



Review Report under the
Government Information (Public Access) Act 2009

Applicant: Richard Smolenski
Respondent: NSW Police Force (Police)
Decision date: 3 July 2012
Report date: 6 November 2013
IPC reference: IPC12/R000173
Catchwords: Government information – prejudice the supply of confidential information – prejudice the effective exercise by an agency of the agency’s functions – personal information – exempt documents under interstate Freedom of Information legislation

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Summary

1. The NSW Police Force (**Police**) decided to provide Mr Smolenski with access to some information about his application for the position of Special Constable. It also decided to refuse to provide him with access to some information on the basis of an overriding public interest against disclosure. We are not satisfied that there is an overriding public interest against disclosure of the information Police decided to withhold. Our reasons are explained in this report.
2. Under section 93 of the GIPA Act we recommend Police reconsider its decision to refuse Mr Smolenski access to some of the information he applied for and make a new decision.

Background

3. Mr Smolenski was employed as a Customs Officer with the Australian Customs Service & Border Protection Service (**Customs**) from 1983 over a period of approximately 25 years.
4. In May 2007 Mr Smolenski applied for the position of head of Tongan Customs Service. He was not appointed to this position.
5. In 2008 Mr Smolenski resigned from his position as a Customs Officer.
6. In September 2009 Mr Smolenski applied for the position of Investigation Assistant with the Australian Federal Police (**AFP**). He was not appointed to this position.
7. In October 2009 Mr Smolenski applied for the position of Security Investigator with the US Consulate (Sydney). He was not appointed to this position.
8. Mr Smolenski has informed us that in 2009 he made a public submission and a confidential submission before the Parliamentary Joint Committee of the Australian Commission for Law Enforcement Integrity.
9. In November 2010 Mr Smolenski applied for the position of Special Constable (security) with the NSW Police Force. He was not appointed to this position.
10. On both 8 July and 10 July 2011 Mr Smolenski wrote to the Commissioner of the NSW Police Force, Mr Andrew Scipione, requesting access to particular information about him that was provided to Police by Customs, the Australian Security Intelligence Organisation (**ASIO**) and the AFP. Police provided Mr Smolenski with some information in response to this request.
11. On 7 November 2011 Mr Smolenski applied to Police for access to:

Any letters, documents, emails, file notes, file notes of conversations relating to enquiries concerning me, my wife in relation to any application for the NSW Police Force Special Constable (Security) position, between the NSW Police Force & Australian Federal Police (AFP) &/or Australian Customs & Border Protection Service Customs). This includes any

documents dated 01 & 06 June 2011. Further to this any information, documents, emails, file notes, sent to NSW Police by AFP & Customs relating to my evidence or submissions to the Parliamentary Joint Committee on the Australian Commission for Law Enforcement Integrity (PJC-ACELI).

12. On 3 July 2012 Police decided to provide Mr Smolenski with access to some of the information he applied for and to refuse to provide access to some of the information contained within 169 pages of information on the basis of an overriding public interest against disclosure.

Our review

13. On 23 August 2012 Mr Smolenski requested that we review Police's decision, to refuse him access to information on the basis of an overriding public interest against disclosure.
14. In conducting this review we have:
 - examined the notice of decision dated 3 July 2012;
 - examined Police's GIPA file;
 - examined the information Police claims is subject to an overriding public interest against disclosure; and
 - examined the submission and supporting documentation provided to us by Mr Smolenski.

Decisions under review

15. This report addresses the decision made by Police, under section 58(1)(d) of the GIPA Act, to withhold some information Mr Smolenski applied for on the basis of an overriding public interest against disclosure.
16. On external review, Police bear the burden of establishing that the decisions are justified in accordance with section 97(1) of the GIPA Act.

The public interest test

17. Mr Smolenski has a legally enforceable right to access all the information he applied for, unless there is an overriding public interest against disclosing the information (section 9(1) of the GIPA Act).
18. Before deciding whether to release or withhold information, Police must apply the public interest test and decide whether or not an overriding public interest against disclosure applies to the information.

19. Section 13 of the GIPA Act sets out the public interest test as follows:

There is an overriding public interest against disclosure of government information for the purposes of this Act if (and only if) there are public interest considerations against disclosure and, on balance, those considerations outweigh the public interest considerations in favour of disclosure.

