



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

Applicant: The Applicant
Agency: Roads and Maritime Services
Report date: 07 April 2016
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Keywords: Government information – searches for information – unreasonable and substantial diversion of resources – process for dealing with GIPA applications

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Summary

1. The Applicant applied for information from the Roads and Maritime Services (the Agency) under the *Government Information (Public Access) Act 2009* (GIPA Act).
2. The Agency decided to refuse to deal with the access application, because it would require an unreasonable and substantial diversion of the Agency's resources pursuant to section 60(1)(a) of the GIPA Act.
3. The Information Commissioner makes the following recommendations in relation to the Agency's decision:
 - a. That the Agency reconsider its decision and make a new decision as if the decision reviewed had not been made, pursuant to section 93 of the GIPA Act; and
 - b. In making a new decision, and in dealing with future GIPA applications, that the Agency follow the guidance contained in this report, pursuant to section 95 of the GIPA Act.

Background

4. The Applicant applied under the GIPA Act to the Agency for access to the following information:
 - 1) *All correspondence between the Department of Roads and Maritime Services (RMS) or the office of the Minister for Roads of the Minister for Roads, and the Taxi Council of NSW, the Australian Taxi Drivers Association (ATDA), the Australian Taxi Industry Association (ATIA), the Tourism & Transport Forum (TTF), CabCharge, IPART, or individuals from those organisations.*
 - 2) *Briefings prepared by RMS about ridesharing or "Uber".*
 - 3) *Any document held by RMS about ridesharing or "Uber".*
 - 4) *Briefings or correspondence between RMS and Parliamentary Counsel about ridesharing or "Uber".*
 - 5) *Correspondence about ridesharing or "Uber" between RMS and Queensland Department of Transport and Main Roads, the Victorian Department of Transport, Planning and Local Infrastructure, VicRoads, the Victorian Taxi Services Commission (or the former Victorian Taxi Directorate), or individuals from those organisations.*
 - 6) *Any document held by the offices of the Minister for Roads about ridesharing or "Uber".*
5. In its decision issued on 3 June 2015, the Agency decided:
 - a. to provide access to documents 1-3, comprising an email, a media release and a sample warning letter, plus some numerical information, which is that the Agency issued 400 warning letters, issued 33 penalty notices to drivers, commenced 77 court proceedings, and received in excess of 140 complaints and enquiries;
 - b. to decline access to some other information (documents 4-11) because of an overriding public interest against its disclosure; and

- c. that some of the requested information is not held.
6. On 2 July 2015 the Applicant requested an internal review of the Agency's decision, raising concerns about searches for information, and the Agency's decision not to provide access to documents, which in the Applicant's view could have been produced in part with information redacted.
7. On 6 August 2015 the Agency invited the Applicant to amend his access application and on 12 August 2015 he agreed to amend his application as follows.
 - 1) *In relation to all paragraphs, limit searches to dates after 1 March 2014 until now;*
 - 2) *In paragraph 1, please use the keywords ridesharing, Uber, UberX;*
 - 3) *At this stage I am willing to exclude the files held by the Legal Branch from the Access Application. This should include files held exclusively by the Legal Branch, and where copies of those documents are held in other groups too they should be produced. I also note with interest that the previously mentioned prosecutions have been withdrawn and so I retain the right to request Legal Branch documents in the future;*
 - 4) *Withdraw paragraph 6: request for information held by the offices of the Minister for Roads.*
8. On 23 September 2015, the Agency decided to refuse to deal with the access application, because it would require an unreasonable and substantial diversion of the Agency's resources pursuant to section 60(1)(a) of the GIPA Act.
9. In seeking a review of the decision by the Information Commissioner on 4 November 2015, the Applicant expressed concern that:
 - a. *"[his] initial application uncovered only 8 documents, but only upon internal Appeal did the [Agency] stumble across 9000 pages (based on 159 hours at 1 min per page);"*
 - b. he received conflicting advice from Agency officers with respect to processing charges, as the notice at 6.4 states that the Agency *"is unable to accept payment for processing charges."* On July 16 2015, the Agency's Lawyer Litigation & Inquiries advised that *"Following receipt of the cost estimate, you will confirm whether or not you wish to proceed with the Application or if you intend to narrow the scope of the Application;"* and
 - c. the Agency *"missed deadlines,"* as it acknowledged the amended access application was received on 12 August 2015 and the decision was made on 23 September 2015, more than the 15 working days allowed for determination of internal review.

Decisions under review

10. The decision under review is the Agency's decision to refuse to deal with the application, which is a reviewable decision under section 80(c) of the GIPA Act.
11. The burden of establishing that the decision is justified lies on the Agency pursuant to section 97(1) of the GIPA Act.
12. There are two issues in this review:

- a. searches, because the Applicant alleges that “*only on internal Appeal did the [Agency] stumble across 9000 pages (based on 159 hours at 1 min per page);*” and
- b. the issue of unreasonable and substantial diversion of the Agency’s resources.

