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

Applicant:	Office of the Leader of the Opposition in the NSW Legislative Assembly
Agency:	Office of the Minister for Police and Counter-terrorism
Report date:	17 November 2023
IPC reference:	IPC23/R000527
Agency reference	A5812968
Keywords:	Government information – prejudice deliberative processes – inhibition of frankness and candour – the requirements to weigh relevant considerations – information not held – retrieval of versions from collaborative software
Legislation cited:	*Government Information (Public Access) Act 2009*
Cases cited:	*Amos v Central Coast Council* [2018] NSWCATAD 101; *Fitzpatrick v NSW Office of Liquor and Gaming* [2010] NSWADT 72; *Commissioner of Police, NSW Police Force v Camilleri (GD)* [2012] NSWADTAP 19; *McKinnon v Secretary, Department of Treasury* [2006] HCA 45; *Taylor v Office of Destination NSW* [2018] NSWCATAD 195; *Wojciechowska v Commissioner of Police (NSW)* [2020] NSWCATAP 173; *Davidson v NSW Department of Education and Training* [2013] NSWADT 25; *Stanley v Roads and Maritime Services (NSW)* [2014] NSWCATAD 123; *MJ v Department of Education and Communities* [2014] NSWCATAD 12

This review has been conducted under delegation by the Information Commissioner pursuant to Section 13 of the *Government Information (Information Commissioner) Act 2009*

Summary

The Office of the Leader of the Opposition in the NSW Legislative Assembly (the Applicant) applied for information from the Office of the Minister for Police and Counter-terrorism (the Agency) under the *Government Information (Public Access) Act 2009* (GIPA Act).

The Agency decided to refuse to provide access to certain emails because of concerns about effective agency function.

The Applicant applied for an external review by the Information Commissioner contesting the decision and raising concerns about the sufficiency of the agency's searches.

The review of the Agency's information and decision concluded that its decision is not justified.

The reviewer recommends the Agency make a new decision.

Background

1. On 17 May 2023, NSW police officers were involved in a critical incident which resulted in the death of an aged care resident. The incident became the subject of significant media and parliamentary scrutiny.
2. On 24 July 2023, the Applicant applied under the GIPA Act to the Agency for access to the following information:
    a. *All documents created between 17 May 2023 and 31 May 2023 relating to the critical incident involving the tasering of Mrs Clare Nowland in Cooma (the "Incident" (whether or not Mrs Nowland is named in that document) in the possession, custody or control of the Minister for the Police and Counter-terrorism (the "Minister") and/or the Minister's Office.*
    b. *I note that an application in similar terms has been made to the Office of the Premier and that a related application has been made to the NSW Police Force.*
    c. *The categories of documents being applied for include but are not limited to:*
        i. *text messages, messages sent on other messenger services and any attachments to those messages;*
        ii. *all versions of departmental briefings, documents relating to media releases and talking points and any versions of those document; and*
        iii. *emails and attachments*
    d. *The documents sought include but are not limited to:*
        i. *Drafts of documents intended to provide information to the public about the Incident, whether prepared by officials in the NSW Police Force, the Premier's Office or the Minister's Office*
        ii. *Briefings, file notes or other documents about, and/or notifications of, meetings held between any of the NSW Police Force, members of the family of Mrs Nowland or the aged care facility, including any documents disclosing the dates and times of those meetings, who was present and what was discussed.*
        iii. *Briefings, file notes or other documents received by the Premier, the Minister and/or their staff in relation to the Incident.*
        iv. *Communications to or from the Premier, the Minister and/or their staff regarding the incident or developments in relation to the Incident*
3. The Agency consulted with the NSW Police Force and the Office of the Premier of NSW about the records subject to the access application and the NSW Police Forces provided objections to the public disclosure of the records.
4. In its Notice of Decision issued on 1 September 2023, the Agency decided:
    a. to refuse to provide access to 193 constituent letters about the Incident based on a privacy-related public interest concern.

b. to refuse to provide access to a record of legal advice from the NSW Police Force's Office of the General Counsel

c. to refuse to provide access to six notes pertaining to Parliamentary business because of public interest concern including anticipated prejudice to Ministerial responsibility

d. to partially refuse to provide access to various emails making redactions on public interest grounds involving concerns about an inhibition of frankness and candour within an agency

e. that some of the information sought is already available to the Applicant.

