



Overview

Applicant:	Applicant	Request date:	29 April 2013
Agency:	South Western Sydney Local Health District	Report date:	28 October 2013
		Our reference:	IPC13/R000193

Issue

The applicant asked us to review the South Western Sydney Local Health District's decision to refuse access to four documents, which were identified as documents 7, 13, 16 and 19. The information in these documents was refused because the local health district decided that there is an overriding public interest against disclosure.

Our findings

We are not satisfied that the local health district's decision was justified. For this reason, we recommend that it reconsider the decision within 15 working days of this report (subject to any extensions available under the GIPA Act).

Next steps

This review is now closed.

We ask that the local health district advises us and the applicant of any actions it intends to take in response to our recommendation by 4 November 2013.

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About the public interest test

A person who applies to access government information has a legal right to access it unless there is an overriding public interest for it not to be disclosed. An agency must weigh considerations for and against releasing information before making its decision.

This is known as the public interest test, which is outlined in the GIPA Act:

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. (Section 13)

Balancing considerations

The GIPA Act does not provide a set formula for working out the weight of considerations for or against disclosure, or deciding if one set of considerations outweighs the other.

Decision makers may take their own approach, as long as they act in good faith and are consistent with the Act. They may weigh questions of fact or degree differently, coming up with different answers without being wrong.

However, an agency must follow the principles in section 15:

- agencies must exercise their functions in a way that promotes the object of the Act
- agencies must bear in mind any applicable Information Commissioner guidelines
- it is irrelevant if disclosure might cause embarrassment to, or loss of confidence in, the agency
- it is irrelevant if any disclosed information might be misinterpreted or misunderstood
- agencies cannot put conditions on the use of disclosed information for a formal access application.

Considerations for and against disclosure

Section 12(2) does not limit the considerations in favour of disclosure that might be relevant, but gives some examples. Section 14 sets out the considerations against disclosure.

Section 14(1) says that if information falls within the scope of any of the clauses in schedule 1, its release is not in the public interest. This means the

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agency does not have to balance the considerations before refusing access to the information.

Section 14(2) says that the only other relevant considerations against disclosure are those in the table to section 14. If the agency raises any of the points in clauses 1 to 6, it must establish that disclosing the information ‘... could reasonably be expected to have ... the effect’ outlined in that table.

If at this stage the agency considers that there is an overriding public interest against disclosing the information, the GIPA Act contains a number of provisions that may apply to mitigate the effect of, or reduce the weight of, public interest considerations against disclosure or even avoid an overriding public interest consideration against disclosure altogether. These provisions are found in sections 72 to 78 of the GIPA Act. It is consistent with the objects of the GIPA Act that these provisions be considered, where relevant, before a decision is made to not disclose information because there is an overriding public interest consideration against disclosure.

An agency may also 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. 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.

Once all of the appropriate steps have been finalised, an agency should explain its reasons for the decision to the applicant. If the agency decides that there is an overriding public interest against disclosing the information its notice of decision must meet the notice requirements in section 61 of the GIPA Act.

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HCCC complaints (documents 7, 13 and 16)

The local health district decided not to release documents 7, 13 and 16, which are each described in the schedule of documents as “Complaint – Health Care Complaints Commission.” The reason provided by the local health district is that the information is the excluded information of the Health Care Complaints Commission (HCCC).

The categories of excluded information are set out in schedule 2 to the GIPA Act. In accordance with clause 2 of schedule 2, information relating to the following functions of the HCCC is excluded information:

The Health Care Complaints Commission—complaint handling, investigative, complaints resolution and reporting functions (including any functions exercised by the Health Conciliation Registry and any function concerning the provision of information to a registration authority or a professional council (within the meaning of the Health Care Complaints Act 1993) relating to a particular complaint).

This means that, under section 43 of the GIPA Act, an access application made to the HCCC for this information is invalid. Where the application is made to another agency, as in this case, clause 6 of schedule 1 to the GIPA Act applies.

Clause 6 of schedule 1 to the GIPA Act states that it is conclusively presumed that there is an overriding public interest against disclosing another agency’s excluded information, unless that agency consents to the information being disclosed.

Under clause 6(2) of schedule 1 to the GIPA Act, an agency must ask the agency who holds the benefit of the excluded information whether they consent to disclosure before making a decision about whether or not to provide access to the information. The other agency’s decision about whether or not to consent to disclosure is not reviewable (clause 6(3) of schedule 2).

The local health district did not consult with the HCCC in relation to documents 7, 13 and 16. In making this decision, the local health district considered the time taken to process the application, the applicant’s request that the costs be kept as low as possible, and its view that the HCCC would not consent to disclosure. However, consultation with the HCCC is a requirement of the GIPA Act that must be met before an agency can decide to refuse access to information because it is HCCC’s excluded information.

