



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

Applicant: Bashir Fazli
Agency: NSW Police Force
Report date: 29 April 2016
IPC reference: IPC15/R000487
Keywords: Government information – adequacy of searches – prejudice
the investigation of a contravention of possible contravention of
the law – personal information

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Summary

1. Mr Bashir Fazli (the Applicant) represented by Ms Andrea Turner (Solicitor and Barrister) applied for information from the NSW Police Force (the Agency) under the *Government Information (Public Access) Act 2009* (GIPA Act).
2. The Agency provided access to some information with redactions, refused access to some information in full and decided that some of the information requested was not held by the Agency.
3. The Information Commissioner makes the following recommendations in relation to the Agency's decision:
 - a. That pursuant to section 93 of the GIPA Act the Agency make a new decision by way of internal review with particular regard to the information sought in relation to Part C1 - third arrest, and the:
 - i. searches conducted in relation to the Applicant's request for police notebooks and diary entries.
 - ii. information withheld on the grounds of clause 2(b) and of the table to section 14 of the GIPA Act.

Background

4. Ms Turner applied under the GIPA Act to the Agency for access to information regarding several separate arrests of the Applicant.
5. On 3 August 2015 the Agency acknowledged receipt of the application and noted that the access application was 11 pages and contained over 60 requests for information.
6. The Agency requested that the Applicant amend the application to reduce the scope.
7. On 18 August 2015 the Applicant amended the scope of the GIPA application as follows:

Part A - In relation to the first arrest at McDonalds Merrylands at about 1.30am 8 March 2014 the Applicant sought:

- a. All Computerised Operational Policing Systems (COPS) event entries
- b. All reports in the NSW police service *Intelligence Information System* – concerning 'intelligence' connected to the white Nissan Pulsar registration no BY 65 XE with the Applicant as the registered owner
- c. all notes concerning the placing of the Applicant in the police paddy wagon
- d. All notes made by police officer surname 'Shepherd'
- e. All in car video and audio
- f. All documents that record the identify of police drivers and passengers in all attending police cars

Part B - In relation to the second arrest at 12.45am 18 May 2015 at no 625 Victoria Road, Ermington

- a. All Computerised Operational Policing Systems (COPS) event entries

- b. All notes from diaries and notebooks kept by police
- c. All video and audio from whatever source
- d. All documents that record the identity of the drivers and passengers in the 4 attending police cars, namely: call sign RY 36; registration number CD 33 KX with call sign RY 13; registration number CB 56 HR with call sign RY 15 (a paddy wagon); registration number CB 30 MP with call sign RH 18)

Part C1 - The third arrest at about 12.20am on 20 March 2015 at Caltex Woolworths service station 404 Parramatta Road Strathfield

- a. All Computerised Operational Policing Systems (COPS) event entries.
- b. All reports in the NSW police service *Intelligence Information System* – including *Information Report Summary* – concerning vehicle with registration number YNL 552.
- c. All notes from diaries and notebooks kept by police.
- d. All documents that record the identify of police drivers and passengers in police car registration number BW 88 BU and CB 60 NM.

Part C2 -The fourth arrest – About 10mins after release from the third arrest – at about 10.30pm on 20 March 2015

- a. All Computerised Operational Policing Systems (COPS) event entries

Part C3 -The fifth arrest – At about 11.30pm on 20 March 2015

- a. All Computerised Operational Policing Systems (COPS) event entries

Part D - The sixth arrest – At 1.10pm 1 June 2015 at 39 O’Connell street Parramatta

- a. All Computerised Operational Policing Systems (COPS) event entries
- b. All documents that record the identify of police drivers and passengers in the attending 2 police cars: registration numbers CD 58 KY and BZ 30 EZ.

8. In its decision issued on 2 September 2015 the Agency decided:
 - a. to provide access to some information in part;
 - b. to refuse access to some information in full; and
 - c. that some of the information was not held by the agency.
9. In seeking a review of the decision by the Information Commissioner, the Applicant states that this review application is only concerned with the Agency’s response to Part C1 – the third arrest. Therefore, we have confined our external review to this aspect of the decision.
10. In seeking a review the Applicant presses for the:

“COPS Event, Intelligence report, police notebooks and names of police cross referenced to their Raptor nos as provided by the Applicant in the access application process”.

Decisions under review

11. The decisions under review are the Agency's decisions to:
 - a. provide access to information in part;
 - b. refuse access to some information in full;
 - c. that some information is not held by the Agency.
12. The Agency's decision in relation to the Applicant's request for access to information in relation to Part C1- the third arrest was as follows:

Part C1		
IAU Ref No	Document Description	Decision T= Section 14 Table
22-25	Intelligence Report 157924729	Refused in full T2(b)
26	Duty Book of Kanard	Released in Part T3(a) , T2(b)
	Identity of attending police in reg BW 88 BU and CB 60	S/Cst Kanard, S/Cst Asquini, S/Cst Grant. S/Cst Smith of strike force RAPTOR

The public interest test

13. 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.
14. 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.
15. 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.
16. 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.
17. 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

18. 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).
19. 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;
 - b. The general right of the public to have access to government information held by agencies;
 - c. The release of the information requested could reasonably be expected to promote accountability of this agency;
 - d. The identify of officers performing public duties is required to be given to a suspect under the *Law Enforcement (Powers and Responsibilities) Act 2002 S202(1)(B)*. This is a safeguard under the Act and may facilitate accountability on the exercise of police powers;
 - e. In some cases the information relates to the Applicant.
20. The Agency apportioned strong weight to each of these public interest considerations.