5. On 6 September 2023, the Applicant sought an external review by the Information Commissioner. The Applicant raised their concerns about the decision of the Agency, claiming that:

a. the Agency's decision to redact information from emails (see paragraph 4(d) of this report) was incorrect because public interest claims had been misapplied; and

b. the Agency's searches for the government information applied for, were incomplete.

Decision under review

6. The Information Commissioner has jurisdiction to review the decision made by the Agency pursuant to section 89 of the GIPA Act.

7. The decisions under review are the Agency's decisions:

a. to refuse to provide access to information because there is an overriding public interest against disclosure (section 58(1)(d) of the GIPA Act)

b. that no further information is held by the agency (being an implied decision[1]).

8. These are reviewable decisions under section 80(d) and 80(e) of the GIPA Act, respectively.

Government information at issue

9. This review covers the 29 pages of records located by the Agency in response to the Applicant's access application (identified in the Agency's notice of decision as pages *1-20* and *23-31*). These records are emails from the time of the Incident which are about:

a. The critical incident generally

b. The NSWPF press conference

c. the Government's position on the incident

d. a review by the Law Enforcement Conduct Commission

e. Media statements and draft messaging

f. a Change.org petition

g. Notes for the Minister

[1] *Amos v Central Coast Council* [2018] NSWCATAD 101

h. Proposed responses to constituents.

10. Upon requesting a review by the Information Commissioner, the Applicant confirmed that they seek review of the decisions to redact information from each of the 29 pages of emails.

Further information sought

11. In respect of the Applicant's concerns about incomplete searches (see paragraph 5(b) of this report), the Applicant did not point to a specific record which they desired, instead they raised broader concerns about the absence of certain contextual emails (i.e Minister's approval of statements), briefing materials, drafts, and text messages.

Material considered

12. During this external review, I have examined information provided by both the Applicant and the Agency including:

a. submissions provided by the Applicant attached to their external review application

b. redacted and unredacted copies of the information in issue

c. the objections of the NSW Police Force

d. information about searches conducted by the Agency

The Applicant's submissions

13. When requesting a review of the Agency's decision by the Information Commissioner, the Applicant raised the following relevant concerns:

a. [The Agency] seems to have taken a very cavalier attitude to transparency. In particular, the decision-maker seems to have been very trigger-happy [in] claiming exemptions…

b. It would appear…no attempt has been made to identify or provide documents of any description other than emails.

c. That the Agency public interest claims about public officials being inhibited from providing frank and candid advice were not well founded because relevant deliberations were not current and prejudice anticipated was not realistic:

> *Given the ongoing obligations of staffers to support the work of the Minister per Fitzpatrick[2] at [173]…it is difficult to conceive how the disclosure of these documents would prevent those staffers from doing their work, albeit in a more considered manner.*

The public interest test

14. 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.

[2] *Fitzpatrick v NSW Office of Liquor and Gaming* [2010] NSWADT 72

Public interest considerations in favour of disclosure

15. In its Notice of Decision, the Agency accounted for the following public interest considerations in favour of disclosure of the information in issue:
    a. the general public interest in favour of disclosing government information (section 12(1))
    b. 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 (section 12(2)(a))
16. I am satisfied that the Agency's public interest determination accounted for relevant considerations in favour of disclosure in all the circumstances.

Public interest considerations against disclosure

17. In its Notice of Decision, the Agency raised the following public interest considerations against disclosure of the information, deciding that its release could reasonably be expected to:
    a. reveal a deliberation or consultation conducted, or an opinion, advice or recommendation given, in such a way as to prejudice a deliberative process of government or an agency (clause 1(e) of the table to section 14 of the GIPA Act)
    b. 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)
18. For further information about the application of the public interest considerations against disclosure, see the Public Interest Consideration (PIC) Resource on the IPC website.

