

The Challenges of Searching and Maintaining Trust in the Answers

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Introduction

I begin by acknowledging the traditional custodians of the land on which I am speaking, the Gadigal people of the Eora nation, and pay my respects to elders past, present and emerging.

Thank you, once again, to Martyn Killion for the opportunity to speak to you all today. Clearly, I did not put you all off when I spoke at this forum in March. I am delighted to be back.

In thinking about what I could speak on today, I thought I would do a bit of a 'reverse engineering reflection', working back from some of the issues that arise through the external review function of the Information Commissioner and the administrative review function of NCAT.

Reviews

Data on reviews

First, some data on reviews. I will speak of the 'Information Commissioner' in the generic sense and not insert the first-person pronouns ('me'/'I') for the purpose of presenting this information.

Looking at last year's report on the operation of the GIPA Act (2024–25) – my s 37 Report as Information Commissioner, tabled in April – the data is instructive. In that year, there were 400 external reviews finalised by the Information Commissioner and 148 by NCAT.¹ Using internal data, the number of external reviews received by the Information Commissioner significantly increased in 2024–25, with 379 reviews, compared to 297 in 2023–24.² That represents a 28% increase. Administrative reviews by NCAT, however, remained stable.³

Numbers increasing

This increase in numbers of external reviews is continuing – and somewhat exponentially. During 2025–26, we received 668 applications for external review, a 76% increase from 2024–25.

What is driving it? The answer may lie in the use of generative AI tools to frame and make GIPA applications and complaints about agencies in handling them. AI tools can be a real boon in certain aspects of the information landscape, but when it comes to framing complaints, AI can significantly muddy the waters of expectations without any nuance – for example, pointing to offence provisions without any real understanding of the elements required. Presenting conclusions without evidence. AI can add fuel to a fire of disquiet.

¹ [Report on the Operation of the Government Information \(Public Access\) Act 2009: 2024–25](#), 44, Figure 32.

² Ibid, 44.

³ Ibid, 46.



(I note an article in *The Conversation* by doctoral students in information sciences about an AI system being unable to distinguish between a blueberry muffin and a chihuahua and between sheepdogs and mops).⁴

Such increases have an impact on the IPC, agencies and records managers alike. From the IPC perspective, as a very small agency of 40, the flood coming in the door, so to speak, is an ongoing challenge. As an agency we, and I as CEO, have committed to a surge workforce to help address this. The battle is now not only to manage the increasing 'inbox' of matters, but also to chip away at the backlog. We manage it on the basis of attending to matters in the order received, on the basis of fairness to all.

Timeliness is a key concern for external stakeholders. This is an area which takes considerable expectation management. Under the GIPA Act, for an external review by the Information Commissioner, there is a timeframe of 40 working days for the review period. But – and this is a big 'but' – that deadline in s 92A does not start to run until *after* we have received all the information considered necessary to complete the review. This is a chokepoint for us and creates the backlog. At the moment, it can take 4–6 months to allocate a matter to a case officer, after preliminary inquiries, and then the 40 days won't start to run until the officer has all the information needed to conduct the review – both from the applicant and the agency. We have improved our website messaging, and in the correspondence to applicants, but we still have a way to go when it comes to people understanding that 40 days is not necessarily what they think it is.

Being able to respond to people in a timely way is hardwired into the GIPA Act with the inclusion of timeframes. But there is nuance as is clear as to when the time starts to run for Information Commissioner reviews.

We are not alone in having to grapple with these challenges. I'm all *for* people exercising their rights. Agencies, like the IPC, have to manage that exercise.

Workload and burnout are also key concerns among staff – as reflected across the public sector through the annual PMES (People Matter Employee Survey).

However, if the additional staff we have brought on only enable us to keep up with the new higher caseload 'normal', then further staffing, both permanent and additional surge staff will need to be considered.

What was the result of these reviews?

Let's look at the results of the reviews.

