



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

Applicant:

Agency: Department of Communities and Justice

Report date: 24 August 2020

IPC reference: IPC20/R000449

Agency reference:

Keywords: Government information – refuse to confirm or deny – reveal the identity of an informant – prejudice the security, discipline or good order of any correctional facility

Legislation cited: *Government Information (Public Access) Act 2009*

Cases cited: *Commissioner of Police, NSW Police Force v Barrett [2015] NSWCATAP 68; Sternberg v Blue Mountains City Council [2017] NSWCATAD 67; Cain v Glass (No 2) (1985) 3 NSWLR 230; Attorney-General (NSW) v Stuart (1994) 34 NSWLR 667; 75 A Crim R 8; Selby v Commissioner of Police (NSW) [2013] NSWADT 61; Hurst v Wagga Wagga City Council [2011] NSWADT 307*

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 Applicant applied for information from the Department of Communities and Justice (the Agency) under the *Government Information (Public Access) Act 2009* (GIPA Act).

The Agency decided to refuse to confirm or deny that some of the information is held, to release some of the information and to not release some of the information.

The Applicant applied for external review of that decision on 24 June 2020. The reviewer obtained information from the Agency including the notice of decision.

The review of the Agency's information and decision concluded that its decision is justified.

**The reviewer makes no recommendations.**

## Background

1. The Applicant applied under the GIPA Act to the Agency for access to the following information:
  1. *Incident Report on or about 20/9/2019 wherein inmate X was the informant*
  2. *Corrections Intelligence Group findings of the incident by Corrective Services NSW*
  3. *OIMS case notes for the date range 01/01/2019 to present (the date your application).*

The incident relates to an alleged escape plot on or around 20 September 2019.

2. In its decision dated 28 May 2020, the Agency decided to refuse to confirm or deny whether the Agency holds information in response to parts 1 and 2 because there is an overriding public interest against confirming or denying that fact, and to provide access to part of the information in part 3 and to refuse access to part of the information because there is, on balance, an overriding public interest against its disclosure.
3. On 24 June 2020, the Applicant applied to the IPC for external review of that decision.
4. In seeking a review of the decision by the Information Commissioner, the Applicant contests the Agency's decision that there is an overriding public interest against disclosure of the information to refuse to confirm or deny that information is held by the Agency and to not release certain information to the Applicant that the Agency has confirmed it holds.

## Decision under review

5. The Information Commissioner has jurisdiction to review the decision made by the Agency pursuant to section 89 of the GIPA Act.
6. The decision under review is the Agency's decision to refuse to confirm or deny that information is held because there is an overriding public interest against disclosure of information confirming or denying that fact under section 58(1)(f), and the decision to refuse to provide access to the information because there is an overriding public interest against disclosure of the information under section 58(1)(d) of the GIPA Act.
7. These are reviewable decisions under section 80(g) and 80(d) of the GIPA Act.

## **The decision to refuse to confirm or deny that information is held by the agency because there is an overriding public interest against disclosure of information confirming or denying that fact**

8. In the case of a decision under s 58(1)(f) the Agency must be satisfied that there is an overriding public interest against disclosure of information confirming or denying that information is held by the agency. Thus, the GIPA Act at this point introduces a public interest against disclosure that goes beyond those listed in the Table to section 14 (see *Commissioner of Police, NSW Police Force v Barrett [2015] NSWCATAP 68* at [28]).

9. An agency must justify to the Information Commissioner its decision according to the standard set out in section 97(1) of the GIPA Act. Section 97(1) provides:

*(1) In any review under this Division concerning a decision made under this Act by an agency, the burden of establishing that the decision is justified lies on the agency, except as otherwise provided by this section.*