The public interest in responsible and effective government

Related public interest claims

19. The Agency's Notice of Decision does not provide reasons which expressly address clause 1(f) (prejudice the effective exercise by an agency of the agency's functions) as would be required to justify its reliance upon this consideration against disclosure. As such, implicit in the Agency's reasons is a finding that prejudice to the general conduct of an agency's deliberative processes will necessarily be detrimental to the effective exercise of that agency's functions. To properly make this finding the Notice of Decision ought to have identified the function/s of concern and explained how deliberative processes are involved in the exercise of these functions.
20. In view of the nature of the Agency's reasons, the analysis which follows is focused upon the Agency's primary public interest claim which has been made under clause 1(e) noting that in my view clause 1(f) has not been made out.

Principles

21. For clause 1(e) to be a relevant public interest consideration against disclosure, the Agency must establish the elements of the clause are applicable in the circumstances. Based on the Agency's claims the Agency must establish that disclosing the information could reasonably be expected to:

a. "reveal" the government information meaning the information must not have already been publicly disclosed (See Schedule 4, Clause 1 of the GIPA Act); and

b. the information must constitute opinion, advice or recommendation given; and

c. the revelation must occur in "such a way" as to prejudice a deliberative process of government or an agency. Meaning there must be an appropriate connection established between the government information and the prejudice anticipated (see *Wall v University of Sydney* (2008) NSWADT 213 at [36])

22. The meaning of the term "deliberative process" was considered by the Administrative Appeals Tribunal, in *Re Waterford and Department of the Treasury (No 2)* (1984) 5 ALD 588 at [58] to [61]. The AAT held that the deliberative processes involved in the functions of an agency are its thinking processes – the processes of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action (at [58]). The Tribunal adopted this analysis within the GIPA Act context in *Fire Brigade Employees' Union v Fire and Rescue (NSW)* [2014] NSWCATAD 113, considering whether documents in issue formed part of the agency's "internal thinking".

23. The standard required to establish that the claimed effects of disclosure "could reasonably be expected" is that the opinion must be based on "real and substantial grounds" (see *Newcastle City Council v Newcastle East Residents Action Group* [2018] NSWCATAP 254).

24. The Appeal Panel in *Commissioner of Police, NSW Police Force v Camilleri (GD)* [2012] NSWADTAP 19 relevantly held that considerations pertaining to effective agency function should be examined at a "**broad operational level**" in considering their relevance to the public interest balancing exercise.

Agency's case

25. The Agency's notice of decision sets out their reasoning for relying on clause 1(e):

> *I considered that disclosure of information may prejudice a deliberative process of government or an agency.*
>
> *The documents disclose advice given by staff. The documents contained information to be publicly released in connection with an at the time ongoing investigation into a major incident. They were therefore prepared via a deliberative process of an agency. It is reasonably expected that officials would be inhibited in recording their candid opinions, advice or recommendations in relation to communications regarding major incidents if they were made aware that a document would be made public. Officials may also feel reluctant to commit their views in writing and may only feel comfortable participating in deliberations orally. Officials should be free to do in written form what they could otherwise do orally, in circumstances where any oral communication would remain confidential. Such written communications ensure communications ensure that a proper record is maintained of the matters considered in what is a case that has attracted considerable attention…*

Consideration

26. Frankness and candour claims are established as legitimate having been tested in right to information case law. These claims have at their heart concerns with relation to the inhibition of ideas, views, opinions or assessments of public officials and the desirability of written communications (see *McKinnon v Secretary, Department of Treasury* [2006] HCA 45).

27. I have examined each of the various emails at issue. I am satisfied that they contain advice and/or recommendations as claimed by the Agency and on the evidence before me, I am also satisfied that the redacted material has not been previously revealed.

28. The Agency's findings of fact in respect of the anticipated prejudice are somewhat vague. The Agency's explanation is concerned with future deliberations, but it is not made clear which agency's deliberative processes are of concern in respect of each piece of information at issue and the agency does not support their opinion with an example of any specific prospective deliberations which might be impacted.