Internal reviews *by the agencies* were equally balanced between upholding and overturning the original decisions: 53% in 2024–25, and 50% the prior year.⁵

Of the external reviews by the Information Commissioner, 40% recommended that agencies reconsider their decisions, under s 93 – similar to the previous year.⁶

What happened then? 35% of the agency reconsiderations of their original decisions landed in the same place – ie they arrived at the same decision as the original decision. This was a moderate decrease from the previous year (42%).⁷

The Information Commissioner does not have a power of determination to *remake* a decision. In NSW, only NCAT can do that on external administrative review and make a decision as to what should be the 'correct and preferable decision' on a GIPA application. When the Information

⁴ A Choi and K Mei, [What are AI hallucinations? Why AIs sometimes make things up](#), *The Conversation*, 21 March 2025.

⁵ Ibid, 47, Figure 41.

⁶ Ibid, 47, Figure 42.

⁷ Ibid, 47, Fig 43.

Commissioner recommends that the agency *reconsider* its decision, it is not necessarily saying that the decision was *wrong*, but that the agency has not *sufficiently justified the reasons for its decision*.⁸

Justifying the decision

This is an issue I would like to explore today. Namely, the justification of the decision by the agency and, in the context of today's audience, I thought I could focus on responses to GIPA applications that records 'do not exist' or are 'not held' (s 58(1)(b)).

I have observed certain 'suspicions' among members of the public that may arise in relation to such responses – an underlying conviction that the records *must* exist, or have been destroyed, or hidden, with perhaps malevolent intent to the applicant, or to hide the issue. Indeed, even urging, and stating as a fact, that the agency is guilty of an offence under s 120 – of concealing or destroying government information; or that some senior person has sought to improperly influence the decision on the access application under s 118. As I observed before, AI may be driving this as well – leaping to an unnuanced conclusion that offences have been committed.

Looking at internal data on this topic in the context of external reviews by the Information Commissioner, the picture we get over the last 5 years is this:

Financial year	No. of reviews finalised	No. of reviews where information not held/searches was an issue	% of total reviews where information not held/searches was an issue
2025–26	262	50	19%
2024–25	400	116	29%
2023–24	297	96	32%
2022–23	362	98	27%
2021–22	374	99	26%

The 19% figure for 2025/26 is likely understated, as we are still processing review requests from that year. So the figure is probably pretty stable around 30% – for the % of reviews where the issue was the adequacy of searches in the context of an agency's decision that information was 'not held'.

Where an applicant seeks an external review in relation to a decision that the information is not held, they are usually concerned about the *quality and extent of searches* undertaken by the agency.

We keep an eye on information like this through our Compliance Committee and analysis of data trends. We only have data for the current year for a short period, but it is fourth on the list of top 10 issues, while for the previous year (2024–25), it was the commonest issue raised.

A decision that information is 'not held' is a conclusion based on trying to find it, in response to the GIPA request. This, in turn, takes us to the issue of searching and the obligations under the GIPA Act in relation to searches.

⁸ Ibid, 47.



One of the key questions the IPC is looking at is, ‘How can we improve decisions made by agencies and reduce the need for an external review?’ This is where your roles as records managers or RTI officers come in and an issue I would like to explore today. Namely, the justification of the decision by the agency when records are not held and, in the context of today’s audience, I thought I could focus on responses to GIPA applications that records ‘do not exist’ or are ‘not held’ (s 58(1)(b)).

Reasonable searches

For those of you who attended my presentation in March, I referred to my long-term project of refreshing all of the information access resources – not just updating them, but ‘revoicing them’ and restructuring them in accordance with current best practice communications. One key shift in the ‘voicing’ is that the Fact Sheet will speak to ‘you’ – not ‘agencies must’ etc. but ‘you.

One of these I have recently been working on concerns the topic of reasonable searches under the GIPA Act – specifically, section 53. This will be familiar territory to you all I’m sure – certainly for those who have GIPA/Right to Information functions as part of your job descriptions.

