



information
and privacy
commission
new south wales

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

Applicant: Mr Joe Zidar
Agency: Department of Justice
Report date: 5 July 2018
IPC reference: IPC18/R000218
Agency reference: LEGAL422/18
Keywords: Government information – searches
Legislation cited: *Government Information (Public Access) Act 2009*
Cases cited: *Miriani v Commissioner of Police, NSW Police Force* [2005]
NSWADT 187; *Smith v Commissioner of Police* [2012]
NSWADT 85

This review has been conducted under delegation by the Information Commissioner pursuant to section 13 of the *Government Information (Information Commissioner) Act 2009*.

Summary

Mr Joe Zidar (the Applicant) applied for information from the Department of Justice (the Agency) under the *Government Information (Public Access) Act 2009* (GIPA Act). The information sought by the Applicant was about the blocking of emails.

The Agency decided to provide access to some information and that other information was not held.

The Applicant applied for external review on 22 April 2018. The reviewer obtained information from the Agency including the notice of decision and the Agency's GIPA file.

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

The reviewer makes no recommendation to the Agency.

Background

1. The Agency received two separate access applications from the Applicant dated 16 August 2017 and 18 August 2017 that were then combined into one access application and re-scoped by the Applicant.
2. On 28 August 2017, the Agency received an access application under the GIPA Act for access to the following information:

'1 Records held by the NSW Department of Justice relating to the unlawful and uncommunicated Blocking of emails from Fraud Detection and Reporting Pty Ltd to the following (3) independent statutory authorities of the Justice Cluster, which include (NCAT, OLSC & IPC), however, excluding the (OGIP) unit and issued by the primary parties which include (Mr Mark Speakman, Mr Andrew Cappie-Wood, Ms Lida Kaban, Ms Jodie Shepherd), Ms Rebecca Jeyasingham & Mr Michael McIntosh for the period between 25 May 2017 to the date of receipt of a valid access application);

This includes the following types of records:

- a. Emails /letters (inbound and outbound)*
- b. Video / Voice recordings*
- c. File-notes / Phone Logs*
- d. Minutes of meetings held'*

2 Please provide any policy, procedure document or signed letter of authority or directive relied on by Ms Kaban enforcing Fraud Detection and Reporting Pty Ltd to post all future correspondence to the NSW Department of Justice;

3 Please provide any policy, procedure document or signed letter of authority or directive relied on by Ms Kaban relating to the unlawful and uncommunicated BLOCKING of emails from Fraud Detection and Reporting Pty Ltd to the following (3) independent statutory authorities of the Justice Cluster, which include (NCAT, OLSC & IPC), however, excluding the (OGIP) unit;

4 Please provide any policy, procedure document or signed letter of authority or directive relied on by the NSW Department of Justice Digital Technology Services relating to the unlawful and uncommunicated BLOCKING of emails from Fraud Detection and Reporting Pty Ltd to the following (3) independent statutory authorities of the Justice Cluster, which include (NCAT, OLSC & IPC), however, excluding the (OGIP) unit;

5 Please provide a list of Business Units and Agencies serviced by NSW Department of Justice Digital Technology Services for the period between (6am 25 May 2017 to the date of receipt of a valid access application);

6 Please provide the most recent Organisational Chart of the {OGIP} Unit which details the number of Officers in this unit;

7 Please provide the list of NSW Department of Justice Officers who form part of the infoandprivacy@justice.nsw.gov.au distribution list, as at 20 May 2016, 30 July 2017 and 2 December 2017;

8 Please provide all relevant and current JOB descriptions applicable for the following Officers as published and advertised on employment websites such as (i.e. SEEK & INDEED);

a. All correspondence under the Scope of Documents defined above for the following Officers:

- i. Mr Andrew Cappie-Wood (Secretary, NSW Department of Justice)
- ii. Ms Lida Kaban (General Counsel, Office of the General Counsel)
- iii. Ms Jodie Shepherd (Director, Open Government, Information and Privacy)
- iv. Ms Rebecca Jeyasingam (Manager, Open Government, Information and Privacy)
- v. Mr Michael McIntosh (Assistant Manager, Open Government, Information and Privacy)
- vi. Mr Giancarlo Nalapo (Privacy Officer, Open Government, Information and Privacy)
- vii. Mr John McKenzie (Commissioner, NSW Legal Services Commissioner)
- viii. Ms Elizabeth Knight (Senior Officer, NSW Legal Services Commissioner)

9 In relation to GIPA application 1994/17, we seek access to:

- a. Emails/Letters (inbound and outbound)
- b. Video/Voice recordings
- c. File-notes / Phone Logs
- d. Minutes of meetings held

held by (Mr Mark Speakman, Mr Andrew Cappie-wood, Ms Lida Kaban, Ms Jodie Shepherd and) Ms Rebecca Jeyasingam in dealing with GIPA application (LEGAL1994/17) for the period 25 May 2017 to the date of receipt of a valid access application;

