

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

Applicant: Mr Kelvin Bissett
Agency: NSW Police Force
Report date: 03 July 2015
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personal information – contravene an information protection
principle – disclosure of personal information about a child -
information not held

Contents

| | |
|--|----|
| Summary | 2 |
| Background..... | 2 |
| Decisions under review | 3 |
| CCTV footage of incidents 5151319, 5257178, 5272642, 5336317 not held | 3 |
| Information released in part and information not released | 5 |
| The public interest test..... | 5 |
| Public interest considerations in favour of disclosure..... | 5 |
| Public interest considerations against disclosure | 6 |
| Consideration 3(a) – reveal an individual’s personal information..... | 6 |
| Was the CCTV footage shown in open Court? | 8 |
| Consideration 3(b) – contravene an information protection principle..... | 8 |
| Consideration 3(g) – disclosure of personal information about a child | 9 |
| Editing CCTV footage..... | 10 |
| Balancing the public interest test..... | 10 |
| Recommendations..... | 11 |
| Review rights | 11 |
| Completion of this review | 12 |

Summary

1. Mr Kelvin Bissett (the Applicant) applied for information in the form of 12 distinct CCTV incidents from the NSW Police Force (the Agency) under the *Government Information (Public Access) Act 2009* (GIPA Act).
2. The Agency decided to provide access to CCTV of one incident, decided against providing access to CCTV of seven incidents and decided that CCTV of four other incidents was not held.
3. The Information Commissioner makes the following recommendations in relation to the Agency's decision:
 - a. under section 93 of the GIPA Act, the Agency reconsider the decisions:
 - i. to release in part CCTV footage in relation to incident 5447239; and
 - ii. not to release CCTV footage in relation to incidents 5144558, 5156250, 5191508, 5217665, 5256617, 5313389, 5354724 because of an overriding public interest against disclosure; and make new decisions by way of internal review;
 - b. under section 92 of the GIPA Act, the Agency in making new decisions have regard to the matters raised and recommendations in this report.
 - c. under section 95 of the GIPA Act, that in dealing with future applications, the Agency adopt the guidance in this report, as outlined in paragraphs 20 and 66.

Background

4. The Applicant applied under the GIPA Act to the Agency for access to CCTV footage in connection to the following incidents where police officers were assaulted while attending incidents on the rail network:
 - a. iAsk 5144558, incident date 2/7/2013, Westmead Railway Station;
 - b. iAsk 5151319, incident date 6/7/2013, Sutherland Railway Station;
 - c. iAsk 5156250, incident date 3/7/2013, Mt Druitt;
 - d. iAsk 5257178, incident date 9/7/2013, Parramatta Platform 4;
 - e. iAsk 5191508, incident date 27/7/2013, Fairfield;
 - f. iAsk 5217665, incident date 9/8/2013, Blacktown;
 - g. iAsk 5256617, incident date 29/8/2013, Bondi Junction Railway;
 - h. iAsk 5272642, incident date 6/9/2013, Strathfield Railway Station;
 - i. iAsk 5313389, incident date 29/9/2013, Hurstville Railway Station;
 - j. iAsk 5336317, incident date 12/10/2013, Sutherland Railway Station;
 - k. iAsk 5354724, incident date 23/10/2013, Auburn Railway Station;
 - l. iAsk 5447239, incident date 16/12/2013, Central Railway Station;
5. In its notice of decision with reference 126664:RH, issued on 29 October 2014, the Agency determined:

- a. to release in part CCTV footage in relation to incident 5447239;
 - b. not to release CCTV footage in relation to incidents 5144558, 5156250, 5191508, 5217665, 5256617, 5313389, 5354724 because of an overriding public interest against disclosure; and
 - c. that CCTV footage in relation to incidents 5151319, 5257178, 5272642, 5336317 is not held.
6. In seeking a review of the Agency's decision, the Applicant expressed dissatisfaction with the Agency's response, in the following terms:
- "The one example of released CCTV was of no illustrative or informative value";*
- "...there appears to have been little serious attempt to weigh up the public interest in favour of disclosure in any of the videos";*
- "There was also no attempt to make use of editing to disguise personal information where these disclosures may have been of sufficient concern"; and*
- "There is also no evidence that any consideration was given to whether these matters have been revealed in court."*

Decisions under review

7. The decisions under review are the Agency's decisions:
- a. to release in part CCTV footage in relation to incident 5447239;
 - b. not to release CCTV footage in relation to incidents 5144558, 5156250, 5191508, 5217665, 5256617, 5313389, 5354724 because of an overriding public interest against disclosure; and
 - c. that CCTV footage in relation to incidents 5151319, 5257178, 5272642, 5336317 is not held.

