



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

Applicant: Ms Alison Sandy
Agency: NSW Police Force
Report date: 14 July 2017
IPC reference: IPC17/R000259
Agency reference: 2017-1984: LT
Keywords: Government information – reveal an individual’s personal information – prejudice the conduct of an investigation conducted by an agency by revealing its purpose, conduct or results (whether or not commenced or whether or not completed) – prejudice any person’s legitimate business, commercial, professional or financial interests.
Legislation cited: *Government Information (Public Access) Act 2009*
Cases cited: *Seven Network v South Eastern Sydney Local Health District* [2017] NSWCADAT 210

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

Summary

Ms Alison Sandy (the Applicant) applied for information from the NSW Police Force (the Agency) under the *Government Information (Public Access) Act 2009* (GIPA Act). The information sought by the Applicant is the video footage of an incident involving a Taser on 7 December 2016.

The Agency decided to grant access to some information in part and to refuse access to some information in full.

The Applicant applied for external review on 22 May 2017. 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 not justified.

The reviewer recommends the Agency make a new decision by way of internal review.

Background

1. The Applicant applied under the GIPA Act to the Agency for access to the following information:
 - a. *I'm seeking documents specifically incident reports and the related CCTV/Video footage related to the following incident: On Sunday 7 December 2016, at about 5pm, a 45 year-old man was arrested by police after allegedly shoplifting from a shop in the Sydney CBD.*
2. In its decision at first instance issued on 12 May 2017, the Agency decided to grant access to some information in part and to refuse access to some information in full.
3. In seeking a review of the decision by the Information Commissioner, the Applicant confirmed that the only information in dispute is the video footage of the incident.

Decision under review

4. The Information Commissioner has jurisdiction to review the decision made by the Agency pursuant to section 89 of the GIPA Act.
5. The decision under review is the Agency's decision to refuse access in full to the video footage of the incident.
6. This is a reviewable decision under section 80(d) of the GIPA Act.
7. The issue arising in this review is in relation to the application of the public interest test.

The public interest test

8. 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. For further information on the public interest test, see the information resource sheet at the end of this report.

Public interest considerations in favour of disclosure

9. 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 (section 5 of the GIPA Act); and
 - b. The general right of the public to access government information (section 12(1) of the GIPA Act).

Public interest considerations against disclosure

10. In its notice of decision the Agency raised the following 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. Prejudice the conduct, effectiveness or integrity of any audit, test, investigation or review conducted by or on behalf of an agency by revealing its purpose, conduct or results (whether or not commenced or whether or not completed) (clause 1(h) of the table to section 14 of the GIPA Act); and
 - c. Prejudice any person's legitimate business, commercial, professional or financial interests (clause 4(d) of the table to section 14 of the GIPA Act).
11. In the notice of decision clause 3(a) was applied to the Taser footage which has been refused in full as it clearly depicts the offender.
 12. The Applicant has advised that only the video footage is in dispute. As a result I will only consider the application of clause 3(a) in relation to the video footage.

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

13. For guidance on the application of clause 3(a) of the table at section 14 as a public interest consideration against disclosure, see the information resource sheet at the end of this report.
14. In the notice of decision the Agency states:

The Taser footage has been refused in full as it clearly depicts the offender. Checks conducted have not been able to provide a current address for this person, therefore consultation cannot be undertaken to determine whether or not they have an objection to the release of their personal information. As such we must protect the identity of the person involved.
15. I have reviewed the information. I am satisfied that the information contains personal information.
16. I am satisfied as the footage contains the identifiable image of a man involved in the recorded incident with Police. In 2011 the Information Commissioner published *Guideline 4 Personal information as a public interest consideration under the GIPA Act*. At paragraph 1.2 Guideline 4 lists some common examples of personal information including:
 - *Photographs or audio or video recordings, including CCTV footage, which identifies individuals.*
17. I am satisfied also that the information has not been publicly revealed.
18. On this basis I am satisfied that the Agency's reliance on clause 3(a) as a relevant public interest against disclosure is justified.

Section 74 of the GIPA Act

19. The Agency has not, in its notice of decision, considered the application of section 74 in relation to the possible redaction of the personal information contained in the video footage.
20. The footage clearly depicts the offender. It is feasible that redaction of the face of the offender would render the image unidentifiable. The image could be modified pursuant to section 74 of the GIPA Act by pixilation or blurring.
21. In *Seven Network Limited v South Eastern Sydney Local Health District* [2017] NSWCATAD 210 at paragraph 5 Senior Member Robertson states that the Information Commissioner remitted the decision back to the Agency on external

review for consideration as to whether there is a possibility of redacting video footage through pixilation.

