



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

Applicant: Ms Alison Sandy  
Agency: The Ministry of Health  
Report date: 21 June 2017  
IPC reference: IPC17/R000180  
Agency reference: PA17/20  
Keywords: Government information – prejudice the supply of confidential information – found an action for breach of confidence – contravene an information protection or health protection principle  
Legislation cited: *Government Information (Public Access) Act 2009*  
*Privacy and Personal Information Protection Act 1888*  
*Health Records and Information Privacy Act 2002*  
*Health Administration Act 1982*  
Cases cited: Commissioner of Police, NSW Police Force v Barrett [2015] NSWCATAP 68

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 Ministry of Health (the Agency) under the *Government Information (Public Access) Act 2009* (GIPA Act). The information sought by the Applicant included records since 1 January 2015 involving newborn baby 'mix-ups' where mothers were given other babies for breastfeeding in hospitals.

The Agency decided to refuse access to some information and refuse to confirm or deny that some information is held.

The Applicant applied for external review on 10 April 2017. The reviewer obtained information from the Agency including the notice of decision and the information refused.

The review of the Agency's information and decision concluded that the Agency's decisions are not justified.

**The reviewer recommends that 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:
  - ...‘access to documents since January 1, 2015. Specifically briefing notes and attachments, reports, photos and CCTV relating to newborn baby mix-ups including mothers given the wrong babies for breastfeeding in hospitals’.
2. In its notice of decision issued on 29 March 2017, the Agency decided to:
  - a. refuse to confirm or deny that information is held by the agency, and
  - b. refuse access to some of the information sought by Applicant.
3. In seeking a review of the decision by the Information Commissioner, the Applicant confirmed that they do not agree with the Agency decision, and consider that some of the information sought could have been released in a redacted fashion.

## Decisions 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 decisions under review are the Agency’s decisions to:
  - a. confirm or deny that information is held by the Agency, and
  - b. refuse to provide access to information in response to an access application.
6. These are reviewable decisions under section 80(g) and 80(d) respectively of the GIPA Act.
7. The issues that arise in this review are whether or not the Agency has justified the decisions listed in paragraph 5 above.
8. In this report I will discuss the first decision in the next paragraph and the second decision in the paragraphs that follow.

## Refusal to confirm or deny that the Agency holds information

9. Page 2 of the Agency’s notice of decision states that they have decided to refuse to confirm or deny that information is held in reference to documents that, if held, would attract the following three conclusive presumption public interest considerations against disclosure of the information:
  - a. overriding secrecy laws under the *Health Administration Act 1982* (clause 1 of Schedule 1 of the GIPA Act)
  - b. contempt (clause 4 of Schedule 1 of the GIPA Act), and
  - c. legal professional privilege (clause 5 of Schedule 1 of the GIPA Act).
10. Under section 58(1)(f) of the GIPA Act, an agency may decide to refuse to confirm or deny that information is held because there is an overriding public interest against disclosure of information confirming or denying that fact.
11. Paragraph 39 of the Tribunal’s decision in the *Commissioner of Police, NSW Police Force v Barrett* [2015] NSWCATAP 68 states that this test introduces ‘a public interest against disclosure that goes beyond those listed in the Table to s

14' of the GIPA Act.

12. Whereas the considerations against disclosure in section 14 of the GIPA Act apply if disclosure of the information could reasonably be expected to have certain effects, a decision to confirm or deny whether information is held must show that the effects could reasonably be expected to apply to the confirmation or denial of whether information is held.
13. From *Commissioner of Police, NSW Police Force v Barrett* [2015] NSWCATAP 68, paragraphs 63 to 72, the Tribunal has held that when an Agency makes a decision relying on section 58(1)(f) of the GIPA Act, the Agency is not obliged to provide reasons for its decisions but it is strongly encouraged to do so.
14. Regardless, under section 97(1) of the GIPA Act, in this review the Agency bears the burden of establishing that the decision is justified.
15. The notice of decision mentions the reasoning behind the application of the three conclusive presumptions listed at paragraph nine above, and that the Agency refuses access to information where two of those presumptions are applied.
16. In my view, the Agency does not sufficiently justify any reasoning in which they have made the decision to refuse to confirm or deny that information is held, which is required under the GIPA Act. That is, the Agency has not articulated or demonstrated any overriding public interest against disclosure of information confirming or denying the fact that it holds the information sought.
17. Should conclusively presumed public interest considerations against disclosure be apparent, the Agency is still required to justify their reasons for deciding to refuse to confirm or deny that it holds information in a manner consistent with the test specified in *Commissioner of Police, NSW Police Force v Barrett*.
18. Based on my review of the information before me, I am not satisfied that the Agency has justified their decision to confirm or deny they hold the information sought by the Applicant.

