

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

Applicant: Kelvin Bissett
Agency: Clinical Excellence Commission
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information – creation of a new record

Summary.....	2
Background.....	2
Decision under review	3
Is the information held?	3
Creation of a new record	4
Searches for information.....	5
Recommendations	6
Review rights.....	6
Completion of this review.....	6

Summary

1. Kelvin Bissett (the Applicant) applied for information from the Clinical Excellence Commission (the Agency) under the *Government Information (Public Access) Act 2009* (GIPA Act).
2. The Agency decided that it does not hold the information requested.
3. The Information Commissioner makes no recommendations against the Agency's decision.
4. The Information Commissioner recommends that pursuant to section 95 of the GIPA Act, in future notices of decision in which the issue of searches for information may be enlivened, the Agency take the step of including details in support of the Agency's claims as to the reasonableness of its searches.

Background

5. On 20 August 2015, the Applicant applied under the GIPA Act to NSW Health for access to:
 - a. *The comparative data based on indicators created by the Australian Commission for Safety and Quality in Healthcare, for Hospital Standardised Mortality Ratios (HSMR). These HSMR indicators are one of three types of routine indicators on death rates in hospitals, including Deaths in Low Mortality Diagnostic Related Groups (DLMRG) and Condition Specific Mortality Indicators.*
 - b. *I request the following from NSW Health:
the HSMR for first two quarters of 2015 for each NSW hospital;
the HSMR for the four quarters of 2014 for each NSW hospital;
the HSMR for the four quarters of 2013 for each NSW hospital; and
the HSMR for the four quarters of 2012 for each NSW hospital.*
6. On 2 September 2015, NSW Health made a decision that the information was not held and advised the Applicant that the Agency "may likely hold parts of the information" sought and that the request would be transferred to the Agency.
7. On 22 September 2015, the Agency received the transferred GIPA request.
8. In its decision dated 12 October 2015, the Agency decided that the information is not held. In the cover letter to the notice of decision, the Applicant was referred to the Bureau of Health Information, (BHI) which has published information on Standardised Mortality Ratios for five clinical conditions on its website. We note the five clinical conditions are acute myocardial infarction, ischaemic stroke, haemorrhagic stroke, pneumonia and hip fracture surgery.
9. In seeking a review of the decision by the Information Commissioner, the Applicant expressed surprise that the information is not held. He states that:
 - a. his request was submitted after noting that the information was to be collected from all hospitals based on indicators created by the Australian Commissioner for Safety and Quality in Health Care (ACSQHC);
 - b. the ACSQHC's website states that in November 2009 all Australian health ministers endorsed recommendations that hospitals monitor and

review a succinct set of indicators. Indicators are generated by “jurisdictions and private hospital ownership groups” and “reported back to provider facilities”. The first indicator listed is described as “CHBO1 Hospital standardised mortality ratio (HSMR;)”

- c. an identical request for the same statistical information was made to Queensland Health under the *Right to Information Act 2009* and the Applicant understands the information is to be released as requested;
- d. the information the Applicant was referred to on the BHI website is not the HSMR data as he requested; and
- e. the information indicates that the raw data capable of producing the HSMR is collected.

Decision under review

10. The decision under review is the Agency’s decision that information is not held, which is a reviewable decision under section 80(e) of the GIPA Act.
11. In undertaking this review, we have had access to further details with respect to the Agency’s searches in response to the GIPA request and its role.

Is the information held?

12. Section 4 of the GIPA Act defines ‘government information’ as ‘information contained in a record held by an agency’.
13. Before deciding that it does not hold government information an agency must comply with the requirements of section 53(2) of the GIPA Act. These requirements are:
 - a. undertake such reasonable searches as necessary to locate the information requested; and
 - b. use the most efficient means reasonably available to the agency.
14. In reviewing whether an agency’s searches were sufficient, we consider two questions:
 - a. are there reasonable grounds to believe that the requested information exists and is information of the agency; and if so,
 - b. have the search efforts made by the agency to locate such information been reasonable in all the circumstances of a particular case?
15. To answer these questions, the individual circumstances of the application and the steps taken by the Agency are relevant.
16. The circumstances of the application are informed by an examination of the websites of the Agency, ACSQHC and the BHI, together with the Applicant’s assertion that access to the same information is to be provided by the Agency’s counterpart in another jurisdiction.
17. To address this last point, the fact that the HSMR information requested by the Applicant is held and purportedly being provided by a health agency in another jurisdiction does not mean it is “information contained in a record held”¹ by its NSW counterpart.

¹ Section 4 of the GIPA Act provides that government information means information contained in a record held by an agency.

