



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

Applicant: Ms Leslie Iggleden  
Agency: Department of Family and Community Services  
Report date: 14 April 2015  
IPC reference: IPC14/R000624  
Keywords: Government information – conclusive presumption – risk of harm reports – prejudice supply of confidential information – disclose information provided in confidence – personal information – best interests of a child – public interest test

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## Summary

1. Ms Leslie Iggleden (the Applicant) with assistance from the Many Rivers Family Violence and Legal Service applied under the *Government Information (Public Access) Act 2009* (GIPA Act) to the Department of Family and Community Services (the Agency) for information about the removal and placement of her daughter.
2. The Information Commissioner recommends that the Agency reconsider its decision under section 93 of the GIPA Act, and make a new decision with respect to:
  - a. the request for “case notes for the period 31 July 2008 to 1 July 2010”;
  - b. two items of information that are not dates, contained in paragraph seven of page 90;
  - c. paragraphs 11-12 of page 32 - no reasons were given for withholding this information;
  - d. page 2 – it is not clear what personal information would be revealed if this information was disclosed;
  - e. paragraph 5 on page 33 – we are not satisfied that this information would be revealed to the Applicant if it was disclosed; and
  - f. paragraph 7 on page 33 – we are not satisfied that this information would be revealed to the Applicant if it was disclosed.
3. On our review of the documents we observed that additional information was redacted on the basis of a conclusive presumption of an overriding public interest against disclosure. The Information Commissioner recommends:
  - a. under section 93 of the GIPA Act that the Agency reconsider this information in light of the guidance provided in paragraphs 25-31 of this report; and
  - b. under section 92 of the GIPA Act that in future decisions the notice of decision and schedule of documents clearly identify the reasons for all redacted information.

## Information requested

4. The Applicant applied under the GIPA Act to the Agency for access to copies of the following information:
  - a. *Any/all affidavits submitted for Community Services to the Court supporting the Emergency Care and Protection Order in or about January 2007;*
  - b. *Any/all affidavits submitted for Community Services to the Court that accompanied the Care Plan filed 4 April 2007;*
  - c. *Any/all Case Plan meeting notes pursuant to section 4 of the Care Plan filed 4 April 2007;*
  - d. *Transition plan pursuant to section 4 of the Care Plan filed 4 April 2007; and*
  - e. *Case notes for the period 31 July 2008 to 1 July 2010.*

## **Decision under review**

5. 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.
6. In accordance with section 97 of the GIPA Act, in this review it is the Agency who bears the burden of establishing that its decision is justified.
7. In the course of this review we have considered the Agency's decision and information provided by the parties, including an unredacted copy of the information that was withheld.

## **Request for case notes and information withheld without reasons**

8. In its decision issued on 18 September 2014, the Agency responded to the first four items in the access application but did not respond to the fifth item (the fifth item requested case notes for the period 31 July 2008 to 1 July 2010). This appears to have been an oversight on the part of the Agency, as the fifth item was on a different page of the access application to the other four items. The Information Commissioner recommends that the Agency make a new decision about the case notes as this was not addressed in the original decision.
9. With respect to the first four items, the Agency decided to provide access to some information and to refuse access to other information because of an overriding public interest against disclosure.
10. We also note that information was redacted from paragraphs 11-12 of page 32, however it is not clear on what basis this information was withheld. We recommend this information is also reconsidered because, in the absence of a reason to withhold the information, we cannot find that this redaction is justified.

## **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 listed the following public interest considerations in favour of disclosure of the information in issue:
  - a. the information is about the Applicant and her family, and there is a general public interest in individuals being aware of the nature of records held about them by Government agencies;
  - b. there is a general understanding that the public interest is best served by transparency in Government decision-making – transparency is best achieved when access to Government records is permitted; and
  - c. section 5 of the GIPA Act provides a general presumption in favour of the disclosure of government information and section 9 provides a legally enforceable right for individuals to receive access to government information for which they have applied except where there is an overriding public interest against disclosure of the relevant information.