### **The public interest test**

19. 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 [Public interest test fact sheet](#) on our website.

### **Public interest considerations in favour of disclosure**

20. In its notice of decision, the Agency listed the following public interest considerations in favour of disclosure of the information in issue:
  - a. 'Disclosure of the information could reasonably be expected to promote open discussion of public affairs, enhance government accountability or contribute to positive and informed debate on issues of public importance'
  - b. 'Disclosure of the information could reasonably be expected to inform the public about the operations of agencies and, in particular, their policies and practices for dealing with members of the public'
  - c. 'Disclosure of the information could reasonably be expected to ensure effective oversight of the expenditure of public funds'

- d. 'The information is personal information of the person to whom it is to be disclosed' and
  - e. 'Disclosure of the information could reasonably be expected to reveal or substantiate that an agency (or a member of an agency) has engaged in misconduct or negligent, improper or unlawful conduct'.
21. It is apparent that all of these the public interest considerations listed in paragraph 9 above:
- a. are quoted from section 12 of the GIPA Act verbatim, and
  - b. are not all entirely relevant to this access application, as the information applied for does not appear to be the personal information of the Applicant.
22. The considerations found under section 12(2) of the GIPA Act are examples of considerations in favour of disclosure. I remind the Agency that it is not limited in the considerations in favour of disclosure that it may contemplate, in addition the relevant example considerations.

### **Public interest considerations against disclosure**

23. In the notice of decision, the Agency raised three public interest considerations against disclosure of the information, deciding that its release could reasonably be expected to:
- a. prejudice the supply to an agency of the confidential information that facilitates the effective exercise of that agency's functions (clause 1(d) of the table to section 14 of the GIPA Act); and
  - b. found an action against an agency for breach of confidence or otherwise result in the disclosure of information provided to an agency in confidence (clause 1(g) of the table to section 14 of the GIPA Act); and
  - c. contravene an information protection principle under the *Privacy and Personal Information Protection Act 1998* or a Health Privacy Principle under the *Health Records and Information Privacy Act 2002* (clause 3(b) of the table to section 14 of the GIPA Act).
24. I will discuss each of these considerations in turn.

### **Consideration 1(d) – prejudice the supply to an agency of confidential information that facilitates the effective exercise of that agency functions**

25. For guidance on the application of clause 1(d) of the table at section 14 as a public interest consideration against disclosure, see the Public Interest Consideration (PIC) Resource attached to the end of this report.
26. In the notice of decision document, the Agency indicates that:
- a. all correspondence regarding Severity Assessment Code 1 to 4 (SAC1 to SAC4) incidents is confidential
  - b. the Agency needs confidential information to carry out its objectives
  - c. stakeholders provide information to the Agency and it is commonly understood that this information will be kept confidentially, and
  - d. disclosure of this information, obtained confidentially, may bias the future supply of this information.

27. In order for this to be a relevant consideration against disclosure, the Agency must be satisfied that:
  - a. the information was obtained in confidence;
  - b. disclosure of the information could reasonably be expected to prejudice the supply of such information to the Agency in future; and
  - c. the information facilitates the effective exercise of the Agency's functions.
28. While I do agree that both stakeholders provide the Agency with information, and that disclosure of confidential information will bias the supply of future confidential information, I am not satisfied that the Agency has demonstrated either:
  - a. the information that this consideration has been claimed over is confidential in nature; or
  - b. that its release would prejudice the future supply of this information.
29. As per the schedule of documents, the Agency has applied this consideration over four email records found. Based on my review of those documents refused:
  - a. I am not satisfied that the Agency has demonstrated that all the information is confidential SAC incident reporting; and
  - b. I am not satisfied that all the information provided to the Agency in those emails is confidential in nature.
30. I am therefore not satisfied that this is a valid consideration as a public interest against disclosure.