18. We confirm that the ASCHC site says that:
“a number of jurisdictions are already undertaking a similar process with many of the same indicators” and that
“the core hospital-based outcome indicators recommended for local generation and review include HSMR”.²
19. We also note that the BHI website publishes Standardised Mortality Ratios for five clinical conditions, and that the Applicant believes this is indicative that raw data is collected which is capable of producing the HSMR information sought.
20. While there may be reasonable grounds to believe that the raw data is collected, it may not be in the form of the information requested by the Applicant.

Creation of a new record

21. Section 75(2) of the GIPA Act provides:
An agency’s obligation to provide access to government information in response to an access application does not require the agency to do any of the following:
 - (a) *make a new record of information held by the agency,*
 - (b) *update or verify information held by the agency,*
 - (c) *create new information, or produce a new record of information, by deduction, inference or calculation from information held by the agency or by any other use or application of information held by the agency.*
22. The effect of section 75(2) of the GIPA Act is that an agency is not required to use the information it holds to calculate, infer or deduce the information which is the subject of the access application.
23. The *Information Commissioner’s fact sheet – Creating new records under the GIPA Act*, provides some guidance. The GIPA Act provides that an agency may create a new record, but is not obliged to do so. An agency is not required to create a new record in situations where the creation would:
 - a. unreasonably interfere with the operations of the agency; or
 - b. result in the agency incurring unreasonable additional costs.
24. We note the Applicant’s assertions in his request for external review that information in the form of raw data is collected from all hospitals which is capable of producing the HSMR.
25. However, it appears that the information requested by the Applicant is not information that the Agency routinely creates and we are satisfied that to respond to the Applicant’s request may amount to the creation of a new record, for the purposes of disclosing the information.

² <http://www.safetyandquality.gov.au/our-work/information-strategy/indicators/core-hospital-based-outcome-indicators/> accessed 11 February 2016

26. We turn now to an examination of the searches undertaken by the Agency.

Searches for information

27. Key factors in making an assessment about reasonable searches include “the clarity of the request, the way the agency’s recordkeeping system is organised and the ability to retrieve any documents that are the subject of the request, by reference to the identifiers supplied by the applicant or those that can be inferred reasonably by the agency from any other information supplied by the applicant” (*Miriani v Commissioner of Police, NSW Police Force [2005] NSWADT 187* at [30]).
28. With respect to searches conducted, the notice of decision says that:
- relevant directors at the Agency were asked to conduct searches for the requested information;
 - directors conducted a keyword search of TRIM (including restricted folders), emails and local drives that would likely hold the information;
 - hard copy records held by directors that may contain information relating to HSMRs were also searched; and
 - no government information falling within the scope of the application has been identified.
29. During the course of this review, we requested further information from the Agency about its searches for information. The Agency provided its records of searches, including the email to relevant directors requesting that they search TRIM folders, email, hard copies, local drives and any other storage devices for information within the scope of the request.
30. We examined responses from two Clinical Directors; the Director, Clinical Governance; the Director, Patient Based Care; the Director of Medications Safety and Deteriorating Patients Programs; the Director of Patient Safety and the Director, Information Management. Six of the seven Directors advised that they did not hold the information, and the Director, Information Management advised that:
- HSMR data for NSW for 2006-07, 2007-08, 2008-09 was prepared by AIHW and is available...but it is all outside the 2012-2015 scope of the request; and*
 - the work done on HSMRs by [staff members A, B and C] for a project jointly funded by CEC, BHI and ACSQHC also precedes the scope;*
 - I’m unsure where the ACSQHC are currently up to with reporting CHBOI-1 (HSMRs).*
31. On examination of the additional information provided, we are satisfied that the Agency conducted reasonable searches in compliance with the requirements of section 53(2) of the GIPA Act.
32. The GIPA Act does not require an agency to include details of its searches in a notice of decision. However, it is good practice in written decisions to clearly explain what the search processes were, what was found, an explanation if no records were found, what was released and what was held back. Details of searches should include where and how the agency searched, a list of any records found and if appropriate, a reference to the business centre holding the records, the key words used to search digital records (including alternative spellings used) and a description of the paper records that were searched.

33. The Agency's notice of decision would have benefitted from including the relevant level of detail with respect to searches undertaken.
34. We recommend that in dealing with future GIPA applications the Agency note this guidance and include further details of searches undertaken in its notices of decision, where relevant.

Recommendations

35. The Information Commissioner makes no recommendations against the Agency's decision.
36. The Information Commissioner recommends that pursuant to section 95 of the GIPA Act, in future notices of decision in which the issue of searches for information may be enlivened, the Agency take the step of including details in support of the Agency's claims as to the reasonableness of its searches. We refer the Agency to our fact sheet on Reasonable Searches under the GIPA Act at www.ipc.nsw.gov.au

Review rights

37. 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.
38. The Applicant has the right to ask the NCAT to review the Agency's decision.
39. 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>

40. 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

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

Elizabeth Tydd
Information Commissioner