Once the applicant has given you a GIPA application you can work with – including such information as is reasonably necessary to enable you to identify the government information applied for – you are then required to undertake *such reasonable searches as may be necessary to locate the information held by your agency and to determine whether or not the information is held at the time the application is received.*

Because the GIPA Act definition of ‘government information’ is ‘information contained in a record held by an agency’, your searches will need to be broadly conducted and include both paper-based and electronic records.

If you conclude that the information sought is **not held** by your agency (s 58(1)(b)), you will need to demonstrate that you have searched properly.

This information will be crucially important if the applicant seeks external review by the Information Commissioner or administrative review by NCAT of your agency’s decision, as the *onus is on the agency* to explain the decision: ss 97, 105. We added this emphasis in the updated Fact Sheet to bring home the consequences of ‘what if I don’t’ at this early point.

What is a reasonable search?

Section 53 sets out your obligations in making ‘such reasonable searches as may be necessary’ to find the information requested by an access applicant. You must use:

- the ‘most efficient means reasonably available’: s 53(2).
- any resources reasonably available to facilitate the retrieval of information stored electronically: s 53(3). This is where I see the potential for well-crafted AI search tools coming into their own.

You don’t have to search for information:

- after the date the application was received: s 53(2).
- in electronic backup systems unless, e.g. it was lost or destroyed improperly, in contravention of the *State Records Act 1998* or established records management procedures: s 53(4).

You are generally in the best position to assess whether the information requested in an access application exists and is held by your agency because you are familiar with your own agency’s records management systems, as noted by the NCAT Appeal Panel in [Wojciechowska v Commissioner of Police \[2020\] NSWCATAP 173](#).⁹ They also observed:

⁹ [Wojciechowska v Commissioner of Police \[2020\] NSWCATAP 173](#), [38].



The question of whether there are reasonable grounds to believe that the information the subject of the access application exists and is held by an agency, is plainly relevant to the nature and extent of the searches required to be undertaken to discharge the obligation under s 53. Where, for example, the likelihood of the requested information existing and being held by the agency is farfetched or fanciful, for example, NSW Health holding information about US President Donald Trump's Twitter account or evidence of alien life in Wagga Wagga, arguably no search could properly be characterised as being a 'reasonable search ... as may be necessary to find any of the government information applied for' and, therefore no obligation to search arises. Conversely, where it is reasonably likely that the requested information exists and is held by the agency, a cursory search said to be unable to find the requested information, is unlikely to satisfy the obligation imposed by s 53.¹⁰

Searching for information in digital archives

Agency record-keeping systems should not adversely affect applicants and electronic record keeping should promote ease of access to those records. The shift in search tools over the past decade or so should have improved searchability.

The issues that we see from dissatisfied GIPA applicants concern the search terms used, as being insufficiently broad, and the places searched. For example, did the searches include records management systems like EDRMS and TRIM; CRMs (we use RESOLVE – as do a number of other agencies); collaborative tools – like SharePoint and Teams; emails; WhatsApp and similar group messaging?¹¹

Notice of decision

Tips to avoid a disgruntled GIPA applicant in circumstances in which information is not held would be to provide as much detailed information as possible about searches for records that were conducted, and to give careful consideration of what those searches should be in each case. If applicants are satisfied that fulsome searches have been conducted they are more likely to accept the outcome.

As I am sure you appreciate, your agency should explain clearly the search processes you conducted and what information was located in response to the access application, as well as an explanation if no records were located.

Best practice is for a notice of decision to include the following information:

- an explanation of what your agency understands the applicant's request to be
- how your agency's record-keeping system is organised
- how information is retrieved from the record-keeping system
- if the system is electronic, the search terms used by your agency to identify information relevant to the request
- if the system is paper-based, how the information is stored and how your agency was able to ascertain what information was relevant to the applicant's request
- the steps you took to retrieve any documents that are the subject of the request.