**Consideration 1(g) –result in the disclosure of information provided in confidence.**

31. For guidance on the application of clause 1(g) of the table at section 14 as a public interest consideration against disclosure, see the Public Interest Consideration (PIC) Resource attached to the end of this report.
32. To show that this is a relevant consideration against disclosure, the Agency must establish:
  - a. the information was obtained in confidence; and
  - b. disclosure of the information could reasonably be expected to found an action against an agency for breach of confidence; or
  - c. otherwise result in the disclosure of information provided in confidence.
33. In the notice of decision document, the Agency states:

“The information contained in these documents takes the form of confidential advice between the local health district and the Ministry. These documents include confidential information regarding impacts on patients, impact on staff and outcomes of root cause analysis investigations. It can be assumed that the Local Health Districts in question would assume that this information would remain confidential and not be released to anyone. If the Ministry were to release this information it would breach this confidence.”
34. The Agency has applied this consideration over all four email records and, based on my review of those records, I am not satisfied that all of the information contained is obtained in confidence. This is because, in my view,

the Agency has not obtained this information in a manner consistent with the provision of confidential information in a confidential environment.

35. While I acknowledge that the sensitive nature of the information, in my view, I do not consider that the Agency has demonstrated that the information being provided is provided in confidence by the Local Health Districts.
36. I am therefore not satisfied that the Agency has justified that this as a relevant public interest against disclosure.

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

37. For guidance on the application of clause 3(b) of the table at section 14 as a public interest consideration against disclosure, see the Public Interest Consideration (PIC) Resource attached to the end of this report.
38. In its notice of decision document, the Agency:
  - a. makes reference to clause 3(a) of the table at section 14 of the GIPA Act, and the definition of ‘personal information’ as defined by schedule 4 of the GIPA Act). Although this clause is discussed in the notice of decision, it is not identified as a factor in the Agency’s schedule of documents
  - b. notes that some of the information which is personal in nature as the identity of the individual could be reasonably ascertained, especially in in smaller, regional local health districts
  - c. states the following principles, from schedule 1 of the *Health Records and Information Privacy Act 2002* (HRIP Act) are relevant to the access application:
    - i. [Principle 11](#)
    - ii. [Principle 12](#)
  - d. states the following principles of the *Privacy and Personal Information Act 1998* (PPIIP Act) are relevant to the access application:
    - i. Principle 11 ([section 18](#) of the PPIIP Act)
    - ii. Principle 12 ([section 19](#) of the PPIIP Act); and
  - e. notes that seeking consent for the release of an individual’s personal information is not appropriate in this instance.
39. [Section 6](#) of the HRIP Act defines health information to be a subset of *personal information*, which is defined in the HRIP Act in [section 5](#). Please note that the definition of *personal information* in both the HRIP Act and PPIIP Act differ from the definition of personal information in schedule 4 of the GIPA Act.
40. Based on my review of the four records of information refused, I am not satisfied that all of information over which this consideration is claimed is either health information (as defined in the HRIP Act) or is personal information (as defined by the PPIIP Act).
41. This is because some of the information over which this consideration is claimed is incident information prepared by the departments within the Agency, and the identity of an individual is not apparent, or could not be reasonably ascertained.
42. While I acknowledge that some of the information is health information and some of the information is personal information, as defined by the relevant

Acts, I do not agree that all of the information contained in those four refused records is health or personal information.

43. On this basis, I agree that this is a valid public interest consideration against disclosure for only some of the information, but not all the information.
44. I therefore am not satisfied that this is a valid consideration as a public interest against disclosure, over all of the information claimed.

### **Deletion of information**

45. Section 74 of the GIPA Act helps to mitigate considerations against disclosure, by enabling an agency to delete information from a copy of a record to which access is to be provided.
46. In the Applicant's request for IPC external review, the Applicant advised that they are seeking partial release, through redaction of identifying information, so the Agency may provide access to information that may contain details of Agency accountability and specific practices.
47. In future notices of decision, I encourage the Agency's decision maker to demonstrate that it has considered possibility of deletion of information for which there is an overriding public interest against disclosure, in order to facilitate access to information applied for in line with the objective of the GIPA Act.

### **Third party consultation**

48. Under section 54 of the GIPA Act, the Agency may also be required to consult third parties if the information is of a kind requiring consultation. The Information Commissioner has issued a guideline about consultation under section 54 of the GIPA Act, which is available on our [website](#).
49. For guidance on third party consultation, see the Public Interest Consideration (PIC) Resource attached to the end of this report.
50. The notice of decision indicates the Agency conducted consultation with third parties and they received a number of objections to the disclosure of the information the Applicant applied for.
51. I have reviewed the Agency's records regarding the consultations undertaken, and I am satisfied that that the Agency has met their GIPA Act requirements in third party consultation.

