



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

Applicant: Ms Alison Sandy
Agency: The NSW Police Force
Report date: 17 July 2017
IPC reference: IPC17/R000212
Agency reference: 931:LT
Keywords: Government information – personal information – video footage - prejudice the conduct of any audit, test, investigation or review – diminish the competitive commercial value of any information to any person – prejudice business interests
Legislation cited: *Government Information (Public Access) Act 2009*
Cases cited: *Seven Network Limited v South Eastern Sydney Local Health District* [2017] NSWCATAD 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 includes documents and video footage relating to offences committed at sea.

The Agency decided to both provide access to some information and refuse to access to all records of video footage.

The Applicant, aggrieved only by the Agency's decision regarding the video footage, applied for external review on 24 April 2017. The reviewer obtained information from the Agency including the notice of decision and access to the refused video footage.

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

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

Background

1. The Applicant applied to the Agency, under the GIPA Act, for access to information stating:

‘I am seeking access to documents, such as incident reports, executive briefing notes and attachments, photos and CCTV/video footage since 1 January 2015 relating to offences against the person committed at sea, handled by the Marine Area Command

By offences against the person, I am referring to offences such as assaults and robberies.

If footage of more than 10 incidents are located, please limit to the first 10 incidents where the footage has also been located where there is no legal action pending.’
2. In its decision issued on 10 April 2017, the Agency decided to:
 - a. provide access to some documents in full;
 - b. provide access to documents with redactions; and
 - c. refuse to provide access to video footage.
3. In relation to the video footage, the Applicant seeks a review of the decision by the Information Commissioner, and confirmed that:
 - a. they are seeking the Agency release some video footage, with pixelation or redactions where appropriate
 - b. they have received pixelated video footage from the Agency in the past, and on this basis they consider the Agency should release pixelated video footage in response to this access application, and
 - c. they consider that both:
 - i. it is in the public interest for the information to be released, and
 - ii. the Agency has incorrectly applied the public interest test when deciding this access application.

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 to provide access to information (video footage) in response to an access application.
6. This is a reviewable decision under section 80(d) of the GIPA Act.
7. The issue that arises in this review is whether or not the Agency has justified their decision to refuse access to the information sought by the Applicant.

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

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'; and
 - b. 'the general right of the public to have access to government information held by agencies'.
10. I remind the Agency that the considerations in favour of disclosure of government information found under section 12(2) of the GIPA Act are examples of considerations in favour of disclosure. The Agency is not limited in the considerations it can proffer in favour of the disclosure of government information.
11. I agree that the Agency has indicated relevant public interest considerations for the disclosure of the information sought by the Applicant.

Public interest consideration against disclosure

12. In its notice of decision the Agency raised four public interest considerations against disclosure of the information, deciding that its release could reasonably be expected to:
 - a. 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 and whether or not completed). This is clause 1(h) of the table to section 14 of the GIPA Act);
 - b. reveal an individual's personal information (clause 3(a) of the table to section 14 of the GIPA Act);
 - c. diminish the competitive commercial value of any information to any person (clause 4(c) of the table to section 14 of the GIPA Act); and
 - d. prejudice any person's legitimate business, commercial, professional or financial interests (clause 4(d) of the table to section 14 of the GIPA Act).
13. I will discuss each of these considerations in turn.

Consideration 1(h) – prejudice the conduct of any audit, test, investigation or review

14. For guidance on the application of clause 1(h) 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.
15. On page 3 of the notice of decision, the Agency states that:

'It is my view that disclosure of the information if created would be prejudicial to the proper working of this agency in regard to the investigation process. The purpose of this section is to prevent damage to agency operations relating to investigations or reviews and I consider that should this information be released the effectiveness of the methods and procedures used by the NSW Police Force would be prejudiced'.
16. To demonstrate that the elements of this consideration apply to information, an agency should identify:

- a. the audit, test, investigation or review that would be prejudiced;
 - b. the anticipated prejudice (disadvantage or detriment) that disclosure of this information would have on the effectiveness or integrity of any audit, test, investigation or review conducted; and
 - c. a sufficient link to the information over which this consideration has been claimed, such that the prejudice could reasonably be expected to occur should the information be disclosed.
17. Based on the information presented in the Agency's notice of decision, I am not satisfied that the Agency has identified a specific investigation undertaken that may reasonably be subject to prejudice upon disclosure of the refused records of video footage.
 18. Therefore I am not satisfied that the Agency has demonstrated this to be a valid public interest consideration against disclosure of the refused information.