CCTV footage of incidents 5151319, 5257178, 5272642, 5336317 not held

8. Before deciding that it does not hold information, an agency must comply with the requirements of section 53(2) of the GIPA Act, which provides that:
- An agency must undertake such reasonable searches as may be necessary to find any of the government information applied for that was held by the agency when the application was received. The agency's searches must be conducted using the most efficient means reasonably available to the agency.*
9. In reviewing whether an agency's searches for the above-mentioned CCTV footage were sufficient, we consider two questions:
- a. whether there are reasonable grounds to believe that the CCTV footage exists and is footage of the agency; and if so,
 - b. whether the search efforts made by the agency to locate the CCTV footage have been reasonable in all the circumstances of a particular case.
10. In determining these questions, the individual circumstances of the application and the steps taken by the Agency are relevant.
11. The notice of decision states that a search of the Computerised Operational Policing System (COPS) was carried out, printouts obtained and that enquiries

- were directed to Police Transport Command and Sutherland, Fairfield, Eastern Suburbs, St George and Flemington Local Area Commands.
12. In the course of this review, we examined those parts of the Agency's GIPA working file which were provided by the Agency and that contain evidence as to the searches conducted and responses provided by different operational parts of the Agency.
 13. The Agency's notice of decision states in respect of incident 5151319 that searches of the file were undertaken and the CCTV footage was not found. Sydney Trains, as the original source of the footage, was contacted and the Agency was unsuccessful in obtaining another copy. There was no further information in the Agency's working file.
 14. In respect of incident 5336317, the notice of decision states that the officer in charge of the investigation advised that the footage depicted offences and was used in court. As the matter was finalised in court, the footage was no longer needed and therefore not kept. An attempt was made to obtain another copy from Sydney Trains, but it is no longer held by Sydney Trains. The Agency's working file confirms the searches undertaken and that Sydney Trains advised the Agency that it removed the CCTV footage from their system after 2 weeks.
 15. In respect of incidents 5257178 and 5272642, the notice of decision states that Police Transport Command informed the Agency that the footage is no longer held in the file and is unable to be provided. A report from Parramatta Police Transport Command in the Agency's working file confirms the absence of CCTV footage in these two matters.
 16. 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]*).
 17. We are satisfied, on the basis of the information provided during the course of this review that the Agency does not hold CCTV footage of incidents 5151319, 5257178, 5272642, 5336317.
 18. The GIPA Act does not require an agency to include details of its searches in a notice of decision. However, it is good practice in 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.
 19. The Agency's notice of decision would have benefitted from including this level of detail with respect to searches undertaken, as well as an explanation about its procedures for obtaining CCTV from Sydney Trains and storing CCTV footage.
 20. We recommend that pursuant to section 95 of the GIPA Act, in future notices of decision in which the issue of searches for information is raised, the Agency take the step of including this detail in support of the Agency's claims as to the reasonableness of its searches. We refer the Agency to our fact sheet on Reasonable searches under the GIPA Act at www.ipc.nsw.gov.au.

Information released in part and information not released

21. On page 4 of the notice of decision, the Agency states that it applied the public interest test and determined to release information with the exception of those parts that have been found to have an overriding public interest against disclosure.

5447239 – Central – released in part 3(a), 3(b)

5354724 – Auburn – refused 3(a), 3(b) and 3(g)

5313389 – Hurstville – refused 3(a), 3(b)

5256617 – Bondi Junction – refused 3(a), 3(b)

5217665 – Blacktown – refused (3(a), 3(b)

5191508 – Fairfield – refused 3(a), 3(b) and 3(g)

5156250 – Mt Druitt – refused 3(a), 3(b)

5144558 – Westmead – refused 3(a), 3(b)

The public interest test

22. 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.
23. The general public interest consideration in favour of access to government information set out in section 12 of the GIPA Act means that this balance is always weighted in favour of disclosure. Section 5 of the GIPA Act establishes a presumption in favour of disclosure of government information.
24. Before deciding whether to release or withhold information, the Agency must apply the public interest test and decide whether or not an overriding public interest against disclosure exists for the information.
25. Section 13 requires decision makers to:
 - a. identify relevant public interest considerations in favour of disclosure,
 - b. identify relevant public interest considerations against disclosure,
 - c. attribute weight to each consideration for and against disclosure, and
 - d. determine whether the balance of the public interest lies in favour of or against disclosure of the government information.
26. The Agency must apply the public interest test in accordance with the principles set out in section 15 of the GIPA Act.

