

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

Applicant: Anonymous
Agency: NSW Police Force
Report date: 13 August 2014
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- prejudice the effective exercise of agency’s function –
prejudice the conduct, effectiveness or integrity of any test
conducted by an agency – forms of access

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Summary

1. The Applicant applied for information from the NSW Police Force (the Agency) under the *Government Information (Public Access) Act 2009* (GIPA Act).
2. The Agency decided not to provide access to the information as they determined that there is an overriding public interest against disclosure of the information.
3. The Information Commissioner makes the following recommendations in relation to the Agency's decision:
 - a. that the Agency make a new decision by way of internal review (within 15 working days), pursuant to section 93 of the GIPA Act and
 - b. that the Agency revise its procedures for information access requests so that future notices of decision comply with the requirements of section 72 of the GIPA Act, pursuant to section 95 of the GIPA Act.

Background

4. The Applicant applied under the GIPA Act to the Agency for access to the following information:
 - a. With respect to the NSW Police Inspectors level exam he undertook on 8 May 2013 for the third year in a row, his answers to the "Short Answer" questions and marking of the Short Answer questions.
5. In its decision issued on 10 December 2013, the Agency decided not to provide access to the information, relying upon the overriding public interest considerations against disclosure at clauses 1(f) and 1(h) from the table at section 14 of the GIPA Act.
6. In seeking a review of the decision by the Information Commissioner, the Applicant confirmed that he disagreed with the Agency's decision and that he seeks to view the answers he provided to this exam so that he can gain some understanding as to how the questions have been marked. He says he understands if this has to be done in exam conditions.

Identifying the information requested

7. The notice of decision does not adequately identify the information which is the subject of the Applicant's GIPA request. It is not sufficient to refer to the application in general terms as a description of the information sought.
8. On page one of the notice of decision, a table identifies only one document as being relevant to the request, which is described as Inspector Examination – Answer Booklet. It appears to be 21 pages in length.
9. In its discussion of the overriding public interest considerations against disclosure on page three of the notice of decision, the Agency appears to have characterised its decision as being about the exam questions as well as the Answer Booklet.
10. We have examined the information to which access was refused and confirm that the Short Answers themselves do not contain the exam questions. It is also worth noting that the Short Answers themselves contain no marks,

corrections or comments. The marking of the Short Answer Book is in two separate tables and is in numerical form only.

11. If the Agency is uncertain as to the information sought in a GIPA application, the Agency should raise this with the Applicant on receipt of the request and if necessary, seek clarification, pursuant to sections 51 and 52 of the GIPA Act.
12. Correct identification of the information which is the subject of the information access request is a fundamental step in making a decision under the GIPA Act, (see paragraph 30 below).
13. In making a new decision, we recommend that the Agency correctly identify the information which is the subject of the request, prior to undertaking the public interest test.

The public interest test

14. 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.
15. The general public interest consideration in favour of access to government information set out in section 12 of the GIPA Act means that this balance is always weighted in favour of disclosure. Section 5 of the GIPA Act establishes a presumption in favour of disclosure of government information.
16. Before deciding whether to release or withhold information, the Agency must apply the public interest test and decide whether or not an overriding public interest against disclosure exists for the information.
17. Section 13 requires decision makers to:
 - a. identify relevant public interest considerations in favour of disclosure,
 - b. identify relevant public interest considerations against disclosure,
 - c. attribute weight to each consideration for and against disclosure, and
 - d. determine whether the balance of the public interest lies in favour of or against disclosure of the government information.
18. The Agency must apply the public interest test in accordance with the principles set out in section 15 of the GIPA Act.

Public interest considerations in favour of disclosure

19. 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. A recent decision of the New South Wales Civil and Administrative Tribunal (“NCAT”) states:

It is a weighty consideration as it supports the presumption in favour of disclosure and the stated objects of the Act.¹

20. The Agency may take into account any other considerations in favour of disclosure which may be relevant (s12(2) GIPA Act).

