



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

Applicant: Mr Adel Mehanna
Agency: NSW Police Force
Report date: 23 March 2016
IPC reference: IPC16/R000027
Keywords: Government information – personal information – public
interest test – information not held – searches for information -
scope of application

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Summary

1. Mr Adel Mehanna (the Applicant), represented by Andrea Turner, applied for information from the NSW Police Force (the Agency) under the *Government Information (Public Access) Act 2009* (GIPA Act).
2. The Agency decided to release some information in full, to release some information in part, to refuse some information in full and that it did not hold some of the information requested.
3. The Information Commissioner recommends, under section 93 of the GIPA Act, that Agency make a new decision with regards to the decision to refuse access to information (both in part and in full) and the decision that it does not hold information.
4. The Information Commissioner recommends, under section 92 of the GIPA Act, that, if it reconsiders its decision, the Agency address the Applicant's request for access to Information Summary Reports.
5. In making a new decision the Agency should have regard to the matters raised and guidance provided in this report relating to searches for information, considerations for and against disclosure and balancing the public interest test.

Background

6. In an application received by the Agency on 26 October 2015, the Applicant requested access to information relating to eleven incidents where the Applicant interacted with police officers. He requested three types of information in relation to each of the eleven incidents.
7. The eleven incidents were:

Reference ¹	Incident number	Officer/s
B	E 4137 19191	Shaw and Barton
C	E 4731 0482	Broadhurst, Bridges and Kalantzis
D	E 4812 0771	Emanuel and Tracey
E	E 4320 8688	McCann and Berlangieri
K	E 5759 1217	Berlangieri and Smith
M	E 5747 1174	Lattouf
N	E 1036 16001	Finlay
O	E 5303 8309	Voget
P	E 5343 8876	Davidson and Audibert
Q	E 5325 6218	Davidson and Yewdall

¹ The reference numbers were allocated by the Applicant in the application.

S	E 517 44513	Davidson and Cardenzana
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8. The three items of information requested were:
 - a. police notebooks of all the police named as being involved in each incident;
 - b. police notebooks of any other police officer then working with the police officer named at point a above; and
 - c. Information Summary Reports relating to each incident.
9. The Agency decided the application on 23 November 2015. The specific decisions in relation to each item of information are contained in the notice of decision. In summary the Agency provided:
 - a. full access to four COPS Event Records;
 - b. partial access to seven COPS Event Records;
 - c. full access to two notebooks; and
 - d. partial access to eight notebooks.
10. The Agency also decided to refuse access to eight notebooks in full and that it did not hold one notebook.
11. In seeking a review of the decision by the Information Commissioner, the Applicant confirmed that he disagrees with the Agency's decision to refuse to provide access to information and raised the issue that the notice of decision does not refer to Information Summary Reports.
12. There is one exception to this. In his request for external review the Applicant stated that he is not pursuing the decision in relation to Event Number E 4320 8666. Therefore this part of the Agency's decision is not considered in this review.

Decisions under review

13. The two decisions under review are the Agency's decisions to:
 - a. refuse access to information, in part and in full; and
 - b. that it does not hold some of the information requested.
14. The decision to refuse access to information is reviewable under section 80(d) of the GIPA Act.
15. The decision that an agency does not hold information is reviewable under section 80(e) of the GIPA Act.
16. This review also examines whether the Agency's searches were reasonable in the context of the Information Summary Reports.

The public interest test

17. 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.

18. 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.
19. 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.
20. 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.
21. 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

22. 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).
23. In its notice of decision, the Agency listed the following public interest considerations in favour of disclosure of the information in issue:
 - 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 an agency.
24. These are appropriate considerations. However, there appears to be at least one other consideration in favour of disclosure that applies but wasn't considered by the Agency.
25. Point (d) of the example considerations in favour of disclosure contained in section 12 of the GIPA Act states that if 'the information is personal information of the person to whom it is to be disclosed' that can be a public interest consideration in favour of disclosure. Given that the Applicant has applied for information about himself this appears to be a relevant consideration.
26. It is recommended that, if the Agency reconsiders its decision, it reconsider what public interest considerations in favour of disclosure it takes into account.

Public interest considerations against disclosure

27. The only public interest considerations against disclosure that can be considered are those in schedule 1 and section 14 of the GIPA Act.
28. 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.

29. 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.
30. In its notice of decision the Agency raised one public interest consideration against disclosure of the information, deciding that its release could reasonably be expected to reveal an individual's personal information (clause 3(a) of the table to section 14 of the GIPA Act). This consideration is discussed below.

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

31. 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.

