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

Applicant:	Alison Sandy on behalf of the Seven Network (Operations) Limited
Agency:	Department of Family and Community Services
Report date:	2 November 2015
IPC reference:	IPC15/R000414
Keywords:	Government information – information not held – information searches

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Summary

1. Ms Alison Sandy on behalf of Seven Network (Operations) Limited (the Applicant) applied for information from the Department of Family and Community Services (the Agency) under the *Government Information (Public Access) Act 2009* (GIPA Act).
2. The Agency decided that the information is not held by the Agency.
3. The Information Commissioner is not satisfied that the Agency's decision to refuse to provide access to the information sought is justified.
4. The Information Commissioner recommends that pursuant to section 93 of the GIPA Act, the Agency make a new decision by way of internal review (within 15 working days), for the following reasons:
    - the notice of decision does not address every aspect of the information request, and
    - the notice of decision does not sufficiently demonstrate that its searches for the information were reasonable or used the most efficient means reasonably available.
5. The Information Commissioner also recommends under section 95 of the GIPA Act that the Agency adopt the guidance provided in this report in dealing with future access applications.

Background

6. On 22 June 2015 the Applicant applied under the GIPA Act to the Agency for access to the following information:

    Any correspondence between the Secretary and the Minister in relation to:

    a. Children abused in state care;

    b. GIPA applications from Seven Network in relation to the abuse of children in state care; and

    c. The subsequent stories that run on the Seven Network as a result of the above mentioned.

    Please also exclude duplicates, documents which have been publicly released, correspondence with media, and media statements/reports/articles.
7. In its decision issued on 13 August 2015, the Agency decided that the information requested is not held by the Agency.
8. In seeking a review of the decision by the Information Commissioner, the Applicant asserts that:
    - searches for information were not adequately conducted:

        After our stories ran, the Secretary of FACS wrote to Seven Sydney News Director Chris Willis. I find it impossible to believe that he [the Secretary] *wouldn't have ran any correspondence past the Minister and that he wouldn't have explained why the correspondence was necessary.*

        There were also significant media follow-ups which would necessitate the Minister being properly briefed on the information that was provided

to the Seven Network and any other relevant issues. This is common practice.

- the full intention of the request has not been properly considered:

  …I ask the following, were emails checked/text messages or diaries.

  In relation to correspondence between the Secretary and the Minister, it should be qualified that it includes that correspondence on their behalf – eg, between executives assistants, other staff etc.on behalf of the Secretary or the Minister. I don't believe that documentation was checked.

- the request for correspondence should include "*correspondence on their behalf – eg, between executives assistants, other staff etc.on behalf of the Secretary or the Minister."*

Decision under review

9. The decision under review is the Agency's decision that information is not held by the Agency.
10. This is a reviewable decision under section 80(e) of the GIPA Act.
11. In accordance with section 97 of the GIPA Act, in this review the Agency bears the burden of establishing that its decision is justified.
12. In this review we have taken into account information provided by both the Applicant and the Agency.

Searches for information

13. Section 53 of the GIPA Act sets out the requirement to conduct searches:

53 Searches for information held by agency

(1) The obligation of an agency to provide access to government information in response to an access application is limited to information held by the agency when the application is received.

(2) 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.

(3) The obligation of an agency to undertake reasonable searches extends to searches using any resources reasonably available to the agency including resources that facilitate the retrieval of information stored electronically.

(4) An agency is not required to search for information in records held by the agency in an electronic backup system unless a record containing the information has been lost to the agency as a result of having been destroyed, transferred, or otherwise dealt with, in contravention of the State Records Act 1998 or contrary to the agency's established record management procedures.

(5) An agency is not required to undertake any search for information that would require an unreasonable and substantial diversion of the agency's resources.

14. The term 'government information' is given a wide meaning by section 4 of the GIPA Act being defined as 'information contained in a record held by an agency.'