20. The test in section 13 of the GIPA Act requires decision makers to:

- (i) identify relevant public interest considerations in favour of disclosure,
- (ii) identify relevant public interest considerations against disclosure,
- (iii) attribute weight to each consideration for and against disclosure, and
- (iv) determine whether the balance of the public interest lies in favour of or against disclosure of the government information.

21. Police must apply the public interest test in accordance with the principles set out under section 15 of the GIPA Act.

Public interest considerations in favour of disclosure

22. Section 12(1) of the GIPA Act sets out a general public interest in favour of disclosing government information, which must always be weighed in the application of the public interest test. Police may take into account any other consideration in favour of disclosure which may be relevant (s12(2) GIPA Act).

23. In its notice of decision, Police state that in accordance with section 12 of the GIPA Act, it took into account the following public interest considerations in favour of disclosure:

- the statutory presumption in favour of the disclosure of government information;
- the general right of the public to have access to government information held by agencies;
- information in the documents that includes Mr Smolenski's personal information; and
- Mr Smolenski's assertion that the release of the information relates to the accountability of Federal Agencies.

24. The information in issue includes references to events involving Mr Smolenski. It also includes information and opinions about him.

25. We consider disclosure of the information, in response to Mr Smolenski's access application, could reasonably be expected to:

- advance the fair treatment of individuals and other entities in accordance with the law in their dealings with agencies;

- contribute to the administration of justice generally, including procedural fairness;
 - reveal the reason for a government decision and any background or contextual information that informed that decision.
26. The personal factors of the application may also be relevant considerations in the application of the public interest test (section 55 of the GIPA Act), including:
- Mr Smolenski's identity and relationship with any other person;
 - Mr Smolenski's motive for making the access application; and
 - any other factors particular to Mr Smolenski's application.
27. Mr Smolenski told us that after reviewing the information supplied to him by Police, he is concerned the AFP and Customs are providing information about him to potential employers that is "untrue or misrepresented". He also told us that the supply of such information is having a negative effect on his employment prospects and as long as such statements are being provided in "secret and without scrutiny or a right of reply by me they remain untested and uncorrected".
28. The public interest considerations in favour of disclosure, carry substantial weight, as they support a broader public interest in the fair treatment of individuals in their dealings with agencies, by ensuring that agencies are transparent and accountable in the way that they exercise their functions and make decisions.

Public interest considerations against disclosure

29. With the exception of schedule 1 to the GIPA Act, the table in section 14(2) provides the only public interest considerations against disclosure that may be taken into account in the application of the public interest test.
30. In its notice of decision, Police rely on four public interest considerations against disclosure from the table to section 14(2) of the GIPA Act. Three of those considerations provide that there is a public interest consideration against disclosure of information if disclosure of the information *could reasonably be expected to*:
- clause 1(d) – prejudice the supply to an agency of confidential information that facilitates the effective exercise of that agency's functions;
 - clause 1(f) – prejudice the effective exercise by an agency of Police's functions;
 - clause 3(a) - reveal an individual's personal information.
31. The fourth consideration is found at clause 7 of the table at section 14(2) of the GIPA Act and deals with exempt documents under interstate Freedom of Information legislation.

32. Before applying a consideration against disclosure to the information, Police must:
- identify the information;
 - characterise it as information to which a public interest consideration against disclosure applies, and
 - demonstrate that disclosure of the information could have the effect deemed not to be in the public interest.
33. In its notice of decision Police included a table that schedules the documents and considerations against disclosure it relied on for refusing access to some of the information within these documents. The notice of decision also includes a “statement of reasons” in which Police explain why it regards each of the public interest considerations against disclosure to be relevant.

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)

34. This public interest consideration against disclosure is found at clause 1(d) of the table at section 14(2) of the GIPA Act.
35. The documents containing the information Police refused to release (the information in issue), in reliance on this public interest consideration against disclosure are as follows:

IAU Ref Page #	Name of Document	Decision T = Section 14 Table
95-96	Emails dated 1/6/2012	Refused T1(d)
97	Notes re conversations	Partial Release T1(d)
98-100	Employment Check forms	Refused T1(d)

36. In giving reasons for refusing some or all of the information within these documents Police stated that:
- The material deleted/refused relates to frank responses given to police during the course of police inquiries and were obtained in confidence. In this regard, it is my view that the individuals concerned are entitled to assume that information supplied would be dealt with confidentially and only released in pursuance of legal proceedings or on their specific authority. If that were not the case, the ability of the NSW Police Force to investigate matters of this nature would be impeded *and it could reasonably be expected that the supply of confidential information that facilitates the effective exercise of this agency could be prejudiced.*
37. This consideration against disclosure will only apply to the refused information if all the elements of the consideration are satisfied. For example the word “prejudice” has

been found in the *Hurst v Wagga Wagga City Council*¹ case, which was decided under the GIPA Act to have its ordinary meaning: “to cause detriment or disadvantage”.