Public interest considerations in favour of disclosure

27. Section 12(1) of the GIPA Act sets out a general public interest in favour of disclosing government information, which must always be weighed in the application of the public interest test. The Agency may take into account any other considerations in favour of disclosure which may be relevant (s12(2) GIPA Act).

28. In its notice of decision, the Agency listed the following public interest considerations in favour of disclosure of the information in issue:
 - a. the statutory presumption in favour of the disclosure of government information; and
 - b. the general right of the public to have access to government information held by agencies.
29. We are satisfied that these are relevant considerations in favour of disclosure of the information in question.

Public interest considerations against disclosure

30. The only public interest considerations against disclosure that can be considered are those in schedule 1 and section 14 of the GIPA Act.
31. In order for the considerations against disclosure set out in the table to section 14 of the GIPA Act to be raised as relevant, the Agency must establish that the disclosure of the information *could reasonably be expected to have the effect* outlined in the table.
32. The words “could reasonably be expected to” should be given their ordinary meaning. This requires a judgment to be made by the decision-maker as to whether it is reasonable, as distinct from irrational, absurd or ridiculous, to expect the effect outlined.
33. In its notice of decision the Agency raised three public interest considerations against disclosure of the information, deciding that its release could reasonably be expected to:
 - a. reveal an individual's personal information (clause 3(a) of the table to section 14 of the GIPA Act);
 - b. contravene an information protection principle under the *Privacy and Personal Information Protection Act 1998* or a Health Privacy Principle under the *Health Records and Information Privacy Act 2002* (clause 3(b) of the table to section 14 of the GIPA Act); and
 - c. in the case of the disclosure of personal information about a child-the disclosure of information that it would not be in the best interests of the child to have disclosed (clause 3(g) of the table to section 14 of the GIPA Act).
34. I will discuss each of these considerations in turn.

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

35. Clause 3(a) of the table at section 14 as a public interest consideration against disclosure states:

There is a public interest consideration against disclosure of information if disclosure of the information could reasonably be expected to reveal an individual's personal information.
36. Personal information is defined in the GIPA Act as being:

...information or an opinion (including information or an opinion forming part of a database and whether or not recorded in a material form) about an individual (whether living or dead) whose identity is apparent or can

reasonably be ascertained from the information or opinion. [Schedule 4(4)(1) GIPA Act]

37. Section 15(b) of the GIPA Act provides that agencies must have regard to any relevant guidelines issued by the Information Commissioner when determining whether there is an overriding public interest against disclosure.
38. The Information Commissioner has published *Guideline 4 – Personal information as a public interest consideration under the GIPA Act* in December 2011. This Guideline sets out what is meant by ‘personal information’ in the GIPA Act and includes (in paragraph 1.2) examples of what should be considered personal information. Specifically, the Guideline notes that video recordings, including CCTV footage which identifies individuals is personal information.
39. In order to establish that this consideration applies, the Agency has to:
 - a. identify whether the information is personal information
 - b. consider whether the information would be revealed by disclosing it under the GIPA Act.
40. At page 3 the notice of decision considers the definition of personal information from the GIPA Act before concluding that persons can be identified from the images. We have examined the CCTV footage during the course of this review and confirm that it contains identifiable images of individuals, which constitutes their personal information.
41. The second limb of the test requires an agency to consider whether the information would be revealed by disclosing it under the GIPA Act.
42. ‘Reveal’ is defined in Clause 1 of Schedule 4 –

reveal information means to disclose information that has not already been publicly disclosed (otherwise than by unlawful disclosure).
43. Pursuant to section 55(1) of the GIPA Act, the Agency is entitled to take into account the personal factors of the application in determining whether there is an overriding public interest against disclosure of the information, which include at section 55(1)(b) the applicant’s motives for making the access application.
44. Section 55(3) of the GIPA Act provides that personal factors of the application can be taken into account as factors against providing access if (and only to the extent that) those factors are relevant to the agency’s consideration of whether the disclosure of the information concerned could reasonably be expected to have any of the effects referred to in clauses 2-5 (but not clause 1, 6, or 7) of the Table to section 14.
45. The notice of decision takes into account the motives of the Applicant in making the application for the purposes of a television broadcast, before concluding that the release of the images is likely to result in the broadcast of personal information.
46. The Applicant noted in his request for external review the absence of evidence that the Agency gave any consideration to whether these matters have already been revealed in court. This is discussed in the following section of this report.