15. Further, clause 10(1) to Schedule 4 of the GIPA Act defines 'record' as *"any document or other source of information compiled, recorded or stored in written form or by electronic process, or in any other manner or by any other means."*

16. 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:

    - undertake such reasonable searches as necessary to locate the information requested; and
    - use the most efficient means reasonably available to the agency.

17. 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.*

18. 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 is relevant. Key factors in making an assessment about reasonable searches include "the clarity of the request, the way the agency's recordkeeping system is organised and the ability to retrieve any documents that are the subject of the request, by reference to the identifiers supplied by the applicant or those that can be inferred reasonably by the agency from any other information supplied by the applicant" (*Miriani v Commissioner of Police, NSW Police Force [2005] NSWADT 187* at [30]).

19. The GIPA Act does not require an Agency to include details of its searches in a notice of decision. However, it is good practice for written decisions to clearly explain what the search processes were, what was found, an explanation if no records were found, what was released and what was held back. Details of searches should include where and how the Agency searched, a list of any records found – and if appropriate a reference to the business centre holding the records, the key words used to search digital records (including alternative spellings used) and a description of the paper records that were searched.

The Agency's decision that information is not held

20. The Agency's decision that the information is not held by the Agency relies on section 58(1)(b) of the GIPA Act, which provides:

> ***58 How applications are decided***
>
> *(1) An agency decides an access application for government information by:*
>
> *(b) deciding that the information is not held by the agency.*

21. In its notice of decision, the Agency states:

> *In consultation with the Secretary's office, I am advised that no correspondence relevant to your enquiry has been located. Although a*

reasonable search has been undertaken, no government information falling within the scope of your application has been identified.

22. During the course of this review, the Agency provided the following details relating to its searches:

> *The Right to Information Unit, FACS Legal, specifically liaised with the Director of the Office of the Secretary, who in turn liaised with Mr Michael Coutts-Trotter, Secretary, FACS, in relation to the information requested by Ms Sandy* [the Applicant]. *The Director of the Office of the Secretary advised the Right to Information Unit, Legal that they did not hold any information that fell within the scope of Ms Sandy's request.*
>
> *It should be noted that Ms Sandy's access application is very specific, and is limited to* ***"correspondence between the Secretary and the Minister…"*** [Agency's emphasis] *i.e., correspondence between The Hon. Brad Hazzard MP (Minister for Family and Community Services and Minister for Social Housing) and Mr Michael Coutts-Trotter (Secretary, FACS).*
>
> *Therefore, I am of the opinion that the Department satisfied the search provisions outlined in section 53 of the GIPA Act considering the* ***specifics*** [Agency's emphasis] *of the information requested by Ms Sandy.*

23. The details provided by the Agency in relation to its searches for information indicates that the Agency:

- searched for information strictly within the scope of the Applicant's request (i.e., *"correspondence between the Secretary and the Minister…"*); and
- considered only the current office holders in their interpretation of the Applicant's request. That is, the current Minister and the current Secretary of the Agency.

24. It is noted that the Applicant did not specify a timeframe for "*Any correspondence…"* in the access application. However, it appears that the Agency, in limiting its searches to just the current office holders, has searched for correspondence relating to a period of just 5 months (ie, April – August 2015):

29 July 2013	Mr Michael Coutts-Trotter appointed Director-General (now Secretary) of the Agency.
April 2015	The Hon. Brad Hazzard MP sworn in as Minister of the Agency.
22 June 2015	Access application lodged by the Applicant.
13 August 2015	Notice of decision provided to the Applicant.

25. Further, while the access application did not specifically include a request for *"emails…text messages or diaries"* between correspondents, it is not unreasonable that the Agency include this type of material as part of their search for information as it fits the expansive legislative definition of 'government information' and 'record'.

26. Similarly, although the access application did not specify "*correspondence on their* [the correspondent's] *behalf – eg, between executives assistants, other staff*

etc.on behalf of the Secretary or the Minister", it is not unreasonable that the Agency expand its search parameters to include these parties as part of their searches for information.