10. The Tribunal in *Commissioner of Police, NSW Police Force v Barrett [2015] NSWCATAP 68* at paragraphs 85 and 86 sets out a two-stage process to satisfy the requirements of section 58(1)(f) and section 105(1) (the Tribunal equivalent to section 97(1)). Firstly, the agency must satisfy the requirement that the statutory considerations it relies upon are sufficient to justify refusal of access to any documents that are in existence. Next a separate question must be addressed. That question requires consideration of whether the agency's non-revelation of the mere existence of the documents is justified. The agency bears the onus of proof in accordance with section 105(1) and must satisfy the Tribunal in respect of both these two stages.
11. The Tribunal in *Sternberg v Blue Mountains City Council [2017] NSWCATAD 67* stated that it "assumed that s 58(1)(f) does require the Tribunal to engage in the balancing exercise referred to in s 13, by reference only to the public interest considerations against disclosure referred to in s 14 (except where there is a conclusive presumption of an overriding public interest against disclosure by operation of Sch 1). This appears to be what the legislature intended by the use of the words "an overriding public interest against disclosure of information" in s 58(1)(f), even though the word "government" is omitted. It appears likely that, if the legislature intended to introduce a different test from that referred to in s 13, it would have done so explicitly and with markedly different language. However, in case I am wrong, I have also considered whether there is an overriding public interest against disclosure of the information, on the basis that it is not necessary to conduct the balancing test contemplated by s 13 of the GIPA Act."
12. For the purposes of this review I have considered whether the Agency has justified its decision by reference to the approach set out by the Tribunal in paragraph 11 above.

### **Public interest considerations in favour of disclosure of information confirming or denying that that information is held by the Agency**

13. In its notice of decision, the Agency note the following public interest considerations in favour of disclosure of the information confirming or denying that information is held by the Agency:
  - there is a general presumption in favour of the disclosure of government information,
  - the GIPA Act's objective to "maintain and advance a system of responsible and representative democratic Government that is open, accountable, fair and effective" (GIPA Act, s3(1)), and
  - the Applicant's concerns that the incident that the information sought relates is likely to have an adverse effect on his period of incarceration that is likely to 'result in a continuing detention order

*because I can't partake in treatment owing to inmate X's mendacity.'*

14. I am satisfied that these are relevant public interests in favour of disclosure of the information confirming or denying that information is held by the Agency.

### **Public interest considerations against disclosure of information confirming or denying that that information is held by the Agency**

15. In its notice of decision, the Agency raised the following public interest considerations against disclosure of information confirming or denying that that information is held by the Agency, deciding that disclosing this type of information could reasonably be expected to:
- reveal or tend to reveal the identity of an informant or prejudice the future supply of information from an informant (clause 2(a) of the Table to section 14 of the GIPA Act)
  - prejudice the prevention, detection, investigation, of a contravention or possible contravention of the law (clause 2(b) of the Table to section 14 of the GIPA Act)
  - prejudice the security, discipline or good order of any correctional facility (clause 2(h) of the Table to section 14 of the GIPA Act).
16. I will discuss each of these considerations in turn.

### **Consideration 2(a) – reveal or tend to reveal the identity of an informant or prejudice the future supply of information from an informant**

17. The Agency applied this consideration towards the "*Incident Report on or about 20/9/2019 wherein inmate X was the informant*".
18. The Agency determined that confirming or denying whether the information is held would affirm the existence of a potential informant and/or the identity of the informant of 'the incident', or even the source(s) of information. The Agency determined that a decision that the information is not held could reasonably be expected to reveal that Mr X did not inform the Agency of information in relation to the incident or may suggest another individual was an alternate source of information concerning the incident. Likewise, if the Agency decides to refuse access to the information sought (essentially confirming that it does hold information in response to part 1 of the application) it could reasonably be expected that this could also reveal that Mr X was not the informant, and allow the Applicant to perhaps ascertain the identity of the informant or relevant source by deduction or elimination.
19. The term "informant" is not defined in the GIPA Act and would seem to differ from someone who has merely provided information to an agency in confidence. The concept of an "informer" has a long history in the context of claims for public interest immunity (in either civil or criminal cases): see for example *Cain v Glass (No 2) (1985) 3 NSWLR 230 at 246 (McHugh JA)*; *Attorney-General (NSW) v Stuart (1994) 34 NSWLR 667; 75 A Crim R 8 at 674–675*. The principle behind public interest immunity claims is that it is in the interests of the State to receive information about wrongdoing (and this is often the only way to investigate wrong doing). But, if informants cannot be sure that their identity will not be exposed, then that individual and other future informants will be more reluctant to come forward.