Was the CCTV footage shown in open Court?

47. In *Richards v Commissioner Department of Corrective Services* [2011] NSWADT 98 at [37] it was noted that:
- As the information was disclosed in open court, certain consequences follow. Because the information has already been publicly revealed, release under the GIPA Act could not be reasonably expected to reveal ...personal information.*
48. This has the effect that, in circumstances where information has already been publicly revealed, an Agency cannot rely on clause 3(a) of the table at section 14 of the GIPA Act to refuse access to information, as the release under the GIPA Act could not be reasonably expected to “reveal” personal information.
49. The notice of decision does not consider whether the CCTV footage to which the Applicant sought access was disclosed previously in open court. There is nothing in the Agency’s GIPA working file to indicate this was considered.
50. We recommend pursuant to section 93 of the GIPA Act, that the Agency reconsider the decision with respect to the following incidents and the application of the consideration at clause 3(a), and demonstrate that it has considered whether or not the information has been revealed in open court.
- 5447239 – Central – released in part 3(a), 3(b)
 - 5354724 – Auburn – refused 3(a), 3(b) and 3(g)
 - 5313389 – Hurstville – refused 3(a), 3(b)
 - 5256617 – Bondi Junction – refused 3(a), 3(b)
 - 5217665 – Blacktown – refused (3(a), 3(b)
 - 5191508 – Fairfield – refused 3(a), 3(b) and 3(g)
 - 5156250 – Mt Druitt – refused 3(a), 3(b)
 - 5144558 – Westmead – refused 3(a), 3(b)
51. If the CCTV footage has been disclosed in open court, then section 3(a) cannot be said to apply to the information.

Consideration 3(b) – contravene an information protection principle

52. Clause 3(b) of the table at section 14 as a public interest consideration against disclosure states:
- There is a public interest consideration against disclosure of information if disclosure of the information could reasonably be expected to contravene an information protection principle under the Privacy and Personal Information Protection Act 1998 or a Health Privacy Principle under the Health Records and Information Privacy Act 2002.*
53. The information protection principles in the PPIP Act only apply to personal information as defined in that Act, at section 4(1):
- ...personal information means information or an opinion (including information or an opinion forming part of a database and whether or not recorded in a material form) about an individual whose identity is apparent or can reasonably be ascertained from the information or opinion.*

54. This definition of personal information excludes information about an individual that is contained in a publicly available publication (section 4(3)(b) of the PPIP Act).
55. We note that if the CCTV footage has been shown in open court, this does not mean that the CCTV footage is publicly available and that the exclusion in section 4(3)(b) applies.
56. In order to rely on consideration 3(b), the Agency needs to articulate which privacy principle would be breached by providing access to the information in question and explain how the breach would take effect.
57. The notice of decision reproduces section 18 of the *Privacy and Personal Information Protection Act 1998* (PIPA Act) and explains that:
 - a. release of the information sought without the authority of the persons involved (including those persons captured in the footage walking past, not involved in the incident) would breach the disclosure principle in section 18 of the PIPA Act;
 - b. the information was provided to the Agency and “collected” by the Agency for law enforcement and prosecution purposes; and
 - c. it would be unreasonable to find each of these persons and request their consent to use the information for another purpose.
58. Having reviewed the CCTV footage and noted the number of individuals whose personal information is incidentally captured in the scope of this GIPA application, we are satisfied as to the relevance of this consideration against disclosure to the information in question.
59. Whether or not the CCTV footage has been shown in open court does not change our assessment as to the relevance of this consideration against disclosure.

