



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

Applicant: Mr Joe Zidar
Agency: Department of Justice
Report date: 22 August 2017
IPC reference: IPC17/R000303
Agency reference: LEGAL 1136/17
Keywords: Government information – invalid application – excluded information
Legislation cited: *Government Information (Public Access) Act 2009*
Cases cited: *Watson v NSW Trustee and Guardian (No.2)* [2016] NSWCATAD 19
DF v Attorney General's Department [2002] NSWADT 164
Cianfrano v NSW Ombudsman [2007] NSWADT 273

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 included information regarding two formal complaints made to the Office of the Legal Services Commissioner and its complaints handling manual.

The Agency decided, in its internal review decision, that the access application is invalid because the information the Applicant applied for is excluded under the GIPA Act.

The Applicant applied for external review on 9 June 2017. The reviewer obtained information from the Agency including records related to the access application and communication between the Applicant and the Agency.

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

The reviewer makes no recommendation.

Background

1. The Applicant applied, on 8 February 2017, under the GIPA Act to the Agency for access to the following Office of Legal Services Commissioner (OLSC) information:
 - a. Regarding a formal complaint (OLSC Complaint Number 49213), dated 15 May 2016, involving: Stuart J Beal, Nikki Strong-Harris, John McKenzie, Elisabeth Knight, Stuart Beal, Janelle Pryour, Peter Kirsop, Jann Scott and the Applicant:
 - i. a copy of all communications (including emails, letters, video and voice recordings) received by the OLSC relating to the complaint, from any party, received in the period from 4 April 2016 to midnight 5 February 2017; and
 - ii. a copy of all communications contained with the OLSC complaints register records management system (including complaints case, investigative notes, file logs and both inbound and outbound complaint phone logs) for the period from 4 April 2016 to midnight 5 February 2017; and
 - iii. all communications sent by the OLSC (including emails, letters, video and voice recordings) relating to the complaint, from any party, in the period from 4 April 2016 to midnight 5 February 2017.
 - b. Regarding a formal complaint, dated 31 July 2016, involving Peter Kirsop – MRM Lawyers:
 - i. a copy of all communications (including emails, letters, video and voice recordings) received by the OLSC relating to the complaint, from any party, received in the period from 30 July 2016 to midnight 5 February 2017; and
 - ii. a copy of all communications contained with the OLSC complaints register records management system (including complaints case, investigative notes, file logs and both inbound and outbound complaint phone logs) for the period from 30 July 2016 to midnight 5 February 2017; and
 - iii. all communications sent by the OLSC (including emails, letters, video and voice recordings) relating to the complaint, from any party, in the period from 30 July 2016 to midnight 5 February 2017.
 - c. The OLSC complaints handling procedure manual.
2. In its decision at the first instance, issued on 20 February 2017, the Agency decided that the Applicant's application was invalid because the information applied for is information that is 'excluded information' under the GIPA Act.
3. The Applicant applied for an internal review of that decision, stating he sought an explanation for what he believes to be a breach of both section 51(2) and 52(3) of the GIPA Act. The Agency emailed the Applicant, on 21 March 2017:
 - a. stating that the aspects of the internal review relating to an explanation request were problematic in that they were new issues that could not be raised and questions that could not be asked in an internal review; and

- b. asking the Applicant if he would consider subtracting that aspect of the internal review request so they may process the internal review. On the same day, the Applicant replied indicating that he agreed to do so.
4. In its notice of decision for the external review, dated 7 April 2017, the Agency stated that it upheld the decision made at the first instance.
5. In seeking a review of the decision by the IPC, on 9 July 2017, the Applicant confirmed that:
 - a. it is his view that the date listed on the Agency's internal review decision is not indicative of the decision date, as the document was not emailed to him and posted by the Agency on 11 April 17; and
 - b. he seeks an external review of the Agency's internal review decision.

Time frame for an external review

6. The IPC received the Applicant's request for internal review on 9 June 2017, which is more than 40 working days after the Agency's notice of decision date of 9 April 2017. The IPC made enquires with the Agency and was advised that the notice of decision was posted on 10 April 2017, which is 41 days prior to the receipt of Applicant's request for external review.
7. On this basis, the IPC initially determined that the Applicant's request for review was outside of the statutory 40 day timeframe provided in section 90 of the GIPA Act. The IPC wrote to the Applicant to advise of this on 16 June 2017.
8. The Applicant, on 19 June 2017, wrote to the IPC stating that he believed the Agency's notice of decision was sent to him on 11 April 2017, and not 10 April 2017, so his request for external review was made within the allowable 40 day time frame.
9. The IPC made further enquires with the franking company that collected the notice of decision from the Agency. As a result of these enquires, the IPC still considered that his request for external review was made outside of the statutory 40 working days provided by the GIPA Act. The IPC wrote to the Applicant on 7 July 2017 to advise this.
10. On 9 July 2017, the Applicant wrote to the Information Commissioner and reiterated that he believed his request for external review to be within the 40 working day time frame. He based his view on the premise there is not a precise definition of terms 'collected' and 'posted' for the purposes of the calculation of the day count for the allowable external review period. He also indicated that the envelop that contained the Agency's notice of decision displayed post marking of 11 April 2017, and provided a scanned image of the envelope for the Commissioner's review.
11. In light of the Applicant's submission, the Information Commissioner wrote to both the Applicant and the Agency, on 12 July 2017, to confirm that the Applicant's request for external review was made on time and will be accepted by the IPC.