Details of searches may include:

- where and how you searched
- a list of any records found (including, if appropriate, the relevant business centre)

¹⁰ Ibid, [29].

¹¹ See also [Guide - Quick Guide To My Responsibilities](#)

- the key words you used to search electronic records (including any alternative spelling used)
- a description of the paper records that you searched.

Connecting the dots between proper record management, including lawful record destruction and the GIPA response

How closely do your record managers work with your Right to Information officers? Behind a notice of decision in relation to a GIPA request, that information is ‘not held’, may lie a perfectly sensible and lawful process of ‘sentencing’ of records or destruction of records as normal administrative practice under the *State Records Act*.

Many people believe ardently that government information must be held ‘forever’ and that to destroy government records must be wrong somehow – particularly if it is the very kind of information an applicant may be seeking.

How regularly do you (as an RTI officer) indicate that a record was held, but is no longer, because of lawful record destruction, and for which you have a record of its destruction?

If this is the case, and you can say that in your notice of decision in support of a conclusion that information is ‘not held’, this could potentially head off, or at least act to counteract, suspicions. At the very least, it would also provide a really solid answer on administrative review in NCAT if it comes to that.

Review of your decision

An applicant for information who is dissatisfied with your decision about access, eg that information is not held by your agency, may seek an internal review of the decision by your agency and an external review by the Information Commissioner and NCAT.

In conducting an Information Commissioner external review, we will look at whether and how you have shown that you have taken reasonable steps to locate the information. We will also look at the terms of the access application to determine whether there may be further information within the scope of the access application and may recommend search terms to be used by your agency.

In administrative review proceedings in NCAT, the five-step process set out in *Wojciechowska v Commissioner of Police* [2020] NSWCATAP 173, applies, namely that in reviewing a decision that the requested information is not held, NCAT will:

- identify on the basis of the agency’s reasons and the applicant’s submissions, any factual issues including those derived from the s 53 search obligations
- determine whether the agency has proved any relevant factual issues on the balance of probabilities
- consider any evidence that may have emerged since the agency made its decision that the information is not held
- apply those findings to decide the correct and preferable decision
- affirm, set aside or vary the agency’s decision that the information is not held: *Administrative Decisions Review Act 1997*, s 63(3).

The *Wojciechowska* decision of the NCAT Appeal Panel in 2020 was a significant one as it changed the way that the Tribunal considers applications for administrative review of GIPA decisions in which an agency finds that information is ‘not held’. In this case the Appeal Panel held that it is no longer the law that the applicant has a ‘practical onus’ of establishing reasonable grounds that requested documents exist which have not been produced. The burden lies throughout on the government agency to establish that its decision that information is not held is justified.



Final thoughts

Records managers and Right to Information Officers play a crucial role in our system of ‘open government’. I take my ‘hat’ off to you all!

The IPC, and me as Information Commissioner, have our own role to play with distinct statutory responsibilities.

As I observed at the conclusion of my presentation in March, I look forward to your thoughts, guidance and insights in helping to make our work more effective – yours as record managers, and me as the regulator – in meeting the aspirations set out as the objects and expectations of the GIPA Act.

And, next week is Right to Know Week – an important event in the calendar for all of us! If you haven’t signed up already, there is an excellent panel event at Parliament House on Tuesday morning. The theme of the week is ‘Upholding Information Integrity in the Digital Age: The Role of Access to Information in Addressing Information Disorder’. I will be chairing a panel comprising Dr Lorraine Finlay, Human Rights Commissioner, Kate Boyd PSM, Secretary of The Cabinet Office and Associate Professor Ellen Rock, UNSW Law and Justice. Come one, come all. Public sector staff can attend in person or online. The recording will also be available to the general public after the event.

Thank you again, Martyn, for inviting me to present today and thank you all.