20. In *Selby v Commissioner of Police (NSW) [2013] NSWADT 61* at [59], the tribunal observed that clause 2(a) "should be used to protect the identity of informers who may be subject to reprisals and ensure that they continue to supply evidence to the Police".
21. It is self-evident from the terms of the GIPA application that the "*Incident Report on or about 20/9/2019 wherein inmate X was the informant*" is information that would reveal or tend to reveal the identity of an informant or prejudice the future supply of information from an informant.
22. The Applicant submits in his external review application that there is a non-association order with the inmate in question and the prospects of seeing the inmate again while in custody is virtually non-existent.
23. However, given that the terms of the GIPA application expressly seeks information about an "informant", I am satisfied that disclosure of information confirming or denying that information is held by the Agency would reasonably be expected to reveal or tend to reveal the identity of an informant or prejudice the future supply of information from an informant.
24. I am satisfied that the Agency has justified that clause 2(a) is a relevant public interest consideration against disclosure of the information confirming or denying that information is held by the Agency.
25. The Agency determined that informants are not compelled to bring forward concerns and often do so at risk to their personal health and safety. The Agency also considered that informants are at risk of harm including threats, reprisal and murder.
26. I am satisfied that the Agency has justified that these risks carry a significant weight against disclosure of the information and that this outweighs the considerations in favour of disclosure to justify refusal of access to any documents that are in existence.

### **Consideration 2(b) - prejudice the prevention, detection, investigation, of a contravention or possible contravention of the law**

27. The Agency applied this consideration towards the "*Corrections Intelligence Group findings of the incident by Corrective Services NSW*".
28. The Agency stated that the Corrections Intelligence Group (CIG) gathers intelligence and authors reports on matters involving inmates, having a significant impact on the day to day and long-term operations of correctional centres as well as law enforcement. CIG's functions include the implementation of intelligence gathering and analysis to enable effective assessment and management of security risks including escapes, violence, drug use and criminal activity within CSNSW's correctional centres, as well as the dissemination of intelligence to external law enforcement and investigative agencies.
29. The Agency determined that the information, if held, would confirm that the Agency holds 'intelligence' in relation to an offender. If the Agency were to decide that it did not hold the information sought it could reasonably be expected that this would reveal that it does not hold intelligence information in relation to a particular individual or in relation to their previous activities. Conversely if the Agency decides to refuse access to the information sought it could reasonably be expected to reveal that the Agency holds intelligence in

relation to an individual. To reveal whether CIG holds information or reports with respect to a particular inmate could reasonably be expected to prejudice any ongoing or future investigations by law enforcement agencies or otherwise impact on the security of its correctional centres. This is especially relevant in the custodial environment when an individual is being covertly monitored for intelligence purposes. To confirm or deny the existence of information held by CIG has the potential to undermine undercover investigations by law enforcement agencies or alert an offender that they are being covertly observed.

30. The Applicant submits in his external review application that the informant's allegations are baseless and resulted in no disciplinary action being taken. Accordingly, it would have no influence or prejudice the prevention, detection, investigation, of a contravention or possible contravention of the law.
31. 'Prejudice' under the GIPA Act has been held to have its ordinary meaning, that is, 'to cause detriment or disadvantage' or 'to impede or to derogate from'; see *Hurst v Wagga Wagga City Council [2011] NSWADT 307* at [60].
32. I am satisfied that one of the functions of the Agency is to hold information in respect to inmates for intelligence purposes, and that disclosing the CIG's findings in relation to the incident, if it were to exist, could reasonably be expected to prejudice the prevention, detection, investigation, of a contravention or possible contravention of the law by undermining undercover investigations by law enforcement agencies or alerting an offender that they are being covertly observed.
33. I am satisfied that the Agency has justified that clause 2(b) is a relevant public interest consideration against disclosure of the information confirming or denying that information is held by the Agency.
34. The Agency determined that the broader public interest to effectively monitor inmates to detect potential security risks would be significantly jeopardised by the confirming or denying the existence of intelligence information held by the Agency. The Agency also considered the potential impact if law enforcement investigations and internal Agency investigations were to be prejudiced and the broader impact on the safety of other inmates, correctional centre employees and the community.
35. I am satisfied that the Agency has justified that these risks carry a significant weight against disclosure of the information and that this outweighs the considerations in favour of disclosure to justify refusal of access to any documents that are in existence.