38. 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 of whether disclosure will impact supply of similar information by persons to Police in the future.
39. 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.
40. We are not satisfied that this consideration applies to the information in the Employment Check Forms (pages 98-100) because although some of the information was provided to third parties by Police we are not persuaded of the confidential nature of this information. There is also some information collected by Police from these third parties that Police have not established is confidential.
41. However because of standard content within the Employment Check Forms, that we can see that the information provided to Police by third parties in pages 95-97 was done on the understanding that the information would be kept confidential.
42. We are satisfied that Police has shown this considerations applies to the information in pages 95-97. We discuss our view about the balance of the public interest in the findings and recommendations section of this report.

Prejudice the effective exercise by an agency of the agency’s functions

43. This public interest consideration against disclosure is found at clause 1(f) of the table at section 14(2) of the GIPA Act.
44. The information in issue that Police refused to release in reliance on this public interest consideration against disclosure is as follows:

IAU Ref Page #	Name of Document	Decision T = Section 14 Table
90-92	Email and Fax for Previous Employment Checks	Refused T1(f)
95-96	Emails dated 1/6/2012	Refused T1(f)
97	Notes re conversations	Partial Release T1(f)
98-100	Employment Check forms	Refused T1(f)
106-120	Documents re Interview	Refused T1(f)

45. In its notice of decision Police explains that if the advice or opinion “... created as part of the determination process” were disclosed, the recruitment process would be prejudiced. This is because it would “inhibit candid opinions and comments” and result in the appointment of persons less than suitable for the role of Special Constable.

¹ [2011] NSWADT 307

46. This consideration applies where disclosure of the information, whether or not it was provided in confidence, could prejudice the effective exercise of Police's functions.
47. The reasons provided by Police for relying on this consideration against disclosure hinge on the concept of "candid comments". From the context in which this phrase has been used it can be inferred that the comments are those of third parties, not Mr Smolenski.
48. We have reviewed the information and we are not satisfied that pages 90-92 contain information of this nature. Pages 98-100 and 106-120 contain a very limited amount of information that could be described as "candid comments". A significant portion of information contained in pages 106-120 is information that was supplied to Police by Mr Smolenski.
49. From the information before us we are satisfied that this consideration is relevant in so far as it would reveal how Police recruit for the position of Special Constable and disclosure of the questions asked in interview could prejudice Police's recruitment function.

Reveal an individual's personal information

50. Police's notice of decision identified clause 3(a) of the table at section 14(2) as a public interest consideration against disclosure. This clause provides:

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.

51. The information in issue that Police refused to release in reliance of this public interest consideration against disclosure is as follows:

IAU Ref Page #	Name of Document	Decision T = Section 14 Table
93-94	Emails dated 7/6/11 & 31/5/2011	Partial Release T3(a)
121-148	COPS Printouts	Partial Release T3(a)
149-154	COPS Printouts (do not refer to applicant)	Refused T3(a)
155-159	COPS Printouts	Partial Release T3(a)

52. Clause 4(1) of schedule 4 to the GIPA Act defines personal information to include:

In this Act, personal information means 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.

53. Clause 1 of schedule 4 defines 'reveal' as "... disclose information that has not already been publicly disclosed (otherwise than by unlawful disclosure).
54. In its notice of decision Police state "The information relates to third parties other than the applicant".

55. 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.
56. In December 2011, we published Guideline 4 – *Personal information as a public interest consideration under the GIPA Act*, which sets out what is meant by ‘personal information’ in the GIPA Act.
57. Paragraph 1.2 of this guideline sets out examples of personal information, which includes a person’s name, personal address and contact details.
58. We have had the benefit of reviewing the information and we are satisfied, with the exception of the information withheld in pages 93-94, that this information is the personal information of persons other than Mr Smolenski (third parties).
59. However we are not satisfied that this consideration applies to the email addresses withheld in pages 93-94. This is because we do not consider the names within the email address to be personal information as it is non-personal contact details that reveals nothing more than that the person was engaged in the exercise of public functions (clause 4(3)(b) of schedule 4 to the GIPA Act).

