obligation of confidentiality.
53. For the reasons set out above, we are not satisfied that this consideration applies to all the information contained in the two referee checks.

### **Third party consultation**

54. An agency may be required to consult third parties before making a decision about an access application if the information is of a kind requiring consultation. Section 54 of the GIPA Act sets out when consultation is required. For example, consultation may be required if:
  - a. the information includes personal information about a person, and
  - b. the person may reasonably be expected to have concerns about the disclosure of the information, and
  - c. those concerns may reasonably be expected to be relevant to the question of whether there is a public interest consideration against disclosure.
55. An agency must take any third party objection into account in making its decision, but an objection is not in itself determinative of an overriding public interest consideration against disclosure.
56. An agency may decide to release information despite receiving an objection from a third party. However under section 54(6) and (7) the agency must notify the third party of its decision, and not release the information until the third party's review rights have expired.
57. The Information Commissioner has recently published *Guideline 5: consultation on public interest considerations under section 54 of the GIPA Act*. This Guideline is available on the IPC website. Agencies must have regard to this Guideline pursuant to section 15(b) of the GIPA Act.
58. The Agency did not consult with the referees when it made its decision. As set out in the Information Commissioner's Guideline, the purpose of consultation is to find out the views of the third parties and the basis for those views, which will inform the Agency's decision about whether or not to release the information (paragraph 1.21). Section 54 of the GIPA Act supports the need for agencies to be as fully informed as possible by requiring them to consult with third parties

who may reasonably be expected to have concerns about the disclosure of information that affects them.

59. The Agency's decision would have benefited from third party consultation to inform the Agency:
  - a. whether or not the referees object to disclosure of information from the referee checks;
  - b. the particular information that the referees object to being disclosed – for example whether the referees object to all comments about the Applicant being disclosed or only to information that identifies which referee provided which comment; and
  - c. the basis for those objections (if any).

### **Redacting information under the GIPA Act**

60. Section 74 of the GIPA Act provides:

*An agency can delete information from a copy of a record to which access is to be provided in response to an access application (so as to provide access only to the other information that the record contains) either because the deleted information is not relevant to the information applied for or because (if the deleted information was applied for) the agency has decided to refuse to provide access to that information.*

61. The Agency redacted some information from the records on the basis that it does not relate to the information requested by the Applicant. We have reviewed this information and are satisfied that it relates to other applicants in the recruitment process, not to the Applicant.
62. We are satisfied that the Agency's decision to redact the information that is not related to the access application is justified.
63. Section 74 of the GIPA Act can also be utilised to provide access to some information in a record while withholding other information. In relation to the Applicant's request for the referee checks, it would be appropriate for the Agency to consider whether some information in the referee checks, such as opinions about the Applicant, can be provided even if other information, such as information identifying which referee provided which information, is considered to be subject to an overriding public interest against disclosure.

### **Balancing the public interest test**

64. 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.
65. We are satisfied that the Agency's decision to redact personal information about third parties, other than the Applicant, who applied for the same position is justified.
66. With respect to the referee checks, the Agency has not conducted third party consultation with the two referees, nor does the notice of decision demonstrate that the Agency considered redacting some information from the referee reports and providing other information to the Applicant.

67. The Agency has not demonstrated that the information was obtained in confidence. In order to do so the Agency should provide some evidence of the undertaking of confidentiality provided to the referees, information from its policies and procedures about how it treats referee checks, or other information evidencing the basis for confidentiality.
68. Although the Agency has identified relevant public interest considerations against disclosure that may apply to the referee checks, 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 include those relating to third party consultation and sections 72 to 78 of the GIPA Act.
69. It is consistent with the objects of the GIPA Act that these provisions be considered, where relevant, before a decision is made to not disclose information because there is an overriding public interest consideration against disclosure.
70. For these reasons we are not satisfied, based on the Agency's notice of decision, that its decision was fully justified in accordance with the GIPA Act.

## Recommendations

71. The Information Commissioner recommends under section 93 of the GIPA Act that the Agency make a new decision, by way of internal review, about the two referee checks.
72. In making a new decision, the Agency should have regard to the matters raised and guidance given in this report.
73. We ask that the Agency advise the Applicant and us by **31 July 2015** of the actions to be taken in response to our recommendations.

## Review rights

74. 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.
75. The Applicant has the right to ask the NCAT to review the Agency's decision.
76. 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>
77. 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**

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

Elizabeth Tydd  
**Information Commissioner**