### **Consideration 2(h) – prejudice the security, discipline or good order of any correctional facility**

36. The Agency also applied this consideration towards the "*Corrections Intelligence Group findings of the incident by Corrective Services NSW*".
37. The Agency determined that the broader public interest to effectively monitor inmates to detect potential security risks would be significantly jeopardised by the confirming or denying the existence of intelligence information held by the Agency. In particular, the Agency stated that:

*"security and good order in correctional facilities is heavily reliant on their ability to monitor inmates.....to reveal whether CIG holds*

*information or reports with respect to a particular inmate could reasonably be expected to prejudice any ongoing or future investigations by law enforcement agencies or otherwise impact on the security of its correctional centres. This is especially relevant in the custodial environment when an individual is being covertly monitored for intelligence purposes. To confirm or deny the existence of information held by CIG has the potential to undermine undercover investigations by law enforcement agencies or alert an offender that they are being covertly observed.”*

38. In relation to the above, it appears that the Agency is reasoning that, in confirming or denying the existence of intelligence reports, the prejudicial effect on security, discipline and good order would be that it would assist inmates to avoid detection of their participation in activities that pose security risks because it would alert them to the knowledge that their activities are being monitored.
39. The Agency also considered the potential impact if law enforcement investigations and internal Agency investigations were to be prejudiced and the broader impact on the safety of other inmates, correctional centre employees and the community.
40. I am satisfied that the disclosure of the CIG’s findings, if they were to exist, could reasonably be expected to undermine undercover investigations by law enforcement agencies or alert an offender that they are being covertly observed which is pivotal to maintaining security in correctional centres. I am therefore satisfied that the effects of this disclosure could reasonably be expected to prejudice the security, discipline or good order of any correctional facility.
41. I am satisfied that the Agency relies upon its ability to prevent, detect, and investigate contraventions or possible contraventions of the law in order to ensure the security, discipline or good order its correctional facilities. Disclosing information that could reasonably be expected to prejudice the Agency’s ability to detect potential security risks could reasonably be expected to prejudice the security, discipline or good order of a correctional facility.
42. I am satisfied that the Agency has justified that clause 2(h) is a relevant public interest consideration against disclosure of the information confirming or denying that information is held by the Agency.

### **Is the Agency’s non-revelation of the mere existence of the documents justified?**

43. As I am satisfied that the requirement that the statutory considerations the Agency relies upon are sufficient to justify refusal of access to any documents that are in existence, the next question requires consideration of whether the Agency’s non-revelation of the mere existence of the documents is justified.
44. The public interest considerations against disclosure of information confirming or denying that the information sought is held by the Agency (being that in clauses 2(a), 2(b) and 2(h) of the table to section 14) is to be balanced against the public interest considerations in favour of the disclosure of government information (section 12).

45. Regarding the first part of the application, the Agency determined that informants are not compelled to bring forward concerns and often do so at risk to their personal health and safety. The Agency also considered that informants are at risk of harm including threats, reprisal and murder.
46. I am satisfied that the agency has discharged the onus and demonstrated that this public interest to protect informants and potential informants outweighs the public interest considerations in favour of disclosure to such a level that it justifies the Agency's non-revelation of the mere existence of the information.
47. I am satisfied that the Agency has justified its decision to refuse to confirm or deny that information about an informant is held by the Agency because there is an overriding public interest against disclosure of information confirming or denying that fact.
48. Regarding the second part of the information, the Agency has determined that confirming or denying that the Agency holds the CIG's findings could reasonably be expected to prejudice any ongoing or future investigations by law enforcement agencies or otherwise impact on the security of its correctional centres, and prejudice the Agency's ability to effectively monitor inmates to detect potential security risks, impact upon its investigations and impact on the safety of other inmates, correctional centre employees and the community.
49. I am satisfied that the Agency has justified that the public interest to protect the safety of inmates, correctional centre employees and the community, which arises from the prevention, detection or investigation of a contravention or possible contravention of the law. I am satisfied that the Agency has justified that this assists the Agency's ability to enforce the law, and provide security, discipline and good order in its correctional facility. I am satisfied that the Agency has satisfied that these considerations outweigh the public interest considerations in favour of disclosure to such a level that it justifies the Agency's non-revelation of the mere existence of the information.
50. If it is not necessary for the Agency to conduct the balancing exercise contemplated by section 13 of the GIPA Act when reviewing a decision made under section 58(1)(f) of the GIPA Act, I would still be satisfied that the Agency has justified that there is an overriding public interest against disclosure of information confirming or denying that the information sought by the Applicant is held by the Agency.
51. This is because the Agency has justified that there is a strong public interest in protecting informants and potential informants and to protect the safety of inmates, correctional centre employees and the community. For reasons given above, this is greater than the interest in disclosing whether or not the information sought is held by the Agency.