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

18. The only public interest considerations against disclosure that can be considered are those in schedule 1 and section 14 of the GIPA Act.
19. 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.
20. 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.
21. In its notice of decision the Agency raised one conclusive presumption of an overriding public interest against disclosure from schedule 1 to the GIPA Act and four public interest considerations against disclosure of the information from the table to section 14 of the GIPA Act.
22. The conclusive presumption of an overriding public interest against disclosure is found in clause 10 of schedule 1 to the GIPA Act:

*It is to be conclusively presumed that there is an overriding public interest against disclosure of information contained in a report to which section 29 of the Children and Young Persons (Care and Protection) Act 1998 applies.*
23. The four public interest considerations from the table in section 14 of the GIPA Act are listed below, which provide that there is a public interest consideration against disclosure of information if its disclosure could reasonably be expected to:

- a. 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);
  - b. 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);
  - c. reveal an individual's personal information (clause 3(a) of the table to section 14 of the GIPA Act); and
  - d. in the case of the disclosure of personal information about a child—the disclosure of information that it would not be in the best interests of the child to have disclosed (clause 3(g) of the table to section 14 of the GIPA Act).
24. I will discuss each of these considerations and how they were applied by the Agency to the information in turn.

### **Conclusive presumption against disclosure – risk of harm reports**

25. If information falls within the scope of one of the clauses in schedule 1 to the GIPA Act, then it is conclusively presumed that it is not in the public interest to release the information. This means that the agency is not required to balance the public interest considerations for and against disclosure before refusing access to the information.
26. Clause 10 of schedule 1 to the GIPA Act provides that it is to be conclusively presumed that there is an overriding public interest against disclosure of information contained in a report to which section 29 of the *Children and Young Persons (Care and Protection) Act 1998* (CYPCP Act) applies.
27. Section 29 of the CYPCP Act provides protection for people who make reports or provide certain information, in good faith, to the relevant Director-General. Section 29(1)(f) provides that the identity of the person who made a report about children who may be at risk of harm, and any information which could identify them, must not be disclosed except with the consent of the person who made the report.
28. If a report is a report to which section 29 applies and is made in good faith, section 10 will apply to that report. The question of whether a report is made “in good faith” should be determined as a question of fact on the ordinary meaning of “good faith”: whether it was made honestly. If a report is not made in good faith, section 29 will not apply and nor will the conclusive presumption against disclosure.
29. While section 54 of the GIPA Act requires an agency to consult with third parties under certain circumstances, this does not apply to information that falls within the scope of schedule 1. There is no requirement on an agency to consult before claiming this conclusive presumption against disclosure.
30. The schedule of documents indicates that the only items of information redacted in reliance on this presumption appear on pages 90-91. The information provided to us by the Agency indicates that four items were redacted from paragraph 7 of this document in reliance on this conclusive presumption. We are satisfied that the presumption applies to two of the items, which are dates. However, we are not satisfied that the other two redacted items constitute information “contained in a report to which section 29 of the

CYPCP Act applies.” For this reason we recommend that the Agency reconsider its decision with respect to those two items of information.

31. On our review of the documents we observed that additional information (for example some information on pages 29-34) were also redacted on this basis. We are satisfied that the presumption applies to that some of information, however we recommend that the Agency reconsider this information in light of the guidance provided above.

**Consideration 1(d) – prejudice the supply to an agency of confidential information that facilitates the effective exercise of that agency functions**

32. 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).*

33. 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.
34. 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.
35. 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.
36. We have reviewed the information on pages 29-34 and 165-167 that was redacted on this basis. Some of this information was collected under a legislated process (this is referred to in the documents as a ‘section 248’) and other information was collected from individuals. We are satisfied that the information collected from individuals falls within this consideration, however we are not satisfied that the Agency has justified the application of this consideration with respect to information collected under section 248. We asked the Agency for information about section 248 requests as at the relevant time and were provided with a copy of section 248 of the *Children and Young Persons (Care and Protection) Act 1998*. This provision allows the Agency to direct a prescribed body to furnish it with information relating to the safety, welfare and well-being of a child or young person. It is the duty of a prescribed body to whom a direction is given to comply promptly with the requirements of the direction. As the section 248 requires the prescribed body to provide the information we are not satisfied that disclosure would prejudice supply of such information to the Agency in the future.