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

19. For information on the application of clause 3(a) of the table at section 14 as a public interest consideration against disclosure, see the PIC Resource at the end of this report.
20. 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.
21. In their notice of decision, the Agency indicates that:
 - a. they have attempted to consult with known parties regarding the release of their information contained in the video footage and they have received no replies; and
 - b. there are also numerous other people who are seen within the video footage who have not been identified by the Agency.
22. In providing the video footage to the IPC for review, the Agency has indicated they are of the view that they are unable to redact personal information from the records of video footage because of the camera angle and the nature of the footage captured.
23. Upon a review of the refused records of video footage, it is apparent that some of the records contain the personal information of many individuals and disclosure of those records would reveal many individuals personal information.
24. In the case of *Seven Network Limited v South Eastern Sydney Local Health District* [2017] NSWCATAD 210, paragraphs [52] to [57] address the Tribunal's view of the redaction of personal information and redaction/pixelation in records of video footage. The case highlights in the context of the particular footage at issue in that matter at paragraph [56], that:

'I do not consider any element of the gait or body shape of any person in any of the footage to be sufficiently distinctive as to enable identification where the face, head and neck are concealed by pixelation.'
25. In respect to this view of identifying features and personal information, from my review of the records of refused video footage, it is apparent that in *some* records, personal information is only visible:

- a. in portions of the image; or
 - b. at certain times in the captured footage.
26. Therefore I am not satisfied that the Agency has justified this as a consideration against the disclosure over *all* of the video sought by the Applicant.
 27. Under section 91 of the GIPA Act, the Information Commissioner must not, in the exercise of functions in connection with a review, disclose any information for which there is (or for which an agency claims there is) an overriding public interest against disclosure. On this basis, I will provide further guidance to the Agency separately in respect to this aspect of the review.
 28. I remind the Agency that this is only a consideration against disclosure of information, and not a conclusive presumption against disclosure. Although the personal information of individuals is contained in records of video footage applied for, the Agency may still release this information should it determine that there is an overriding public interest for its disclosure when conducting the public interest test, or following appropriate redaction in accordance with section 74 of the GIPA Act.

Consideration 4(c) – diminish the competitive commercial value of any information to any person

29. For guidance on the application of clause 4(c) of the table at section 14 as a public interest consideration against disclosure, see the PIC Resource attached to the end of this report.
30. With respect to both considerations 4(c) and 4(d), the Agency indicates in their notice of decision that:
 - a. the information contains of the names of the individual cruise ships, their parent companies in addition to information which would allow for these to be ascertained including incident dates, date of departure, date of return and GPS locations; and
 - b. disclosure of the information may create a false impression regarding the level of violence experienced on an individual ship and this may have commercial and financial repercussions.
31. For this consideration to apply, the Agency's notice of decision must identify why the information has a competitive commercial value, and how that value would be adversely affected if the information was disclosed.
32. Based on both the statements above and my review of the refused records of video footage, I am not satisfied that the Agency has demonstrated that the refused video footage has competitive commercial value.
33. On this basis, I am not satisfied that the Agency has justified this as a consideration against disclosure.

Consideration 4(d) – prejudice business interests

34. For guidance on the application of clause 4(d) of the table at section 14 as a public interest consideration against disclosure, see the PIC Resource attached to the end of this report.
35. For this consideration to apply, the Agency must:
 - a. identify both the party whose interests would be prejudiced and the relevant interest/s, and

- b. demonstrate the causal nexus between the disclosure of the information and the prejudice to that interest.
- 36. Based on the notice of decision, and my review of all the information refused under this consideration, I agree with the Agency that disclosure of that information does have a reasonable potential to prejudice any person's legitimate business, commercial, professional or financial interests.
- 37. I am therefore satisfied that the Agency has justified this as a consideration against the disclosure of the information sought.
- 38. However, in saying, this I note that the Agency has redacted this information from copies of documents provided to the Applicant in response to this access application. I encourage the Agency to follow this approach when reviewing video footage.
- 39. I encourage the Agency turn its mind to whether it is able to redact information through pixilation or create a new record by removing sections of the video footage so that this information is not disclosed. In my review of the refused video footage, it is apparent that the information mentioned in paragraph 30 is either unclear or only appears in the corner of the video.

