



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

Applicant: Miranda Kaye
Agency: Ministry of Health
Report date: 25 January 2016
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Summary

1. Ms Mirana Kaye (the Applicant) applied for information from the Ministry of Health (the Agency) under the *Government Information (Public Access) Act 2009* (GIPA Act).
2. The Agency initially decided that the information sought is not held. The Applicant then sought an internal review.
3. In its internal review decision, the Agency decided to affirm its decision that the information sought is not held.
4. The Information Commissioner is satisfied that the Agency's explanation to refuse access to the information sought is made in accordance with section 72(2)(a) of the GIPA Act and section 75(2)(a) of the GIPA Act.
5. The Information Commissioner does not make any recommendations in relation to the Agency's internal review decision.

Background

6. The Applicant applied under the GIPA Act to the Agency for access to the following information:

Information held by [the Agency] in the Central Register – Assisted Reproductive Technology...for the years 2010-2015.

- i. The particular information I would like is the numbers and hence proportions of NSW and interstate and overseas sperm donors for those years.*
- ii. I would also like the same information in relation to egg donors.*

By way of comparison, I refer you to...the information...provided in the UK by the regulator HFEA, in response to a freedom of information request. It shows the numbers and proportions of donors per year on the UK central register for the years 2005 – 2010 according to whether they had a UK residential address or not. I would like similar information in the NSW context.

7. In its decision issued on 8 July 2015, the Agency decided that the information sought is not held.
8. In its internal review decision issued on 30 July 2015, the Agency affirmed its decision that the information sought is not held.
9. In seeking a review of the decision by the Information Commissioner, the Applicant asserts that the information sought should be collected by the Agency:

...The proportion of overseas gamete donors is an important piece of public information that [the Agency] should be collating. It provides valuable information for NSW policy development.

10. We will not be commenting on the Applicant's statement (extracted above in paragraph 10 of this report) as this is a matter for the Agency and is beyond the scope of this review.

Decision under review

11. This review is confined to the Agency's notice of decision dated 30 July 2015 made in regard to the Applicant's internal review application.
12. The decision under review is the Agency's decision that the information sought is not held by the Agency.
13. This is a reviewable decision under section 80(e) of the GIPA Act.
14. In accordance with section 97 of the GIPA Act, the Agency bears the burden of establishing that its decision is justified.
15. In this review we have taken into account information provided by both the Applicant and the Agency.

Decision that information is not held

16. The Agency's internal review decision states that the information sought is not held by the Agency (section 80(e) of the GIPA Act) and considerable resources would be required to meet the terms of the Applicant's request as specified in the access application:

I have decided to affirm the decision of...8 July 2015 [ie, that the information sought is not held by the Agency].

... The branch advised that it would be required to expend resources in creating a new record, and based on the available resources at this current time, is unable to meet the scope of [the Applicant's] request.

17. As part of this review, the Agency provided details indicating that it holds the information sought, however the information is not held in the form specified in the access application and considerable resources of the Agency would be required to meet the terms of the Applicant's request:

...Although [the Agency] is the custodian of the Central Register, the register does not have the capacity to generate reports in the form as requested by the applicant. In order to meet the terms of the applicant's request, the Ministry would have to dedicate in excess of 40 hours to manually generate the report requested. This would have involved a subject matter expert to carefully review each file, and table them in the form and format requested. Due to the sheer volume of files held on the register, [the Agency] determined that it would not create a new record in order to meet the scope of the applicant's request.

18. Section 75(2)(a) of the GIPA Act states that an Agency that holds information which is the subject of an access application is not required to provide access to the information by creating a new record of that information:

75 Providing access by creating new record

(2) An agency's obligation to provide access to government information in response to an access application does not require the agency to do any of the following:

(a) make a new record of information held by the agency

This means that the Agency is not required to make a new record.

19. Section 72(2)(a) of the GIPA Act provides:

72 Forms of Access

(2) The agency must provide access in the way requested by the applicant unless:

(a) to do so would interfere unreasonably with the operations of the agency or would result in the agency incurring unreasonable additional costs.

20. The Information and Privacy Commission has published a fact sheet on Creating New Records under the GIPA Act. This fact sheet aims to provide guidance to Agencies on the creation of a new record under section 75 of the GIPA Act and confirms that an Agency is not obliged to create a new record in response to an access application. A copy of the fact sheet is available from www.ipc.nsw.gov.au.
21. The Agency has explained how providing access in the way requested would reasonably interfere with the Agency's operations.
22. The Information Commissioner is satisfied that the Agency's explanation to refuse access to the information sought is made in accordance with section 72(2)(a) of the GIPA Act and section 75(2)(a) of the GIPA Act.

Forms of Access

23. With regard to the Applicant's subsequent request for "*information to be released in the simplest form*", as opposed to the form originally requested, an Agency cannot consider a request to amend the scope of an access application if the subsequent request was made after the Agency has issued its internal review decision (section 49(1) of the GIPA Act).
24. In seeking a review by the Information Commissioner, the Applicant also asserts that the Agency has refused her offer to search the Agency's records on their behalf, subject to a confidentiality agreement. This issue is beyond the scope of this external review. The Applicant may wish to raise this issue directly with the Agency.

Recommendations

25. The Information Commissioner does not make any recommendations in relation to the Agency's internal review decision.

Review rights

26. 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. The Applicant has the right to ask the NCAT to review the Agency's decision.
27. 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

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

Elizabeth Tydd
Information Commissioner