Decision under review

12. The decision under review is the Agency's decision that the application is not a valid access application.
13. This is a reviewable decision pursuant to section 80(a) of the GIPA Act.

Excluded information

14. The Agency decided that the access application is not a valid application because it requests access to information that is 'excluded information' under Schedule 2 of the GIPA Act.
15. The definition of excluded information is described in the note to Schedule 2 which provides:

Information that relates to a function specified in this Schedule in relation to an agency specified in this Schedule is "excluded information" of the agency. Under Schedule 1 it is to be conclusively presumed that there is an overriding public interest against disclosure of excluded information of an agency (unless the agency consents to disclosure). Section 43 prevents an access application from being made to an agency for excluded information of the agency.
16. Section 43 of the GIPA Act states:
 - (1) *An access application cannot be made to an agency for access to excluded information of the agency.*
 - Note.** *Information is excluded information of an agency if it relates to any function specified in Schedule 2 in relation to the agency.*
 - (2) *An application for government information is not a valid access application to the extent that the application is made in contravention of this section.*
17. The Applicant has applied for information that specifically relates to OLSC complaints and the OLSC complaints handling procedure manual. Information related to the OLSC's complaint handling function is listed as excluded information under Schedule 2(2) to the GIPA Act which states:

The Office of Legal Services Commissioner – complaint handling, investigative, review and reporting functions.
18. I am therefore satisfied that the information the Applicant sought is excluded information under Schedule 2 to the GIPA Act, because:
 - a. the information sought by the Applicant relates to the complaint handling function of the OLSC; and
 - b. the OLSC complaint handling function is listed in Schedule 2(2) of the GIPA Act; and
 - c. information that 'relates' to the functions of agencies listed in the note at Schedule 2 to the GIPA Act is 'excluded information of an agency'.
19. As I am satisfied the Applicant has applied for excluded information of an agency, I am also satisfied that the Agency has justified its decision that the Applicant's access application is invalid because section 43 of the GIPA Act provides that an access application is considered invalid if it is made for 'excluded information of an agency'.

Open access information

20. While I am satisfied that the information the Applicant seeks is excluded information of the Agency for an access application, I have had regard to the Agency's open access information requirements under the GIPA Act. In

particular whether or not the Agency has an obligation to provide access to the some of the information the Applicant sought through this channel.

21. Section 6(1) of the GIPA Act indicates that the Agency has a mandatory obligation to disclose its 'open access information'. Section 6(1) states:

*An agency must make the government information that is its **open access information** publicly available unless there is an overriding public interest against disclosure of the information.*

Note. Part 3 lists the information that is open access information.

Part 3 is sections 18 to 40 of the GIPA Act.
22. I have reviewed a copy of the complaint manual sought by the Applicant and I have considered whether or not the Agency is required to disclose the manual as a policy document of the Agency, pursuant to section 18 of the GIPA Act.
23. However, I note that section 19 of the GIPA Act states that:

This Part does not apply to an agency in respect to any functions of the agency listed in Schedule 2 (Excluded information of particular agencies).
24. I have had regard to *DF v Attorney General's Department* [2002] NSWADT 164 in what is considered a function of the Agency. With reference to the non-disclosure of documents that related to a particular function of an agency, the Tribunal accepted that an 'exempt function' of an agency (prosecution) also extends to all the professional and administrative tasks connected with that 'exempt function'. Paragraph [25] states:

The "functions" connected with prosecution extend, in my view, beyond the in-court conduct of the prosecution to cover all the professional and administrative tasks connected with the preparation of a case for trial, and its outcome including review of the outcome and the taking of any further action in respect of the case (such as a decision to appeal, and the appeal.
25. I have also had regard to *Cianfrano v NSW Ombudsman* [2007] NSWADT 273 for what constitutes as 'relating to' the function of an agency. In this case, the applicant sought, in addition to other documents, all internal working administrative documents in relation to any reports of finding of the Ombudsman. The Tribunal considered at paragraph [26] that: *'the expression "relating to" and similar expressions that these phrases that the words are of the widest import'*.
26. In light of these cases, it is my view that the complaint handling function of the OLSC extends to the complaint manual because the OLSC complaint manual is 'related to' their complaint handling function. This is because the complaint handling manual is information that is related to the professional and administrative task of the OLSC managing, investigating, coding and documenting complaints.
27. It is on this basis, I am satisfied that the complaints handling manual the Applicant applied for is not considered open access information because:
 - a. the complaints handling manual is related to the Agency's complaint handling function; and
 - b. the Agency's complaint handling function is listed in Schedule 2 of the GIPA Act; and

- c. section 19 of the GIPA Act states that this Part is not applicable to an agency in respect to functions of the agency listed in Schedule 2.
28. I am therefore satisfied that the Agency is not required to provide the Applicant access to the OLSC complaints handling procedure manual through this channel.

Conclusion

29. Based on the available information, I am satisfied that the Applicant has applied for information that is excluded information of the Agency, and on this basis, I am satisfied that the Agency has justified its decision that the Applicant's access application is invalid.
30. I am also satisfied that the Agency is not required to provide access to the OLSC complaints handling procedure manual through its open access requirements under the GIPA Act.
31. I make no recommendation to the Agency regarding the decision.

Applicant review rights

32. 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.
33. The Applicant has the right to ask the NCAT to review the Agency's decision.
34. 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

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

Jackson Wong
Investigations and Review Officer