29. Notwithstanding, it is an obvious fact that the records at hand pertain to a significant and contentious matter. This fact supports the Agency's claim that revelation of the information may negatively impact deliberative processes. In the case of *Thomson v Commissioner of Police* [2021] NSWCATAD 53 the Tribunal found that government information pertaining to Police misconduct matters constituted "sensitive deliberations" and so held:

> *Staff may feel inhibited in providing frank and honest views regarding such issues, or may decline to participate in the deliberative process altogether. Staff may also feel reluctant to commit their views in writing, and may only feel comfortable participating in deliberations orally.*

30. Further, in the case of *Ryan v NSW Minister for Planning and Open Spaces* [2021] NSWCATAP 221 the Appeal Panel relevantly found that frankness and candour claims may be realistic where some expectation of confidentiality on the part of involved public officials exists:

> *…It is open for an employee to know that an application may be made for access to that information and to also know that some information may be protected from disclosure.*

31. Having regard to the objections of the NSW Police Force, the sensitive nature of the material redacted and the significant context in which it was created, I am satisfied that the Agency's claim - that disclosure of information of the kind in issue could reasonably be expected to prejudice a deliberative process of an agency – is based on reasonable grounds.

Balancing the public interest

32. At external review the burden of establishing that the decision is justified lies on the Agency (see section 97).

33. In this respect it is notable that the Agency's decision does not provide findings which specify the weight that has been afforded to the considerations against disclosure in relation to each record. The decision simply explains:

> *I have decided that where noted in the tables above, the public interest consideration in favour of disclosure are outweighed by the public interest considerations against disclosure.*

34. The weight which is afforded to each of the various public interest considerations favouring and against disclosure is material to a public interest determination. As stated at section 13 of the GIPA Act:

> *There is an overriding public interest against disclosure of government information for the purposes of this Act if (**and only if**) there are public interest considerations against disclosure and, on balance, those considerations outweigh the public interest considerations in favour of disclosure.* (emphasis added)

35. Section 61(b) of the GIPA Act requires that the reasons in a notice of decision must state all material findings of fact. In this instance the absence of an explanation as to the differing weights afforded to public interest factors is inconsistent with the section 61 obligation.

36. In examining the records involved, it is evident that a significant amount of information has been withheld by way of redaction. The fact that the government information at issue is numerous, diverse and of differing origin, makes it difficult to reconstruct the reasoning underlying some of these redactions.

37. Having regard to the varied nature of the government information at issue, it would appear necessary for the Agency to explain how public interest considerations have been applied to each record.

38. While I have found that there is substance in the Agency's accounting of *considerations* involving effective agency function, the section 14 clauses are not exemptions. This means the balance of public factors may differ between distinct records based on the content and context of each record.[3]

39. I refer the Agency to the case of *Taylor v Office of Destination NSW* [2018] NSWCATAD 195, where the Tribunal was critical of an approach which applies the public interest test to categories of documents. As the Tribunal stated at [20]:

> *It is the Respondent's obligation to identify the information contained in each document which it says should be withheld from the Applicant because the public interest considerations against disclosure of the information contained in the document outweigh those in favour.*

40. Additionally in the recent case of *Bailey v Commissioner of Police, NSW Police Force* [2023] NSWCATAP 103, the Appeal Panel found that the Tribunal had erred in its public interest determination because it "failed to ask itself or determine whether any of the specific factors raised by the Appellant in favour of disclosure applied or what weight should be given to them". (see [87]-[93]).

41. It is not in dispute that the government information at issue is likely to inform positive debate on issues of public importance. This positive factor is plainly significant to the matter at hand and, in my view, warrants a real accounting in any determination on access.

42. Ultimately, on the limited reasons provided by the Agency, I am unable to be satisfied that the decisions to restrict access to certain redacted material are properly justified.

43. In any reconsideration of the decision the Agency is encouraged to demonstrate with its reasons how each distinct record has been considered and how that consideration has informed the weighting of those relevant public interest considerations applied. The IPC's published fact sheet *Fundamentals*

[3] https://www.ipc.nsw.gov.au/destination-nsw-v-taylor-2019-nswcatap-123

for deciding an access application under the GIPA Act[4] clarifies the standard of reasons required to justify public interest determination and may assist the Agency in this respect.