Exempt documents under interstate Freedom of Information legislation

60. Clause 7 of the table at section 14(2) of the GIPA Act provides:
 - (1) There is a public interest consideration against disclosure of information communicated to the Government of New South Wales by the Government of the Commonwealth or of another State if notice has been received from that Government that the information is exempt matter within the meaning of a corresponding law of the Commonwealth or that other State.
 - (2) The public interest consideration under this clause extends to consideration of the policy that underlies the exemption.
 - (3) In this clause, a reference to a corresponding law is a reference to:
 - a. the *Freedom of Information Act 1982* of the Commonwealth, or
 - b. a law of any State that is prescribed by the regulations as a corresponding law for the purposes of this clause.
61. The information in issue that Police refused to release in reliance of this public interest consideration against disclosure is as follows:

IAU Ref Page #	Name of Document	Decision T = Section 14 Table
95-96	Emails dated 1/6/2012	Refused T7
97	Notes re conversations	Partial Release T7

62. This consideration will only be relevant if:
- Police have received *notice* from Australian Customs and Border Protection Service; and
 - the notice states information in issue is exempt within the meaning of the *Freedom of Information Act (1982) Cth*.

63. In its notice of decision Police state that “As a result of consultation it has been determined ...” that section 47B of the *Freedom of Information Act (1982) Cth* (**FOI Act**) applies. Police set out those sections of the FOI Act it considered to be relevant as follows:

A document is conditionally exempt if disclosure of the document under this Act:

- (a) would, or could reasonably be expected to, cause damage to relations between the Commonwealth and a State; or
- (b) would divulge information or matter communicated in confidence by or on behalf of the Government of a State or an authority of a State, to the Government of the Commonwealth, to an authority of the Commonwealth or to a person receiving the communication on behalf of the Commonwealth or of an authority of the Commonwealth;

64. Section 4(1) of the FOI Act 1982 defines a conditionally exempt document as:

a document is **conditionally exempt** if Division 3 of Part IV (public interest conditional exemptions) applies to the document.

65. Section 11A(5) of the FIO Act provides that, if a document is conditionally exempt, it must be disclosed unless (in the circumstances) access to the document at that time would, on balance, be contrary to the public interest.

66. The notice of decision by Police states that advice was received from Customs that “... disclosure of this information could adversely affect the continued level of trust and cooperation between Commonwealth and the state of NSW...”.

67. *Part 6 – Conditional exemptions* of the Australian Information Commissioner’s Guideline at [6.38] provides:

A decision maker may consider that disclosure would, or could reasonably be expected to damage the working relation of the Commonwealth and one or more States (s 47B(a)). ‘Working relations’ encompass all interactions of the Commonwealth and the States, from formal Commonwealth-State consultation processes such as the Council of Australian Governments through to any working arrangements between agencies undertaken as part of their day to day functions.

68. The words “could reasonably be expected to” in this context requires a decision maker to consider whether it is reasonable, as distinct from something that is irrational, absurd or ridiculous.

69. The notice of decision also states that if the comments, which Police described as confidential, were disclosed it would likely “... reduce the effective exchange of information between NSW Police and the Australian Customs and Border Protection Service.

70. Although Police did not establish that the information supplied to it by Customs is confidential, we are satisfied that the information in issue was ‘communicated in confidence’. This is because we can see:
- a course of conduct whereby information has been held in confidence over a period of time; and
 - it was communicated in the reasonable expectation that it would not be divulged to anyone else without the express consent of the government making the information available.
71. We are satisfied that this public interest consideration against disclosure applies. Our view about how this consideration contributes to the balance of the public interest is discussed in the findings and recommendations section of this report.

Third party consultation

72. During its decision making process Police consulted with third parties in accordance with section 54 of the GIPA Act. These third parties supplied referee information to Police about Mr Smolenski.
73. In response to the consultation process Police received consent to the disclosure of some referee information, which Police subsequently disclosed. It also received an objection to the disclosure of some referee information contained within pages 90 – 100. Disclosure of this information was refused.
74. When making its decision Police must take any third party objection into account in making its decision, however an objection is not in itself determinative of an overriding public interest consideration against disclosure.
75. Police may decide to release information despite receiving an objection from a third party. If so, under section 54(6) and (7) Police must notify the third party of its decision, and not release the information until the third party’s review rights have expired.