32. Personal information is defined at clause 4 of schedule 4 to 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.

33. 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.
34. The Information Commissioner 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.
35. 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.
36. The notice of decision cites consideration 3(a) but does not explain its applicability to the specific circumstances of the Applicant's application.
37. A review of the information in question reveals that it does contain personal information of a person who is not the Applicant. Therefore the first element of consideration 3(a) is satisfied.
38. The Agency did not consider whether that personal information would be revealed if disclosed under the GIPA Act. Therefore the Agency has not demonstrated that the second element of consideration 3(a) is established and we cannot be satisfied that the use of consideration 3(a) in the public interest test is justified.
39. Because the information requested contains personal information, the Agency should also consider whether consultation with the relevant people under section 54 of the GIPA Act is appropriate.

Balancing the public interest test

40. The steps required to balance the public interest test are outlined in paragraphs 17 – 21 of this report. The notice of decision demonstrates that the Agency undertook the first two steps, identifying public interest considerations for and against disclosure of the information. But the use of the consideration against disclosure does not appear to be justified and the notice of decision does not demonstrate that the Agency attributed weight to the considerations. Therefore it is not clear how the Agency determined that the factors against disclosure outweighed those in favour in some instances.
41. It is also noted that the notice of decision states ‘...it is unreasonable to release that information [the personal information of other people] to you’. This could imply that the test used by the Agency, either as a substitute for the public interest test or complimentary with it, was a test of reasonableness. Reasonableness is not the test provided by the GIPA Act and should not be used when an agency decides an access application.

Searches and information

42. There are two instances of information requested not being found by the Agency. The first is the specific instance of Constable Lattouf’s notebook which relates to Event number E 5747 1174. The second is the fact that no Information Summary Reports were identified by the Agency.
43. In both cases the adequacy of the Agency’s searches must be examined to determine whether they were reasonable in the context of the application.
44. Section 53 of the GIPA Act sets out the requirement to conduct searches. Before deciding that it does not hold information, an agency must comply with the requirements of section 53(2) of the Act. The 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.
45. In *Smith v Commissioner of Police [2012] NSWADT 85*, Judicial Member Isenberg said at paragraph 27:

In making a decision as to the sufficiency of an agency’s search for documents which an applicant claims to exist, there are two questions:

 - (a) are there reasonable grounds to believe that the requested documents exist and are the documents of the agency; and if so,*
 - (b) have the search efforts made by the agency to locate such documents been reasonable in all the circumstances of a particular case.*
46. When considering whether there are reasonable grounds to believe that information exists and whether searches to locate information were reasonable, the facts, circumstances and context of the application is relevant. 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]).

47. The GIPA Act does not require an agency to include details of its searches in a notice of decision. However, it is good practice for 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.
48. It is reasonable for the Applicant to believe that Constable Lattouf's notebook exists and that there is an entry in the notebook relating to the Applicant because Constable Lattouf is required to have a notebook and the circumstances of the interaction between Constable Lattouf and the Applicant would tend to necessitate an entry in the notebook.
49. Regarding the searches for Constable Lattouf's notebook, the notice of decision states 'Inquiries were directed to the Campsie Local Area Command who advised that they were unable to find the relevant Notebook.' There is no further description of the actions taken to search for the notebook, either by the decision maker or the Local Area Command, therefore it is difficult to assess whether those actions were reasonable in the circumstances.
50. However, when considered in the context of the rules for police notebooks established by the Agency, it appears that the searches were likely not adequate and that further searches should have been undertaken to locate the requested information.
51. The *NSW Police Force Handbook (2015)* provides detailed instructions about how police notebooks are to be used and stored. It places great emphasis on the importance of police notebooks for recording events and actions, and also that notebooks might be relied on in the future. Consequently the Handbook establishes process for securely storing and retrieving notebooks. This includes that access to filed notebooks be controlled by a commander.
52. Therefore it appears that Constable Lattouf's notebook should exist, be held by the Agency and that the Agency's searches for the notebook were not reasonable in the circumstances.
53. With regards to the request for Information Summary Reports, it is reasonable to believe that they might exist given the nature of the Applicant's interaction with the Agency and the Agency's information collection activities. But it is not certain that Information Summary Reports would have been created in relation to the Applicant.
54. During the course of this review the Agency provided information regarding COPS Events and Information Summary Reports. It stated that they are different records created for different purposes although they may be linked through common elements and circumstances. However, that a COPS Event is created does not mean that an Information Report Summary will also be created and visa versa.
55. There are no mentions of Information Summary Reports in the notice of decision and it appears that they were not searched for. If this is the case then the Agency did not address that aspect of the request and its searches cannot be considered adequate.
56. It may be the case that the Agency did search for Information Summary Reports and there are none that fall within the scope of the application. But the notice of decision does not address that possibility.

57. It is recommended that the Agency conduct searches for Information Summary Reports related to the incidents listed by the Applicant and provide details of the searches when reconsidering its decision. If the searches identify relevant Intelligence Summary Reports it is recommended that the Agency decided whether to provide access to those reports.