For this reason, our view is that the decision by the local health district was not available to it to make, and we recommend that it reconsider its decision under section 93 of the GIPA Act.

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Ministerial complaint (document 19)

The local health district decided not to release document 19, which is described in the schedule of documents as “Ministerial complaint.” The reason provided in the schedule of documents is “Redacted under Section 14, Table 1, (d) of the GIPA Act.”

Clause 1(d) of the table to section 14 provides:

1 Responsible and effective government

There is a public interest consideration against disclosure of information if disclosure of the information could reasonably be expected to have one or more of the following effects (whether in a particular case or generally):

...

(d) prejudice the supply to an agency of confidential information that facilitates the effective exercise of that agency's functions,

In order for this consideration to apply, an agency must establish that the disclosure of the information “could reasonably be expected to have the effect” outlined in the table. The phrase “could reasonably be expected to” means more than a mere possibility, risk or a chance and must be based on real and substantial grounds and must not be purely speculative, fanciful, imaginary or contrived. The word “prejudice” has its ordinary meaning: “to cause detriment or disadvantage.”

As is the case with all of the GIPA Act considerations against disclosure, this consideration is made up of several elements. Each element must be satisfied for the consideration to apply. These elements are:

- disclosure could reasonably be expected to
- prejudice the supply to the agency of information
- that is confidential
- and facilitates the effective exercise of the agency's functions

If any of the elements of a consideration are not met, the consideration does not apply. If the elements have been met, the agency can proceed to considering the weight of the consideration and whether or not it overrides the public interest considerations in favour of disclosure, either on its own or in conjunction with other public interest considerations against disclosure.

We were not satisfied that the information in the local health district's notice of decision justifies its decision that this consideration applies, or that the consideration overrides the public interest considerations in favour of

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disclosure. For this reason we sought further information from the local health district. This information indicates that document 19 may be out of scope of the original application, and that the decision to withhold the information was made following consultation with the Ministry of Health.

We agree that, because the complaint was not “made to” the local health district or the hospital administration, it is not strictly captured by the scope of the original access application. This means that the right to the information created by section 9 of the GIPA Act does not apply.

However, the local health district did not decide that the application was out of scope, and section 76 of the GIPA Act authorises agencies to provide access to government information in response to an access application that is in addition to the information applied for, unless there is an overriding public interest against disclosure. The local health district applied the public interest test to document 19 and decided that there is an overriding public interest against disclosure.

With respect to the outcome of the public interest test applied by the local health district, we are not satisfied that this decision as justified under the GIPA Act. This is because:

- no public interest considerations in favour of disclosure were identified
- the information provided by the local health district indicates that public interest considerations considered go beyond the consideration in clause 1(d) (for example, it appears that privacy considerations relating to personal information were considered, but this is not apparent from the notice of decision)
- the local health district has not explained how the elements of the consideration against disclosure would apply (for example, why the information was categorised as being confidential, or how the supply of such information would be prejudiced in future as a result of this information being disclosed). Therefore the local health district’s notice of decision did not meet the requirements in section 61 of the GIPA Act.

For these reasons, we recommend that the local health district reconsider its decision under section 93 of the GIPA Act. In making this recommendation we refer the local health district to the Information Commissioner’s guidelines 4 and 5, regarding personal information as a public interest consideration under the GIPA Act and consultation of public interest considerations under section 54 of the GIPA Act. We also note that the Information Commissioner has recently published a template notice of decision document. All of these resources are available on the IPC website at www.ipc.nsw.gov.au.

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What happens next

Applying for a further review

Our recommendations are not binding and cannot be reviewed under the GIPA Act. However, the local health district's original decision can be reviewed by the Administrative Decisions Tribunal (ADT).

If the applicant is dissatisfied with either our recommendations or the local health district's response to our recommendations, he may ask the ADT to review the original decision.

The applicant must apply to the ADT within 20 working days of the date of this report. After that, the ADT can only accept the application if it agrees to extend the deadline. For information about the process and costs of an ADT review, please contact:

Administrative Decisions Tribunal	Phone	(02) 9377 5711
Level 10, 86 Goulburn Street	Fax	(02) 9377 5723
Sydney NSW 2000	TTY	(02) 9377 5859
www.lawlink.nsw.gov.au/adt	Email	ag_adt@agd.nsw.gov.au

If the local health district makes a new decision because of our review, the applicant will have:

- new rights of review for that new decision
- 40 working days from the date of the new decision to request a review by us or the ADT.

Finding out more

If you have any questions about this report, please contact the Information and Privacy Commission on 1800 472 679 or by email to ipcinfo@ipc.nsw.gov.au.