27. We remind the Agency that it is good practice to clarify any unclear or ambiguous request items with the Applicant prior to conducting searches for the information and prior to making a decision on an access application.
28. We also note that the notice of decision has not addressed each of the request items a, b and c.
29. For these reasons, we are not satisfied that the Agency has conducted reasonable searches for the information sought by the Applicant, or that the Agency has justified its decision that the information is not held.
30. The Information Commissioner recommends that in reconsidering its decision, the Agency:
    - Clarify a specific timeframe for the information sought;
    - ensure that the notice of decision addresses every aspect of the information request, including request items a, b and c;
    - avoid taking a narrow and literal interpretation of the term 'correspondence' and the parties involved in communications by expanding its searches to include emails, text messages or diary entries as well as correspondence on behalf of the current office holders; and
    - include further information about its searches, including whether hard copy and/or electronic records were searched for, and if so, which search terms were used, and in which database/s.
31. We refer the Agency to the Information Commissioner's knowledge update on Reasonable Searches under the GIPA Act. It is available at www.ipc.nsw.gov.au

Notice of decision

32. To assist the Agency in drafting notices of decisions, we include some additional guidance, below.
33. When making a decision about an access application, an Agency must issue a notice of decision that meets the requirements prescribed by section 126 of the GIPA Act:
    - It must be in writing;
    - It must include the date of decision;
    - It must include a statement of the review rights attached to the agency's decision, including details of the time period within which the review rights must be exercised;
    - It must include the contact details of an officer to whom enquiries about the decision can be directed; and
    - It must not disclose information for which there is an overriding public interest against disclosure.
34. The Agency, having applied the public interest test under section 13 of the GIPA Act, must include detailed reasons if it decides not to release information in response to a formal access application.

35. Section 61 of the GIPA Act provides that when an Agency refuses to provide access to information because there is an overriding public interest against disclosure, its notice of decision must include the following:

    - The reasons for its decision to refuse access;
    - The findings on any key questions of fact, and the source of the information on which the findings are based; and
    - The general nature and format of the records that contain the information sought.

36. We advise that as good practice, a notice of decision for access applications should include:

    - Details of the searches conducted by the Agency to locate the information asked for;
    - The reasons for the Agency's decision to withhold the information including:
        - Public interest considerations in favour of disclosure and why the Agency considers them relevant to the information sought;
        - Public interest considerations against disclosure and why the Agency considers them relevant to the information sought; and
        - The Agency's decision after balancing the public interest considerations for and against disclosure;
    - Details of relevant consultations made as required under section 54 of the GIPA Act;
    - Details of any personal factors of the application under section 55 of the GIPA Act that the Agency has taken into account in making its decision;
    - Details about the access period (under section 77 of the GIPA Act) and forms of access to any information released under the Agency's notice of decision;
    - Details about whether any processing charges will be payable for access to the information and how those changes have been calculated (as required by section 62 of the GIPA Act);
    - Whether the Agency will record details about the access application in its disclosure log (as required by sections 25 and 26 of the GIPA Act); and
    - Where relevant, a schedule of documents itemising the documents falling within the scope of the access application, including a description of the record, location within the Agency, format of the record, public interest considerations in favour of, or against disclosure, the corresponding GIPA Act sections for any such considerations, and whether the information was released.

Recommendation

37. The Information Commissioner recommends under section 93 of the GIPA Act that the Agency make a new decision, by way of an internal review.

    - In making a new decision, the Agency should have regard to the matters raised and guidance given in this report.

- We ask that the Agency advise the Applicant and us of any actions to be taken in response to our recommendation within **10 working days** of the date of this report.

38. The Information Commissioner recommends under section 95 of the GIPA Act that the Agency adopt the guidance provided in this report in dealing with future access applications.

Review rights

39. 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.

40. The Applicant has the right to ask the NCAT to review the Agency's decision.

41. 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

42. This review is now complete.

43. If you have any questions about this report please contact the Information and Privacy Commission on 1800 472 679.

Elizabeth Tydd
Information Commissioner