Outcome

44. For the above reasons, I am not satisfied that the Agency has adequately demonstrated that its determination of the public interest is justified.

The decision that no further information is held

Legal principles

45. Under section 53 of the GIPA Act, the 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.

46. While I acknowledge that the Applicant holds an expectation that further information ought to exists and is held by the Agency, it is important to note that, as stated by the Appeal Panel in *Wojciechowska v Commissioner of Police (NSW)* [2020] NSWCATAP 173 ('*Wojciechowska*'):

> […] *generally the agency will be best placed to make an assessment about the likelihood that the requested information exists and is held by it (at [38]), and*
>
> […] *the burden is on the agency to prove that the decision that the government information applied for is not held by the agency, is the correct and preferable decision (at [42]).*

47. The task for the Information Commissioner when reviewing a decision that information is not held is to[5]:

> *1. identify on the basis of the agency's reasons and the applicant's submissions, any relevant factual issues including those derived from s. 53(1)-(5)*
>
> *2. determine whether the agency has proved any relevant factual issues on the balance of probabilities*
>
> *3. consider any evidence which may have emerged since the agency made its decision, which might tend to prove that the requested information is held by the agency.*

48. Core to the review of a not held decision is the question about whether the Agency has adequately demonstrated that it conducted reasonable searches in all the circumstances to locate responsive information and therefore met its obligations under section 53(2) of the GIPA Act (see *Davidson v NSW Department of Education and Training* [2013] NSWADT 25 at [31]; and *Stanley v Roads and Maritime Services (NSW)* [2014] NSWCATAD 123 at [15]).

Searches conducted by the Agency

49. The Agency's notice of decision described its search efforts:

> *A search of the records of the Office was undertaken to identify documents falling within the scope of your application.*

[4] https://www.ipc.nsw.gov.au/fact-sheet-fundamentals-deciding-access-application-under-gipa-act
[5] see *Wojciechowska* at [44]

The Office undertook searches in email inboxes, network drives and filing cabinets using the search terms Cooma, taser and Nowland between the dates prescribed in the GIPA request.

50. On the 6 October and 9 October 2023, the Information Commissioner received additional submissions from the Agency which provided information about the conduct of the searches undertaken by the Agency. The Agency relevantly submitted:

    a. Email searches include the email accounts of all current members of the Agency at the date range specified by the GIPA request.

    b. The "network drives" referred to in the decision is an "office shared drive"

    c. the search terms used to retrieve records were "cooma" and "taser"

    d. "A search of physical files in the office yielded no results that were not duplicated in files available on email or in the shared drive."

    e. "no draft exist as files were updated on our shared document management system, thus 'draft' versions do not exist".

51. In gathering evidence relevant to the external review from the Agency, the Information Commissioner also queried whether searches were conducted for text messages as specified in the access application. In response, on 9 October 2023, the Agency provided copies of three separate text exchanges retrieved from the Minister's phone. The Agency explained that the Minister's phone had been the only device to contain information responsive to the access application.

Consideration

52. There is clear evidence to establish that staff with requisite knowledge of agency holdings conducted searches and, that a comprehensive search of agency email accounts occurred, with many records being located.

53. However, I am not satisfied that all necessary avenues were explored to locate relevant information and I cannot be satisfied that no further information is held as text messages[6] which fall within the scope of the application were not addressed in the Agency's Notice of Decision.

54. Despite the efforts on the part of the Agency to locate relevant information in email accounts, I am not wholly persuaded by the Agency's assertion about the non-existence of previous versions and drafts. The search obligation in the GIPA Act specifies that an agency can utilise "any resources reasonably available to it that facilitate the retrieval of information stored electronically" (section 53(3)).[7] Modern collaborative software platforms commonly maintain version histories by default,[8] which allows for the retrieval of historical records. In the event such functionality is available for the Agency, further information may be accessible.