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 two public interest considerations against disclosure of the information, deciding that its release could reasonably be expected to:
 - a. prejudice the prevention, detection or investigation of a contravention or possible contravention of the law or prejudice the enforcement of the law (clause 2(b) of the table to section 14 of the GIPA Act); and
 - b. reveal an individual’s personal information (clause 3(a) of the table to section 14 of the GIPA Act); and
25. I will discuss each of these considerations in turn.

Consideration 2(b) – prejudice the investigation of a contravention or possible contravention of the law

26. Clause 2(b) 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 prejudice the prevention, detection or investigation of a contravention or possible contravention of the law or prejudice the enforcement of the law (whether in a particular case or generally).

27. In order to establish that this consideration applies, the Agency has to establish that disclosing the information could reasonably be expected to:
- a. prejudice the prevention, detection or investigation
 - b. of a contravention or possible contravention of the law.
 - c. or that disclosing the information could reasonably be expected to prejudice the enforcement of the law.
28. This requires an explanation about:
- a. what prejudice would be caused and how,
 - b. to which investigation (in general terms only, not including the details of the investigation),
 - c. in respect of what contravention,
 - d. to which law.

29. The Agency has noted that:

Police rely on these reports in investigating crime and they are generally not revealed to the person about whom they relate because this would assist a person subject of such a report to evade detection and investigation by police.

30. We are not satisfied the Agency has established the elements of this consideration in circumstances in which the notice of decision does not identify how this consideration relates to the information which is the subject of the GIPA application.
31. A more detailed discussion of the information in question is required in order to establish a connection between it and the assertion that this consideration applies.
32. It is recommended that in making a new decision, the Agency provide a sufficiently detailed description of the information in question, name the relevant considerations against disclosure which it believes to be relevant and establish the nexus between the information and the elements of the consideration in clause 2(b) of the table at section 14 of the GIPA Act, before attributing weight to the respective consideration.

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

33. 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.

34. 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]
35. 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.
36. 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.
37. In order to establish that this consideration applies, the Agency has to:
 - a. identify whether the information is personal information; and
 - b. consider whether the information would be revealed by disclosing it under the GIPA Act.
38. The Agency noted that in determining whether this was a relevant consideration against disclosure the Agency took into account the personal factors of the Applicant provided for in section 55 of the Act.
39. The Agency identified a document with IAU reference 26 as a document containing personal information.
40. We have considered the un-redacted information and are satisfied that the information is personal information as defined in the GIPA Act.
41. The second limb of the test requires that the Agency consider whether the information would be revealed by disclosing it under the GIPA Act.
42. The Agency noted as follows:

Under section 55 of the Act this agency is entitled to take personal factors of an application, including the relationship between two persons, into account where such a question is relevant to the public interest balancing test.

In relation to the events I have decided that the names of persons that were also present at the incident would be known to FAZLI and that therefore it is not necessary to remove them as personal information. I have decided that it is reasonable to believe that the other personal information about those persons, including their contact details and criminal histories may be personal information that would be revealed to the applicant.
43. We have considered the information redacted and note that the information redacted is likely to be revealed should it be released to the Applicant as it extends to information beyond the names of persons present at the incident.
44. For these reasons we are satisfied that the Agency has established this as a valid public interest consideration against disclosure.

Searches for information

45. The Applicant has a legally enforceable right to access information that is relevant to their request.
46. Section 53(2) of the GIPA Act provides that

An agency must undertake such reasonable searches as may be necessary to find any of the government information applied for that was held by the agency when the application was received. The agency's searches must be conducted using the most efficient means reasonably available to the agency.
47. The expression 'government information' is defined in section 4 of the GIPA Act as 'information contained in a record held by an agency.'
48. 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.
49. 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.*
50. 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 are relevant.
51. The Applicant's request for access to information in relation to Part C1 – the third arrest specifically included a request for access to the following:
 - a. *All computerised Operational Policing Systems (COPS) event entries.*
 - b. *All reports in the NSW police service Intelligence Information System – including Information report Summary – concerning vehicle with registration number YNL 552.*
 - c. *All notes from diaries and notebooks kept by police.*
 - d. *All documents that record the identify of police drivers and passengers in police car registration number BW 88 BU and CB 60 NM.*
52. The NSW Police Force Handbook (November 2015) requires officers to record in their notebook, at a minimum, various matters including the exercising of an arrest power including why it was exercised. On that basis we are satisfied that there are reasonable grounds to believe that the document to which access was sought i.e notebook and diary entries should exist in relation to the Applicant's arrest.

53. The Agency's notice of decision states that :

In response to this application a search of the Computerised Operational Policing System (COPS) was carried out and printouts obtained. Enquiries were also directed to RYDE, HOLROYD, PARRAMATTA Local Area Commands, FLEET SERVICES and STATE CRIME COMMAND.

54. The Agency's notice of decision is silent about the searches conducted in relation to the notes from diaries and notebooks kept by police and provides no further information about why this information does not exist or why it cannot be located. For this reason we are not satisfied that the Agency has discharged its obligations in regard to searches as set out in *Smith v Commissioner of Police* outlined above.
55. We are not satisfied, on the basis of the information contained in the Agency's notice of decision that reasonable searches were undertaken to locate all 'notes from diaries and notebooks kept by police'.

Recommendations

56. The Information Commissioner recommends under section 93 of the GIPA Act that the Agency make a new decision, by way of internal review with regard to the Applicant's request for access to information as outlined in Part C1 – the third arrest.
57. In making a new decision, we recommend the Agency have regard to the matters raised and guidance given in this report.
58. We ask that the Agency advise the Applicant and us by **13 May 2016** of the actions to be taken in response to our recommendations.

Review rights

59. 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.
60. The Applicant has the right to ask the NCAT to review the Agency's decision.
61. 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>
62. 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

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

Elizabeth Tydd
Information Commissioner