¹ Mannix v Department of Education and Communities [2014] NSWCATAD 35 at [64]

21. 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;
 - b. the general right of the public to have access to government information held by agencies and
 - c. the fact that the information sought relates to the Applicant, candidate number 123456, Inspector Examination Answer Paper.
22. In its notice of decision, the Agency did not demonstrate that it attributed any weight to any of these considerations.
23. Section 55 of the GIPA Act says that an Agency can take into account the personal factors of the application as relevant factors in the application of the public interest test.
24. The Agency was aware of the Applicant's motives for making the access application. That is, in circumstances in which he has undertaken the exam three times, he wishes to see how his short answers were marked, so that he can "*better understand the expectations for future attempts.*"
25. This might affect the weight attributed to the consideration identified at paragraph 21(c) above and consequently affect the determination of where the balance lies between the public interest considerations for and against disclosure.
26. In making a new decision, the Agency should articulate what effect these considerations in favour of disclosure would have or the weight to be attributed to the factors.

Public interest considerations against disclosure

27. The only public interest considerations against disclosure that can be considered are those in schedule 1 and section 14 of the GIPA Act.
28. In order for the considerations against disclosure set out in the table to section 14 of the GIPA Act to be raised as relevant, the Agency must establish that the disclosure of the information *could reasonably be expected to have the effect* outlined in the table.
29. The words "could reasonably be expected to" should be given their ordinary meaning. Courts have stated that the words *...require a judgment to be made by the decision-maker as to whether it is reasonable, as distinct from something that is irrational, absurd or ridiculous*² to expect the effect outlined.
30. Therefore before applying a consideration against disclosure to the information, the Agency must
 - identify the information;
 - characterise it as information to which a public interest consideration against disclosure set out in the table to section 14 of the GIPA Act applies, and

² Attorney General's Department v Cockcroft (1986) 10 FCR 180. Cited with approval in Hurst v Wagga Wagga City Council [2011] NSWADT 307

- demonstrate that disclosure of the information could have the effect deemed not to be in the public interest.
31. In its notice of decision the Agency raised two public interest considerations against disclosure of the information, deciding that its release could reasonably be expected to:
- a. prejudice the effective exercise by an agency of the agency's functions (clause 1(f) of the table to section 14 of the GIPA Act); and
 - b. prejudice the conduct, effectiveness or integrity of any audit, test, investigation or review conducted by or on behalf of an agency by revealing its purpose, conduct or results (whether or not commenced and whether or not completed) (clause 1(h) of the table to section 14 of the GIPA Act).
32. I will discuss each of these considerations in turn.

Consideration 1(f) – prejudice the effective exercise by an agency of the agency's functions

33. Clause 1(f) 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 effective exercise by an agency of the agency's functions.*
34. To show that this is a relevant consideration against disclosure, the Agency must establish:
- a. the relevant function of the Agency;
 - b. that is or would be prejudiced by release of the information.
35. The meaning of the word prejudice is to 'cause detriment or disadvantage'.³
36. The Agency submits that:
- the documents to which access has been refused are key elements of the selection process of Inspectors within the Agency;
 - should the information be released, it would compromise the effectiveness of the methods and procedures used by the Agency to select the best available candidates for these leadership positions.
 - the importance of maintaining the confidentiality of the information is emphasised to all candidates by way of direction not to disclose the nature and content of the examination questions to any person.
37. The Agency has gone some way to establishing the elements of this consideration. However, as outlined above, the notice of decision needs to accurately identify or describe the information in issue, before it can show that any consideration against disclosure applies.

Consideration 1(h) – prejudice the conduct, effectiveness or integrity of any test conducted by an agency by revealing its purpose, conduct or results

38. Clause 1(h) of the table at section 14 states:

³ Hurst v Wagga Wagga City Council [2011] NSWADT 307 at [60]

There is a public interest consideration against disclosure 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).