55. Separately, no evidence was provided at review that the local drives of staff were searched. It may be the case that staff involved have maintained a version of draft records on their computer storage or within their individual

[6] Text messages are government information for the purpose of the GIPA Act: https://www.ipc.nsw.gov.au/fact-sheet-digital-records-and-gipa-act

[7] See IPC factsheet on digital platforms and compliance: https://www.ipc.nsw.gov.au/fact-sheet-microsoft-365-platforms-and-agencies-compliance-obligations

[8] https://support.microsoft.com/en-us/office/view-the-version-history-of-an-item-or-file-in-a-list-or-library

cloud storage. This could be because such records have historical value, with drafts which pertain to significant matters being classified as State Records.[9]

56. For an abundance of clarity, the information before me does not indicate that any large volume of material was overlooked in processing the access application. That said, having regard to the scope of the information being sought, that is inclusion of *drafts of documents*, it is my view there would appear to be additional reasonable lines of enquiry which may discover information not previously retrieved and assessed.

57. Finally, the retrieval of text messages by the Agency (see paragraph 51 of this report) is not a fact which suggests noncompliance with the obligation to conduct reasonable searches[10]. However, the fact that these records are held and were not subject to the decision, means that the Agency's implied decision that no further information is held, cannot be justified.

Outcome

58. Overall, I am not satisfied that the Agency's decision, that it holds no further information responsive to the access application, has been justified. I have formed this view primarily due to the existence of relevant text message records.

Conclusion

59. On the information available, I am satisfied that the Agency's decisions under review:

    a. are **not justified** in relation to its decision to refuse to provide access redacted material at pages 1-20 and 23-31 of the emails at issue

    b. are **not justified** in relation to its implied decision that no further information is held.

60. Key findings and guidance are summarised below:

- The Agency's consideration that public officials may be inhibited in their advice if information of this kind is disclosed is reasonably based
- The Agency's notice of decision does not provide sufficient reasons to explain the weight given to public interest considerations as relates to each distinct record
- The Agency should ensure that it demonstrates a real accounting of the weight favouring disclosure in any reconsideration. The IPC's published: *Fundamentals for deciding an access application under the GIPA Act* may assist the Agency
- Further relevant information is held in the form of three text message threads not referenced in the Notice of Decision
- In any reconsideration the Agency should also consider searches of staff local drives and might explore whether the collaborative software which holds relevant emails, allows for the retrieval of additional drafts.

[9] https://staterecords.nsw.gov.au/recordkeeping/guidance-and-resources/create-and-capture
[10] *MJ v Department of Education and Communities* [2014] NSWCATAD 12 [at 88]

Recommendations

61. I recommend under section 93 of the GIPA Act that the Agency make a new decision by way of internal review.

62. I further make recommendation under section 92 that the Agency have regard to *Information Access Guideline 10*: *Obligations of Ministers and Ministerial Officers under the GIPA Act*[11] in undertaking any further reconsideration of this matter.

63. I ask that the Agency advise the Applicant and the Information Commissioner **within 10 working days** of the actions to be taken in response to our recommendations.

Applicant's review rights

64. The Information Commissioner's external review of the Agency's decision is not binding and is not reviewable.

65. If the Applicant remains aggrieved by the Agency's decision, the Applicant has the right to ask the NSW Civil and Administrative Tribunal (NCAT) to review that decision.

66. 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. For information about the process and costs associated with a review by the NCAT, please contact the NCAT. The NCAT's contact details can be located at http://www.ncat.nsw.gov.au.

67. If the Agency makes a new reviewable decision because 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 by the Information Commissioner or NCAT.

Completion of this review

68. This review is now complete.

69. If you have any questions about this report, please contact the Information and Privacy Commission on 1800 472 679. Please note that any questions should be received within 20 working days of the date of this report.

Timothy Fleming

Acting Director, Investigation and Reporting

[11] https://www.ipc.nsw.gov.au/information-access-guideline-10-obligations-ministers-and-ministerial-officers-under-government-information-public-access-act-2009-gipa-act