### **Conclusions**

52. On the information available, I am:
  - a. not satisfied that the Agency has justified its decision under section 80(f) of the GIPA Act, refusing to confirm or deny that it holds information.
  - b. not satisfied that the Agency has justified its decision under section 80(d) of the GIPA Act, refusing to provide access to information applied for; and

### **Recommendations**

53. I recommend, under section 93 of the GIPA Act, that the Agency make a new decision by way of internal review within 10 working days. This recommendation only relates to information in which the Agency refused.

54. I ask that the Agency advise the Applicant and the IPC by 6 July 2017 of the actions to be taken in response to our recommendations.

### **Applicant review rights**

55. 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.
56. The Applicant has the right to ask the NCAT to review the Agency's decision.
57. 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>

58. 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**

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



## SECTION 14: Public interest consideration against disclosure

### Consideration 1(d) – prejudice the supply to an agency of confidential information that facilitates the effective exercise of that agency’s functions

Clause 1(d) of the table at section 14 states:

*There is a public interest consideration against disclosure if disclosure of the information could reasonably be expected to prejudice the supply to an agency of confidential information that facilitates the effective exercise of that agency’s functions (whether in a particular case or generally).*

In order for this to be a relevant consideration against disclosure, the Agency must be satisfied that:

- a. the information was obtained in confidence;
- b. disclosure of the information could reasonably be expected to prejudice the supply of such information to the Agency in future; and
- c. the information facilitates the effective exercise of the Agency’s functions.

Although the GIPA Act does not use the phrase “future supply”, the nature of the prejudice that this consideration deems to be contrary to the public interest, is implicit. This future effect is one aspect of the abstract nature of the enquiry. The other abstract element is supply in a general sense and whether disclosure will impact supply of similar information by persons to the agency in the future.

It is commonly understood that information will have a confidential quality if the person was not bound to disclose the information but did so on the basis of an express or inferred understanding that the information would be kept confidential.

The meaning of the word prejudice is to “cause detriment or disadvantage”.

## SECTION 14: Public interest consideration against disclosure

### Consideration 1(g) – found an action against an agency for breach of confidence or otherwise result in the disclosure of information provided to an agency in confidence

Clause 1(g) of the table at section 14 states:

*There is a public interest consideration against disclosure if disclosure of the information could reasonably be expected to found an action against an agency for breach of confidence or otherwise result in the disclosure of information provided to an agency in confidence (whether in a particular case or generally).*

To show that this is a relevant consideration against disclosure, the Agency must establish:

- a. the information was obtained in confidence; and
- b. disclosure of the information could reasonably be expected to found an action against an agency for breach of confidence; or
- c. otherwise result in the disclosure of information provided in confidence.

In raising this public interest consideration against disclosure the Agency needs to ensure the information is in fact confidential.

Once satisfied that the information is confidential information, the agency should then turn its mind to what constitutes a breach of confidence. A breach of confidence arises out of an unauthorised disclosure of, or other use of information, which is subject to an obligation of confidentiality.

## SECTION 14: Public interest consideration against disclosure

### Consideration 3(b) – contravene an information protection or health privacy principle

Clause 3(b) of the table at section 14 of the GIPA Act provides:

*There is a public interest consideration against disclosure of information if disclosure of the information could reasonably be expected to contravene an information protection principle under the Privacy and Personal Information Protection Act 1998 or a Health Privacy Principle under the Health Records and Information Privacy Act 2002*

If an agency relies on clause 3(b) of the table to section 14 as a consideration against disclosure, it must demonstrate a reasonable expectation that an information protection principle or health privacy principle would be contravened by disclosure of the information.

It is not sufficient to simply assert that such a contravention would occur. The agency must identify the principle/s that would be contravened and show how the disclosure would breach the principle.

## Third Party Consultation

An agency may be required to consult third parties before making a decision about an access application if the information is of a kind requiring consultation. Section 54 of the GIPA Act sets out when consultation is required. For example, consultation may be required if:

- the information concerns a person (or entity)'s business, commercial, professional or financial interests, and
- the person (or entity) may reasonably be expected to have concerns about the disclosure of the information, and
- those concerns may reasonably be expected to be relevant to the question of whether there is a public interest consideration against disclosure.

An agency must take any third party objection into account in making its decision, but an objection is not in itself determinative of an overriding public interest consideration against disclosure.

An agency may decide to release information despite receiving an objection from a third party. However under section 54(6) and (7) the agency must notify the third party of its decision, and not release the information until the third party's review rights have expired.

The Information Commissioner has published *Guideline 5: consultation on public interest considerations under section 54 of the GIPA Act*. This Guideline is available on the IPC website. Agencies must have regard to this Guideline pursuant to section 15(b) of the GIPA Act.