Consultation with Privacy Commissioner

76. We consulted with the Privacy Commissioner in accordance with section 94(2) of the GIPA Act as we considered whether to recommend against Police’s.
77. The Privacy Commissioner noted that unlike the GIPA Act the names of public officials could be construed as personal information for the purpose of the *Privacy and Personal Information Protection Act 1998 (PPIP Act)*. She also stated that it was apparent from the email address itself that it is an official government email address which was issued for the purpose of and in connection with public officials performing their official duties.
78. Although Police did not consider that clause 3(a) of the table at section 14(2) of the GIPA Act was a relevant consideration against disclosure of the information contained in pages 95-97, we consulted with the Privacy Commissioner in general terms about this information. This information contains opinions about Mr Smolenski which was provided to Police by third parties as part of its recruitment and selection processes. When offering an opinion about someone else, personal information about the provider of the opinion may also be revealed. (see paragraph 1.4 of Guideline 4 – Personal information as a public interest consideration under the GIPA Act).

79. The Privacy Commissioner noted that the definition of personal information in the PPIP Act does not include information or an opinion about an individual's suitability for appointment or employment as a public sector official.
80. She also considered that the referee would have been aware or should have been made aware that the information was likely to be released to the subject if requested and, as a result, section 18(1)(b) of the PPIP Act provides that the information in issue could be disclosed without contravening an Information Protection Principle.

Findings & recommendations

81. We are not persuaded that there is an overriding public interest against disclosure of the email addresses (pages 93-94). In forming this view we rely on clause 4(3)(b) of schedule 4 to the GIPA Act set out in paragraph 59 of this report.
82. It is our view and that of the Privacy Commissioner, that information about a person who is the subject of a selection and recruitment process for a job in the public sector, is a kind of information that would reasonably be expected to be available to that person.
83. We note that *Chapter 2 – Recruitment, selection and appointment* of the Public Service Commission's Personnel Handbook (first published in 1999) in both the current version 13.3 and the version updated January 2010 set out the objective of the employment policy as follows:

The NSW Government aims to create a world class Public Service that brings excellent services to the people of this State. NSW needs a Public Service which is informed and responsive, able to change, adapt and contribute to the building of a competitive economy and a fairer society.

To achieve this aim and in the public interest, the Government has made a commitment to the firm application of the merit principle encompassing ethical and transparent recruitment and selection processes.

84. The Handbook lists the privacy aspects that must be taken into account and anticipates access applications for job application related information made under the GIPA Act (see chapters 2 & 5 of the Public Service Commission's Personnel Handbook).
85. We are satisfied that in this instance there are public interest considerations against the disclosure of the referee reports. We are not persuaded that these considerations outweigh the interest in providing Mr Smolenski with access to the reports, when weighed against the public interest considerations in favour of disclosure that support accountability and transparency in government decision making.
86. Despite the third party objections and the public interest considerations against disclosure discussed above, we are not satisfied that Police has justified its decision that there is an overriding public interest against disclosure.
87. Therefore under section 93 of the GIPA Act we recommend Police reconsider its decision to refuse Mr Smolenski access to the information in issue, in particular the email addresses, and information that can be categorised as selection panel comments and referee reports.

Applying for a further review

88. Our recommendations are not binding and cannot be reviewed under the GIPA Act. However, the original decision of Police can be reviewed by the Administrative Decisions Tribunal (**ADT**).
89. If Mr Smolenski is dissatisfied with either our recommendations or Police's response to our recommendations, he may ask the ADT to review the original decision.
90. Mr Smolenski must apply to the ADT within 20 working days of the date of this report. After that, the ADT can only accept his application if it agrees to extend the deadline. For information about the process and costs of an ADT review, please contact:

Administrative Decisions Tribunal
Level 10, 86 Goulburn Street
Sydney NSW 2000

Phone (02) 9377 5711
Fax (02) 9377 5723
TTY (02) 9377 5859

www.lawlink.nsw.gov.au/adt

Email ag_adt@agd.nsw.gov.au

91. If Police make a new decision because of our review, Mr Smolenski will have new rights of review for that new decision and 40 working days from the date of the new decision to request a review by us or the ADT.

Closing our file

92. This file is now closed.
93. If you have any questions, please contact our office on 1800 472 679.