### **Consideration 1(g) – found an action against an agency for breach of confidence or otherwise result in the disclosure of information provided to an agency in confidence**

37. 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).*

38. 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.
39. In raising this public interest consideration against disclosure the Agency needs to ensure the information is in fact confidential.
40. 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.
41. In each circumstance where the Agency applied this consideration against disclosure it did so in conjunction with the consideration against disclosure at clause 1(d) of the table to section 14 of the GIPA Act. Our comments about the information redacted on this basis are set out above. We note that whether or not the information was compelled under a section 248 is not relevant to the application of consideration 1(g), as there is no concern with prejudice of future supply of information. However, we are not satisfied that the information provided under a section 248 was provided in confidence and note that there is no requirement in section 248 of the *Children and Young Persons (Care and Protection) Act 1998* that information provided is held in confidence.

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

42. 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.*

43. 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]*

44. 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.
45. 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.
46. 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.
47. The Agency redacted information based on this consideration from pages 1-2, 29-34, 90-91 and 165-167. We have reviewed this information and we are satisfied that the Agency’s decision is justified except for the redactions at:
  - a. page 2 – it is not clear what personal information would be revealed if this information was disclosed.
  - b. paragraph 5 on page 33 – we are not satisfied that this information would be revealed to the Applicant if it was disclosed.
  - c. paragraph 7 on page 33 – we are not satisfied that this information would be revealed to the Applicant if it was disclosed.

### **Consideration 3(g) – best interests of a child**

48. Clause 3(g) of the table to section 14 of the GIPA Act provides:
 

*Individual rights, judicial processes and natural justice*

*There is a public interest consideration against disclosure of information if disclosure of the information could reasonably be expected to have one or more of the following effects:*

...

*(g) in the case of the disclosure of personal information about a child—the disclosure of information that it would not be in the best interests of the child to have disclosed.*
49. In order to rely on this clause as a consideration against disclosure, an agency must show that releasing the information could reasonably be expected to have the effect outlined in clause 3(g) and base this on substantial grounds.
50. The definition of the phrase “could reasonably be expected to” means more than a mere possibility, risk or chance and must be based on real and substantial grounds and not be purely speculative, fanciful, imaginary or contrived.
51. For this consideration to apply the information must be personal information about a child and the Agency must demonstrate why disclosure would not be in the child’s best interests.
52. The Agency redacted information based on this consideration from pages 29-34 and 165-167. We have reviewed this information and are satisfied that it applies to the relevant withheld information on page 165-166. However we are not satisfied that it applies to the information relevantly withheld from



paragraphs 8 and 9 on page 32. We note that the information withheld from paragraphs 8 and 9 on page 32 was also withheld on the basis that disclosure could reasonably be expected to reveal personal information. We are satisfied that on that ground the redaction was justified so we do not make any recommendation about these paragraphs.

### **Was the Agency's decision justified?**

53. 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.
54. 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;
  - 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;
  - c. make a decision about which way the balance lies, in light of the weight in favour and against
55. 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.
56. 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.
57. Having considered the reasons provided by the Agency in its notice of decision and the content of the withheld information, we are satisfied that the Agency's decision is justified except for the recommendations outlined below.

### **Recommendations**

58. The Information Commissioner recommends that the Agency reconsider its decision under section 93 of the GIPA Act, and make a new decision with respect to:
  - a. the request for "case notes for the period 31 July 2008 to 1 July 2010";
  - b. two items of information that are not dates, contained in paragraph seven of page 90;
  - c. paragraphs 11-12 of page 32 - no reasons were given for withholding this information;
  - d. page 2 – it is not clear what personal information would be revealed if this information was disclosed;

- e. paragraph 5 on page 33 – we are not satisfied that this information would be revealed to the Applicant if it was disclosed; and
  - f. paragraph 7 on page 33 – we are not satisfied that this information would be revealed to the Applicant if it was disclosed.
59. On our review of the documents we observed that additional information was redacted on the basis of a conclusive presumption of an overriding public interest against disclosure. The Information Commissioner recommends:
- a. under section 93 of the GIPA Act that the Agency reconsider this information in light of the guidance provided in paragraphs 25-31 of this report; and
  - b. under section 92 of the GIPA Act that in future decisions the notice of decision and schedule of documents clearly identify the reasons for all redacted information.
60. We ask that the Agency advise the Applicant and us by **24 April 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**