10 In relation to GIPA application 3054/17, we seek access to:

- a. Emails/Letters (inbound and outbound)
- b. Video/Voice recordings
- c. File-notes / Phone Logs
- d. Minutes of meetings held

held by (Mr Mark Speakman, Mr Andrew Cappie-wood, Ms Lida Kaban, Ms Jodie Shepherd and Ms Rebecca Jeyasingam in dealing with GIPA application (LEGAL3054/17) for the period 25 May 2017 to the date of receipt of a valid access application;'

3. In its decision at first instance issued on 5 January 2018, the Agency decided to provide access to some information and that other information was not held.
4. On 15 February 2018, the Agency received by post the Applicant's request for an internal review.

5. In its decision on internal review issued on 27 February 2018, the Agency decided to provide access to some information and that other information was not held.

Decision under review

6. The Information Commissioner has jurisdiction to review the decision made by the Agency pursuant to section 89 of the GIPA Act.
7. The decision under review are the Agency's decision:
 - a. that information is not held.
8. This is a reviewable decision under section 80(e) of the GIPA Act.
9. The issue that arises in this review is searches for information.

Searches for information

10. This application for review requires consideration of the adequacy of the searches conducted by the Agency in relation to the items that the Agency claimed that no records were located (Part 3 items ii, iv, vii, viii, ix, x, xi, xiii).
11. For guidance on searches, see the Public Interest Consideration (PIC) Resource attached to this report.
12. The Applicant has a legally enforceable right to access government information that is relevant to their request.
13. Section 53 of the GIPA Act requires agencies to undertake searches for government information requested in an access application that is held at the time the Agency receives the application. The expression 'government information' is defined in section 4 of the GIPA Act as "...information contained in a record held by an agency."
14. 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.
15. I have considered two questions below identified in *Smith v Commissioner of Police* [2012] NSWADT 85 ('*Smith*') by Judicial Member Isenberg at [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."
16. 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] ('Miriani')).

17. 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.
18. In considering the searches for information, I had regard to:
 - the Applicant's submissions
 - the Agency's notice of decision

Existence of requested documents

19. In relation to searches, the first limb in *Smith* to consider is whether there are reasonable grounds to believe that the documents requested exist and are the Agency's (set out at paragraph 15).
20. My view is that there are reasonable grounds to believe that correspondence and policies regarding the blocking of emails exist and are documents of the Agency. This is because it is reasonable to expect that the Agency staff corresponded about this issue and policies about communication strategies (including emails) are common documents for an agency to hold.
21. On this basis, the first limb in *Smith* is satisfied.

Search efforts made by the Agency

22. The second limb to consider in *Smith* is whether the search efforts made by the Agency to locate such documents have been reasonable in all the circumstances of a particular case (set out at paragraph 15).
23. In its notice of decision, the Agency provided information about the searches conducted in relation to the ten points set out in the Applicant's access application. The Agency located some records (for example, the OGIP organisational chart and role descriptions) and stated that other records within the scope of the access application were not held.
24. In relation to points 1, 2, 3, 7, 9 and 10, the Agency stated
 - search terms nominated by the Applicant were used
 - searches were conducted in electronic systems including the email system (Microsoft Outlook) and the Electronic Document and Records Management System (ED-RMS) using key word searches nominated by the Applicant
 - inquiries were made on the Applicant's behalf to the Attorney General's Department (noting that it is a separate government agency)
 - inquiries were directed to the Digital Technology Services (DTS) branch in relation to the Applicant's original access application
 - searches were directed to the Executive Director of DTS, the Director of the Open Government Information and Privacy (OGIP) Unit,

Strategic Human Resources and the relevant parties, and the Office of the Legal Services Commissioner.

25. I am satisfied that the Agency conducted reasonable searches in order to obtain the information sought by the Applicant. I hold this view because the searches were conducted by the most appropriate areas within the Agency and the Attorney General's Department. Further, the searches were conducted using relevant systems and on relevant records. In addition, the searches were conducted using key words that were nominated by the Applicant. This approach to searches is consistent with the search indicators considered in *Miriani* (set out at paragraph 16).

Other issues raised by the Applicant

26. In his submissions to the IPC, the Applicant raised additional issues in relation to the external review request (points 4, 9 and 10), and a general issue about access applications.
27. These issues are outside the scope of the review. I note that the Applicant may wish to consider making a complaint under the *Government Information (Information Commissioner) 2009 Act* in relation to these issues.

Conclusion

28. On the information available, I am satisfied that the Agency's decision under review is justified in relation to information not held.

Recommendation

29. I make no recommendations to the Agency.

Applicant review rights

30. 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.
31. The Applicant has the right to ask the NCAT to review the Agency's decision.
32. 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

33. This review is now complete.

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

Amitha Chetty

Senior Investigation and Review Officer