Consideration 3(g) – disclosure of personal information about a child

60. Clause 3(g) of the table at section 14 states:

There is a public interest consideration against disclosure if disclosure of the information could reasonably be expected to in the case of the disclosure of personal information about a child-the disclosure of information that it would not be in the best interests of the child to have disclosed.
61. In order for this to be a relevant consideration against disclosure, the Agency must be satisfied that:
 - a. the information contains personal information about a child and
 - b. that it would not be in the child’s best interests to disclose the information.
62. The notice of decision describes one set of footage at Auburn Station as depicting a brawl between school students and that it would not be in the best interests of those persons whose identity is revealed to be released to the Applicant. The table which describes documents and applicable considerations indicates this is incident 5354724.
63. We are satisfied this is a relevant consideration against disclosure for CCTV footage of incident 5354724.

64. We note that the table also cites this consideration against disclosure for incident 5191508, which occurred in Fairfield. The notice of decision contains no discussion of the content of this particular CCTV item.
65. However, on examination of the footage we confirm that incident 5191508 does appear to contain images of young persons whose personal information would be disclosed should the footage be released. On the face of the information, the young persons are not portrayed in a positive light and it is reasonably expectable that it is not in their best interests for footage of this incident to be released. We are therefore satisfied that consideration 3(g) applies to the CCTV footage in incident 5191508.
66. Pursuant to section 95 of the GIPA Act, we recommend that future notices of decision sufficiently describe the nature of the information in question (for example in consideration 3(g), what about those young persons is being portrayed) in order to establish the relevance and assessment of, and weight given to any considerations against disclosure.

Editing CCTV footage

67. We note the Applicant's observation that the Agency made no attempt to edit CCTV footage to disguise personal information where disclosure may have been of concern.
68. Editing is enabled by section 74 of the GIPA Act, which provides for deletion of information from a copy of a record to which access is to be provided, in circumstances in which the deleted information is not relevant to the application, or because the agency has decided to refuse to provide access to that information.
69. In keeping with the object of the GIPA Act to open government information to the public, where editing is available to enable access to CCTV footage, the Information Commissioner would expect to see that the Agency has turned its mind to whether this is a viable option.
70. Our examination of the CCTV footage in question confirms that because of the number of individuals whose personal information is recorded, and the distance and angle from which recording took place, redaction may render the remaining footage to be of reduced utility for television broadcast. However, this does not diminish the Applicant's right to access that information under the GIPA Act.
71. Under section 92, we recommend that in reconsidering its decision, the Agency discuss by way of communication with the Applicant, whether or not:
 - a. it is possible for the Agency to edit the footage, and if so, any processing charges that may apply; and
 - b. the Applicant seeks access to redacted footage.

Balancing the public interest test

72. 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 available under the GIPA Act.

73. The notice of decision on page 4 concludes that documents have been released with the exception of those parts of the documents that have been found to have an overriding public interest against their release under section 14 of the GIPA Act.
74. The notice of decision does not describe how the identified considerations against disclosure outweigh the presumption in favour of disclosure which is inherent in the GIPA Act. The notice of decision would have benefitted from this evaluation of factors and attribution of weight for and against with respect to the information in question.
75. The notice of decision also does not address the possibility of redacting or pixilating CCTV footage.
76. We are therefore not satisfied with the Agency's exercise of the public interest test and recommend the Agency make a new decision with respect to items 5447239, 5144558, 5156250, 5191508, 5217665, 5256617, 5313389 and 5354724.


Recommendations

77. The Information Commissioner recommends under section 93 of the GIPA Act that the Agency make new decisions, by way of internal review within 15 working days, with respect to:
 - a. the decision to release in part CCTV footage in relation to incident 5447239; and
 - b. the decision not to release CCTV footage in relation to incidents 5144558, 5156250, 5191508, 5217665, 5256617, 5313389, 5354724 because of an overriding public interest against disclosure;
78. The Information Commissioner recommends under section 92 of the GIPA Act that the Agency in making new decisions have regard to the matters raised and recommendations in this report.
79. The Information Commissioner recommends under section 95 of the GIPA Act that that in dealing with future applications, the Agency adopt the guidance in this report, as outlined in paragraphs 20 and 66.
80. We ask that the Agency advise the Applicant and us by **15 working days from the date of this report** of the actions to be taken in response to our recommendations.

Review rights

81. 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.
82. The Applicant has the right to ask the NCAT to review the Agency's decision.
83. 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>

84. If the Agency makes a new reviewable decision as a result of our review, the Applicant will have new review rights attached to that new decision, and 40 working days from the date of the new decision to request an external review at the IPC or NCAT.

Completion of this review

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

Elizabeth Tydd
Information Commissioner