22. In my view the Agency could also consider this same approach in this matter.

Balancing the public interest test

23. In my view the Agency's decision that the public interest consideration against disclosure regarding the protection of the individual's identity outweighs the general presumption in favour of disclosure of government information and the general right of the public to access government information is not justified.
24. As the Agency has not considered the utility of section 74 in regard to redaction of the identifiable features of the offender in the footage, I cannot be satisfied that the application of the public interest test complies with the requirements of section 13 of the GIPA Act.
25. Whether this kind of redaction can be done in-house or whether the Applicant could assist in this regard would also be a matter for the Agency to consider.

Conclusion

26. On the information available, I am not satisfied that the Agency's decision under review is justified.

Recommendation

27. I recommend under section 93 of the GIPA Act that the Agency make a new decision to the Agency by way of internal review.
28. I ask that the Agency advise the Applicant and the IPC by 28 July 2017 of the actions to be taken in response to our recommendation.

Applicant review rights


29. 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.
30. The Applicant has the right to ask the NCAT to review the Agency's decision.
31. 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>

32. 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 that new decision to request an external review at the IPC or the NCAT.

Completion of this review

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

Lee Fisher
Investigation and Review Officer



SECTION 14: Public interest consideration against disclosure

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

Clause 3(a) of the table at section 14 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.

Personal information is defined in the GIPA Act as:

...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]

The term ‘reveal’ is defined in schedule 4, clause 1 of the GIPA Act to mean:

To disclose information that has not already been publicly disclosed (otherwise than by lawful means).

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.

The Information Commissioner has published *Guideline 4 – Personal information as a public interest consideration under the GIPA Act*. 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.

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.



What is the public interest test?

Fact sheet
January 2016

The right to information system in New South Wales aims to foster responsible and representative government that is open, accountable, fair and effective.

Under the *Government Information (Public Access) Act 2009* (GIPA Act), all government agencies must disclose or release information unless there is an overriding public interest against disclosure. When deciding whether to release information, staff must apply the public interest test. This means, they must weigh the factors in favour of disclosure against the public interest factors against disclosure.

Unless there is an overriding public interest against disclosure, agencies must provide the information. There are some limited exceptions to this general rule, for example where dealing with an application would constitute a significant and unreasonable diversion of an agency's resources.

Applying the public interest test

The public interest test involves three steps:

1. Identify the relevant public interest considerations in favour of disclosure
2. Identify the relevant public interest considerations against disclosure
3. Determine the weight of the public interest considerations in favour of and against disclosure and where the balance between those interests lies.

Step 1: Identify the relevant public interest considerations in favour of disclosure

The GIPA Act (section 12) provides examples of factors that agencies may consider in favour of disclosure. These are:

- promoting open discussion of public affairs, enhancing government accountability or contributing to positive and informed debate on issues of public importance;
- informing the public about the operations of agencies and, in particular, their policies and practices for dealing with members of the public;
- ensuring effective oversight of the expenditure of public funds;

- the information is personal information of the person to whom it is to be disclosed; and
- revealing or substantiating that an agency (or a member of an agency) has engaged in misconduct or negligent, improper or unlawful conduct.

This is not an exhaustive list and agencies may identify other factors in favour of disclosure.

The Information Commissioner may also issue guidelines on additional considerations favouring disclosure.

Step 2: Identify the relevant public interest considerations against disclosure

The GIPA Act (section 14) provides an exhaustive list of public interest considerations against disclosure. These are the **only** considerations against disclosure that agencies may consider in applying the public interest test.

Considerations are grouped under the following headings:

- Responsible and effective government
- Law enforcement and security
- Individual rights, judicial processes and natural justice
- Business interests of agencies and other persons
- Environment, culture, economy and general matters
- Secrecy provisions specifically provide in other legislation
- Exempt documents under interstate Freedom of Information legislation.

The GIPA Act says that in applying the public interest test, agencies are **not** to take into account:

- that disclosure might cause embarrassment to, or loss of confidence in, the government or an agency
- that any information disclosed might be misinterpreted or misunderstood by any person.