39. For this consideration against disclosure to apply to the information, the following elements must be met:
 - a. prejudice the conduct, effectiveness or integrity of the Inspector Exam;
 - b. by revealing its purpose, conduct or results; and
 - c. whether or not commenced and whether or not completed.
40. The Agency submits that:
 - advice from the Promotion Pre Qualifying Unit is that the release of the information requested would prejudice the conduct and integrity of the test and future tests of this nature;
 - the questions used are part of a pool of questions used by the Unit;
 - to provide access to any individual outside of the testing environment would likely give an unfair advantage to any person provided with access to the information and provide the opportunity to encourage corrupt behaviour; and
 - to avoid such risks, access to the tests is strictly limited.
41. While we consider the Agency has established the elements with respect to the exam questions, it has not done so in relation to the information requested, which is the Short Answers and marking of those Short Answers.

Balancing the public interest

42. The GIPA Act does not provide a set formula for weighing individual public interest considerations or assessing their comparative weight. Whatever approach is taken, these questions may be characterised as questions of fact and degree to which different answers may be given without being wrong, provided that the decision-maker acts in good faith and makes a decision available under the GIPA Act.
43. A recent NCAT decision helpfully stated that:

*It is really a matter of placing identified considerations in order of priority or importance.*⁴
44. The notice of decision describes the balancing exercise that took place, stating that the Agency considered the nature of the material, the purpose for which it is created, the information contained therein and the impact on the effective discharge of the Agency's function, to reach the conclusion that there is an overriding public interest against disclosure. However, the balancing exercise is flawed by the Agency's failure to accurately identify the information it is assessing in the public interest test.
45. In reconsidering the decision, the Agency should:
 - correctly identify the information in issue;

⁴ Mannix v Department of Education and Communities [2014] NSWCATAD 35 at [63]

- set out the considerations in favour of disclosure, identify the evidence that affects the weight to be given to each consideration, and give weight to each consideration;
 - set out the considerations against disclosure, identify the evidence that affects the weight to be given to each consideration, and give weight to each consideration;
 - make a decision about which way the balance lies, in light of the weight in favour and against.
46. 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 (see for example sections 72 to 78 of the GIPA Act).
47. 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.

Forms of access

48. Section 72 of the GIPA Act details how access to information is to be provided. Subsection 72(1) lists the ways an applicant can access information, one of which, at section 72(1)(a) is by providing a reasonable opportunity to inspect a record containing the information
49. The Applicant requested access to his exam so that he can better understand the expectations for future attempts. In his application he stated that he understood the need to maintain secrecy of the questions and was mainly interested in viewing the marking of the short answer questions. He indicated that he was happy to attend an agreed location as required.
50. I note that the Applicant's request for review emphasised that his request for access was for "viewing" of the information and he understood if that access was in "exam conditions."
51. Subsection 72(2) states that an agency must provide access in the way requested unless disclosure in that way would have certain effects. It then lists the effects that provide an agency the opportunity to provide access to information in a way other than that requested by an applicant (subsections 72(2)(a)-(d)).
52. Section 73 provides that conditions may be imposed as to how a right of access may be exercised. For example, an applicant may be prevented from making notes from or taking a copy of a record that is made available for inspection.
53. Once all of the above steps have been finalised, the 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.

Recommendations

54. The Information Commissioner recommends that the Agency make a new decision by way of internal review (within 15 working days), pursuant to section 93 of the GIPA Act.
55. The Information Commissioner recommends that the Agency revise its procedures for information access requests so that future notices of decision comply with the requirements of section 72 of the GIPA Act, pursuant to section 95 of the GIPA Act.
56. The Information Commissioner recommends that, in making a new decision, the Agency have regard to the matters raised and guidance given in this report.
57. We ask that the Agency advise the Applicant and us by **12 August 2014** of the actions to be taken in response to our recommendations.

Review rights

58. Our reviews are not binding and are 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.
59. The Applicant has the right to ask the NCAT to review the Agency's decision.
60. 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>

61. 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 NCAT.

Completion of this review

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