Scope of application

58. There are three issues that arise in relation to the scope of the application and the information provided.
59. The first is that the Applicant did not request the COPS Event records. The Applicant made reference to COPS Events to explain what information he did seek access to. However, the Agency provided access to COPS Events records. The notice of decision does not make clear why the Agency provided access to the COPS Events records.
60. If the Agency provided the COPS Events records under section 76 of the GIPA Act as information not requested it should explain that this is the case in the notice of decision.
61. The second and third issues are best discussed with reference to the terms of the original application. The original application sets out the information requested in a table. An extract of the table is provided below.

Schedule

In this schedule the incidents means the stop, detain, questioning and search of Adel Mehanna... as defined by the corresponding COPS Event number, dates, times and locations and police involved as set out in the table below.

	The INCIDENTS COPS EVENT DATE, TIME, LOCATION NAMES OF POLICE INVOLVED	INFORMATION REQUESTED for the incidents
<i>B</i>	<i>E 4137 19191 7pm 25/5/12 Gordon Street Bankstown Shaw & Barton – Bankstown</i>	<i>1. Police notebooks of all police named in left hand column 2. Police notebooks of any other officer then working with the police named in the left hand column 3. Information Report Summary – part of Intelligence Information System</i>

62. The second issue relates to the second type of information requested, police notebooks of any other officer then working with the police named in the left hand column (see point 2 in the right hand column above). The notice of decision is silent on notebooks of police officers who were not identified in the application but were working with the police officers who were identified in the application.
63. It is not clear whether the Agency conducted searches for such notebooks and none were identified or whether no searches for such notebooks were undertaken.

64. It is recommend that the Agency, when reconsidering its decision, undertake searches for such notebooks and include information about those searches and decisions made in relation to the request in the notice of decision.
65. The third issue is that the Applicant has raised the question of what was asked for in relation to the notebooks generally.
66. The Agency, in the instances where it located the notebooks, provided access to the parts of the notebook that related to the Event Number provided by the Applicant and redacted the other information from the notebook.
67. Commenting on the refusal to provide access to Constable Barton's notebook the Applicant states:

The Applicant demands the full notebook... Constable Barton's notebook has been refused in full. How can you refuse a notebook in full that does not contain any material referable to the incident? The Application clearly requested notebooks referable to the COPS event in the left hand column. It is just plain nonsensical to refuse the irrelevant!
68. The Applicant made similar comments about other instances where access to notebooks was refused.
69. The question that arises here is, did the Agency correctly interpret the scope of the application as it applies to the notebooks?
70. Based on the structure and phrasing of the original request for information, it appears that the Agency correctly interpreted the scope of the application as it applies to the notebooks.
71. The heading used in the right hand column of the original request for information states 'INFORMATION REQUESTED for the Incidents'. This is reasonably interpreted as limiting the scope of the application to include only the information contained in the notebooks that relates to the incidents specified by the Applicant. Events other than those listed by the Applicant fall outside the scope of the application as provided by the Applicant.
72. This raises a question about the Agency's approach to deleting information from relevant records. The Agency deleted some information from notebooks on the basis that it was personal information of persons other than the Applicant. That approach is justified if that personal information sits within the information relating to the incidents that the Applicant identified as being within the scope of his application.
73. If the personal information of people other than the Applicant is contained in notebook entries not requested by the Applicant, that information falls outside the scope of the application. If this is the case, the information could be deleted under section 74 of the GIPA Act.
74. It may be that the Applicant did intend that the scope of the application be confined to specific sections of the notebooks when the application was originally made to the Agency but now wishes access to the notebooks in full. However, it is not possible to expand the scope of an application when making an application for external review.

Matters not considered

75. The Applicant also commented on differences between notebook entries and COPS Event entries. This appears to be a complaint that COPS Event records

are more detailed than the notebook entries despite being made some hours after the notebook entries.

76. The GIPA Act provides a mechanism for accessing government information that is contained in a record held by an agency. The GIPA Act does not govern or regulate the manner in which the Agency creates records. Complaints about that issue are outside the scope of the GIPA Act and are not considered as part of this review.
77. This review makes no further comments and no recommendations about those matters.

Recommendations

78. The Information Commissioner recommends, under section 93 of the GIPA Act, that Agency make a new decision with regards to the decisions to refuse access to information (both in part and in full) and that the information is not held.
79. In making a new decision, have regard to the matters raised and guidance relating to searches for information, considerations for and against disclosure and balancing the public interest test given in this report.
80. We ask that the Agency advise the Applicant and us of the actions to be taken in response to our recommendations within fifteen working days of the issuing of this report.
81. The Information Commissioner recommends, under section 95 of the GIPA Act, that the Agency take steps so that it correctly understands the scope of future requests and has processes in place to clarify the scope of an application when it is not clear.

Review rights

82. 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.
83. The Applicant has the right to ask the NCAT to review the Agency's decision.
84. 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>

85. 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

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

Elizabeth Tydd
Information Commissioner