Searches for information held by the Agency

13. Section 53 of the GIPA Act sets out the requirement to conduct searches:
 - (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. With respect to records management and the nature of searches, the notice of decision states that:
 - a. the Agency maintains both digital and hard copy records and does not have a single record keeping procedure;
 - b. records are held in hard copy files, a document management system known as Objective, local computer drives and PST email folders;
 - c. an electronic search of Objective files would not be sufficient to locate all information captured by the narrowed access application; and
 - d. staff would still be required to physically carry out searches to locate documents in any paper based files and saved on local computer drives and in PST email folders.
15. While the Agency has described in a general sense how records are held, it does not refer specifically to information which is subject to the Applicant’s amended request, or provide any indication that searches have been attempted.
16. We are therefore not satisfied that searches were undertaken in compliance with the requirements of section 53(2) of the GIPA Act and recommend that the Agency reconsider its decision under section 93 of the GIPA Act.

17. We refer the Agency to the Information Commissioner's fact sheet *Reasonable searches under the GIPA Act*, which provides best practice guidance in relation to what we would expect to see in a notice of decision regarding the searches conducted.
18. We turn now to an examination of the Agency's position that dealing with the access application would require an unreasonable and substantial diversion of the Agency's resources.

Unreasonable and substantial diversion of resources

19. Under section 60(1)(a) of the GIPA Act, an agency may refuse to deal with an access application if it appears that the work involved in processing the application would substantially and unreasonably divert the agency's resources.
20. Whether an application is one that would be an unreasonable and substantial diversion of resources depends on the facts of each case.
21. In making a decision that dealing with an application would require an unreasonable and substantial diversion of resources, an agency needs to identify what is involved in processing the application, the volume of information captured by the scope of the application, and the resources required to do this.
22. The GIPA Act does not define "unreasonable and substantial diversion," however guidance can be found in *Colefax v Department of Education and Communities No 2 [2013] NSWADT 130*. In the Colefax case, the Administrative Decisions Tribunal considered relevant factors that were outlined in an earlier case: *Cianfrano v Director General, Premier's Department [2006] NSWADT 137*. Cianfrano was decided under previous freedom of information legislation, which contained a provision similar to section 60(1)(a) of the GIPA Act. As noted by the Tribunal in Colefax, there is an important distinction between the tests under the previous FOI legislation and the GIPA Act. The distinction is that under the GIPA Act an applicant has a statutory right to access government information, and the Act instructs that discretions under it be exercised so as to enhance its objects.
23. The factors that were outlined in the Cianfrano case and reinforced in Colefax include:
 - a. terms of the request;
 - b. demonstrable importance of the document(s) to the applicant;
 - c. whether the request is a reasonably manageable one, having regard to the size of the agency and the extent of its resources usually available for dealing with information access applications;
 - d. agency's estimate as to the number of documents affected by the request, and the number of pages and the amount of officer time, and salary cost;
 - e. reasonableness of the agency's initial assessment and whether the applicant has taken a co-operative approach in redrawing the boundaries of the application;
 - f. the time lines binding on the agency, that is, the time in which it has to process the application; and
 - g. the degree of certainty that can be attached to the estimate that is made as to documents affected and hours to be consumed; and whether there is a real possibility that processing time may exceed to some degree the estimate first made.

24. This is not an exhaustive list of factors, and there may be other circumstances that are relevant in deciding whether an application would require an unreasonable and substantial diversion of an agency's resources.
25. Having assessed the access application against the above factors, if an agency refuses to deal with the application then it must provide an applicant with a notice of decision that outlines in some detail why it considers the application to be both unreasonable and substantial diversion of resources (under section 60(5) of the GIPA Act).
26. We are satisfied that the Agency has provided an adequate level of detail as to why it considers that dealing with the application would amount to an unreasonable and substantial diversion of its resources.
27. However, before making a decision pursuant to section 60(1)(a), an Agency must afford the Applicant a reasonable opportunity to amend his application, pursuant to section 60(4).
28. The notice of decision reports that on 6 August 2015, the Agency wrote to the Applicant, assisting and inviting him to amend his application, which he did as outlined at paragraph 7 of this report.
29. Although the amended application excluded files held "*exclusively by the Legal Branch*," limited the time period for information to dates after 1 March 2014 and withdrew the request for information at paragraph 6, it is evident that the scope of the Application remained relatively wide, in circumstances in which the Agency's estimate of time to deal with it amounted to a total of 221 hours.
30. The notice of decision reports that enquiries were made of the Agency's various business units regarding the existence of documents falling within the narrowed scope of the request, and an estimate as to the volume of work required to obtain and collate the information for review by the decision-maker.
31. The Agency calculated "*a conservative estimate of 221 hours*" to deal with the amended application, as follows:

Activity	Estimated time (hours)
Searching for records	33
Reviewing records (estimating 1 min per page)	159
Consulting with third parties	20
Making and documenting the decision	4
Administrative tasks	5
TOTAL	221

32. Given the continuing wide scope of the amended application and the Agency's description of its record-keeping practices, it is not infeasible that the estimate is an accurate one.
33. However, there is nothing in the GIPA Act to prevent an agency from requesting a further amendment of the Applicant's application in circumstances in which it remains unmanageable in terms of the Agency's capacity to deal

with it. In our view, it remained open to the Agency to assist the Applicant to further amend his request, to the extent that it was rendered able to be dealt with.

34. The Tribunal has cautioned that the power to refuse to deal with an application is a powerful one and should be used as a last resort after making every attempt to assist an applicant in narrowing their request.

Agencies should not rely on the power of refusal to the process simply because their information management systems are poorly organised and documents take an unusually long time to identify and retrieve.¹

35. A pragmatic approach at the stage of settling the scope of the application, may be for the Agency to provide the Applicant with a high-level descriptive table of records which goes some way towards meeting his request, and asking him to select which of these he presses for in the first instance. In this way, the Agency may be able to assist the Applicant to prioritise the information requested and narrow the scope of the Application. There is nothing to prevent the Applicant from lodging a separate GIPA application for the balance of the information at a later date.
36. We recommend that the Agency reconsider its decision and in so doing, assist the Applicant to narrow the scope of his application.

Process for dealing with GIPA applications

37. In the Applicant's request for internal review, we note that he requested an estimate of time and costs required to redact and provide access to documents which were not provided in the original decision. We remind the Applicant that, pursuant to section 84 of the GIPA Act, an internal review is to be made by making a new decision, as if the original decision had not been made.
38. We note that the Applicant also asked whether the Agency could calculate how many of the 140 complaints it received were from Uber ridesharing passengers, complaining about the service they received.
39. In its decision in *Davison v NSW Department of Education and Training [2013] NSW ADT 25* at [3] the Tribunal considered what constitutes the terms of an access application for the purposes of the GIPA Act and confirmed that the GIPA Act is
- ... not a vehicle for seeking answers to questions a person might have in regard to administrative action taken by a government agency, or seeking an explanation by an agency as to why particular action was taken.*
40. While the GIPA Act enables access to government information held by an agency, it is not a mechanism through which responses to questions may be sought unless that explanation is contained in a record of the agency at the time the GIPA access request was made.
41. We recommend that in any reconsideration of the Agency's decision and in dealing with future access requests, the Agency clarify the nature of the request if necessary and advise the Applicant that an access application under the GIPA Act cannot be used as a mechanism to request answers to questions, or seek clarification of information to which access has been provided.

¹ Singh v Legal Aid Commission (no 2) [2015] NSWCATAD 5 at [102]

42. With respect to the Applicant's concerns about conflicting advice from the Agency about processing charges, the Agency provided the following explanation during the course of our review.
43. The Agency confirmed that its change of position occurred because it approached its internal review assuming processing charges could be applied. However, on review of the legislation, it came to the position that it was prohibited from charging a processing fee. It is the case that an agency is not entitled to impose any processing charges for work done in connection with an internal review, pursuant to section 87 of the GIPA Act.
44. In relation to the Applicant's allegation that the Agency "missed deadlines" in making its decision, during the course of this review we asked the Agency for information about whether it communicated with the Applicant to extend the time for making the decision, which by our calculations was due on 2 September 2015, pursuant to section 86 of the GIPA Act, 15 working days before it was actually issued.
45. The Agency provided a record of its telephone communication with the Applicant dated 26 August 2015, which confirmed agreement that a further two weeks be allowed to search for information and then contact would be made with the Applicant to discuss timeframes going forward. There is no record of further communication with the Applicant in relation to timeframes.
46. We recommend that in dealing with future GIPA applications, the Agency ensure that it communicate with the Applicant in relation to any delay which may be anticipated, so that it avoids a situation in which section 86(5) is enlivened, which relevantly provides:

If a decision on the internal review is not made within the review period, the agency is deemed to have made that decision by making the original decision again, and the applicant for review is entitled to a refund of any fee paid to the agency for the review.

Review rights

47. 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.
48. The Applicant has the right to ask the NCAT to review the Agency's decision.
49. 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>

50. 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

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

Elizabeth Tydd

Information Commissioner