Deletion of information

- 40. Section 74 of the GIPA Act allows agencies to redact information from a copy of a record. Section 75 of the GIPA Act allows agencies to create a new record in order to promote providing applicants with access to information.
- 41. While these are not mandatory requirements, agencies have the discretion to elect to take these actions where possible to promote the objective of the GIPA Act.
- 42. We acknowledge that in the Applicant's request for external review, the Applicant presses for the redaction of personal information from a copy of the video footage sought.
- 43. The IPC has released a audio visual information factsheet for consultation, with the current draft being located on our [website](#). I encourage the Agency to review the guidance offered under section 3.5 of this draft factsheet.
- 44. I also recommend that in future notices of decision, the Agency demonstrate where it has considered the possibility of the deletion of information for which there is an overriding public interest against disclosure, in order to facilitate access to requested information. This is consistent with the object of the GIPA Act.

Conclusions

- 45. On the information presented before me, I am not satisfied that the Agency's application of either clause 1(h) or clause 4(c) of the table to section 14 of the GIPA Act is justified.
- 46. While I agree with the Agency's application of clause 3(a) and 4(c) over some of the information, I am not satisfied that the Agency's application of these clauses is justified for *all* of the information over which it is claimed. This is because some of the information contained in records of the refused video footage is, in my view, not personal information or information that could prejudice business interests.

47. Based on the refused records of video footage reviewed, it is apparent that information can be deleted, redacted or pixelated from a copy of some of the records of video footage, to allow access pursuant to section 74 of the GIPA Act.

Recommendation

48. I recommend, under section 93 of the GIPA Act, that the Agency make a new decision by way of internal review within 15 working days.
49. In making a new decision, have regard to the matters raised and guidance given in this report.
50. I ask that the Agency advise the Applicant and the IPC by 2 August 2017 of the actions to be taken in response to our recommendations.

Applicant review rights

51. 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.
52. The Applicant has the right to ask the NCAT to review the Agency's decision.
53. 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>

54. 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

55. This review is now complete.
56. 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(h) – 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 and whether or not completed)

Clause 1(h) 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 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 and whether or not completed) (whether in a particular case or generally).

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

To show that this is a relevant consideration against disclosure, the Agency must establish that disclosure of the information would result in:

- a. prejudice to the conduct, effectiveness or integrity of the audit, test, investigation or review conducted by or on behalf of the Agency;
by revealing its purpose, conduct or results; and
whether or not the investigation is commenced and whether or not it is completed.

In particular, the Agency should identify the audit, test, investigation or review that would be prejudiced, and also identify the anticipated prejudice. In order to justify the application of the consideration, the Agency must demonstrate the causal nexus between the disclosure of the information and the prejudice that is expected.

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:

- b. identify whether the information is personal information,
- c. consider whether the information would be revealed by disclosing it under the GIPA Act.

SECTION 14: Public interest consideration against disclosure

Consideration 4(c) – diminish the competitive commercial value of any information to any person

Clause 4(c) of the table to 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 diminish the competitive commercial value of any information to any person

In order to rely on this clause as a consideration against disclosure, an agency must show that releasing the information could reasonably be expected to have the effect outlined in clause 4(c) and base this on substantial grounds.

In particular, an agency must identify why the information has a competitive commercial value, and how that value would be adversely affected if the information was disclosed.

SECTION 14: Public interest consideration against disclosure

Consideration 4(d) – prejudice business interests

Clause 4(d) of the table to 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 prejudice any person's legitimate business, commercial, professional or financial interests

In order to establish the relevance of this consideration, the agency must:

- a. identify the relevant legitimate interest; and
- b. explain how the interest would be prejudiced if the information was disclosed.

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

Our view is that the relevant meaning of “legitimate” for the purposes of this consideration is its ordinary meaning, that is genuine and not spurious.¹

In particular, an agency must identify the party whose interests would be prejudiced, and the relevant interest/s. In order to justify the application of the consideration, an agency must demonstrate the causal nexus between the disclosure of the information and the prejudice to that interest.

¹ Macquarie Dictionary, 6th edition, October 2013