## **The decision that there is an overriding public interest against disclosure**

### **The public interest test**

52. The Applicant has a legally enforceable right to access the information requested and there is a presumption in favour of disclosure of information that is only displaced if there is an overriding public interest against disclosing the information. 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.

### **Public interest considerations in favour of disclosure**

53. In its notice of decision, the Agency listed the following public interest considerations in favour of disclosure of the information in issue:
- there is a statutory presumption in favour of disclosure,
  - the general right of the public to have access to government information held by the agencies,
  - the information relates to the Applicant's period of incarceration and contains the Applicant's personal information.
54. I agree with the Agency that these are relevant public interest considerations in favour of disclosure in this matter.

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

55. In its notice of decision, the Agency raised the following public interest consideration/s against disclosure of the information, deciding that its release could reasonably be expected to:
- Release of the information could reasonably be expected to prejudice the security, discipline or good order of any correctional facility (clause 2(h) of the table to section 14 of the GIPA Act)

### **Consideration 2(h) – prejudice the security, discipline or good order of any correctional facility**

56. The Agency determined that one of its functions is to administer the NSW corrections system, including the management of correctional facilities housing inmates. In carrying out these functions the Agency is required to maintain security, discipline and good order among inmates as well as facilitate proper control and management of the centre for offenders and staff.
57. The Agency determined that the effectiveness of the Agency to maintain the security and good order of their correctional facilities is heavily reliant on their ability to monitor inmates and investigate or prevent contraventions of the law or activity that could result in harm to staff and offenders.
58. The Agency determined that the information if released, could reasonably be expected to inform current and future inmates of strategies used by the Agency to detect and investigate contraventions of the law within their facilities. This information could be exploited by inmates to circumvent the tactics implemented by the Agency as they would have detailed knowledge of the strategies employed by the Agency and allow inmates to devise strategies to undermine the Agency's ability to prevent harmful activity within their centres.
59. I am satisfied that the information redacted from the information provided to the Applicant is information that could reasonably be expected to inform current and future inmates of the strategies used by the Agency to detect and investigate contraventions of the law within their correctional facilities, and

this would prejudice the security, discipline or good order of the Agency's correctional facility.

60. I am satisfied that the Agency has justified that clause 2(h) is a relevant public interest consideration against disclosure.

### **Balancing the public interest test**

61. On the information available I am satisfied that the Agency has appropriately considered the public interest considerations in favour of disclosure.
62. As the Agency has justified the public interest considerations against disclosure it raised (consideration 2(h)), the question then is whether the Agency's decision as a whole to refuse to provide access to the information is justified when considerations which I have found to be justified against the presumption in favour of disclosure at section 12 of the GIPA Act and the public interest considerations in favour of disclosure
63. 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 under the GIPA Act.
64. Balancing the competing public interest considerations under s 13 of GIPA Act, is "a question of fact and degree, requiring the weighing of competing matters, and a task that is not amenable to mathematical calculation" (*Hurst v Wagga City Council [2011] NSWADT 307* at [70]). The Appeal Panel stated in *Transport for NSW v Searle [2018] NSWCATAP 93* at [104], that while the process in s 13 of the GIPA Act requires a broad value judgment to be made, it is not made in a vacuum, but having regard to the objects of the legislation, the general presumption in favour of disclosure of government information, and the principles set out in s 15 of the GIPA Act.
65. On balance, I am satisfied that the Agency's decision that the public interest consideration against disclosure outweigh the public interest considerations and presumption in favour of disclosure is justified.

### **Conclusion**

66. I am satisfied that the Agency's decision to refuse to confirm or deny that information is held by the agency because there is an overriding public interest against disclosure of information confirming or denying that fact is justified.
67. I am satisfied that the Agency's decision that there is an overriding public interest against disclosure of the information is justified.

### **Recommendations**

68. I make no recommendations.

## **Applicant review rights**

69. This review is not binding and is 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.
70. The Applicant has the right to ask the NCAT to review the Agency's decision.
71. 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>

## **Completion of this review**

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

Philip Tran

**Senior Regulatory Officer**