



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

Applicant: Harriet Alexander
Agency: Sydney Children's Hospital Network
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Summary

1. Harriet Alexander (the Applicant) applied for information from the Sydney Children's Hospital Network (the Agency) under the *Government Information (Public Access) Act 2009* (GIPA Act).
2. The Agency decided to refuse access to the information because of an overriding public interest against its disclosure.
3. The Information Commissioner is not satisfied that the Agency's decision is justified under section 97(1) of the GIPA Act.
4. The Information Commissioner recommends that:
 - a. the Agency make a new decision by way of internal review, pursuant to section 93(1) of the GIPA Act; and
 - b. in making a new decision, have regard to the matters raised and guidance given in this report.

Background

5. The Applicant applied under the GIPA Act to the Agency for access to the following information:

Any reports, reviews or investigations, produced internally or externally into provision of pediatric cardiology services at the Sydney Children's Hospital at Randwick and the Children's Hospital at Westmead. I would also like to see a schedule of documents produced by this request in the event more than one document is found.
6. In its decision issued on 17 November 2015, the Agency decided to refuse access to the information because of an overriding public interest against its disclosure.
7. The Applicant sought internal review of the Agency's decision and on 7 January 2016, the Agency upheld its initial decision to refuse access to the information.
8. In seeking a review of the decision by the Information Commissioner, the Applicant confirmed that she would like the Agency to release the information.

Decision under review

9. The decision under review is the Agency's internal review decision to refuse access to information, dated 7 January 2016. This is a reviewable decision pursuant to section 80(d) of the GIPA Act.
10. In undertaking this review we have had the opportunity to examine the information to which access was refused.

The public interest test

11. 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.

12. 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.
13. 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

14. 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. The Agency may take into account any other considerations in favour of disclosure which may be relevant (s12(2) GIPA Act).
15. In its notice of decision, in addition to the general public interest in favour of disclosure at section 12(1) of the GIPA Act, the Agency identified the following public interest consideration in favour of disclosure:

that disclosure 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.
16. We are satisfied this is a relevant consideration in favour of disclosure.
17. Another consideration which may be relevant is that disclosure would contribute to public debate on matters of importance or public interest.
18. We recommend that the Agency note that there is no limit to the relevant considerations in favour of disclosure which may be taken into account for the purposes of determining whether there is an overriding public interest against disclosure of government information.

Public interest considerations against disclosure

19. The only public interest considerations against disclosure that can be considered are those in schedule 1 and section 14 of the GIPA Act.
20. 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.
21. The words “could reasonably be expected to” should be given their ordinary meaning. This requires a judgment to be made by the decision-maker as to whether it is reasonable, as distinct from irrational, absurd or ridiculous, to expect the effect outlined.
22. In its 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. reveal a deliberation or consultation conducted, or an opinion, advice or recommendation given, in such a way as to prejudice a deliberative

- process of government or an agency (clause 1(e) of the table to section 14 of the GIPA Act);
- 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 (clause 1(h) of the table to section 14 of the GIPA Act); and
 - c. prejudice the conduct, effectiveness or integrity of any research by revealing its purpose, conduct or results (clause 4(e) of the table to section 14 of the GIPA Act).
23. I will discuss each of these considerations in turn.

Consideration 1(e) – reveal a deliberation or consultation conducted, or an opinion or recommendation given, in such a way as to prejudice a deliberative process of government or an agency.

24. Clause 1(e) 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 reveal a deliberation or consultation conducted, or an opinion, advice or recommendation given, in such a way as to prejudice a deliberative process of government or an agency (whether in a particular case or generally).

25. In order for clause 1(e) to apply, the Agency must establish that disclosing the information could reasonably be expected to ‘reveal’:
- a. a deliberation or consultation conducted; or
 - b. an opinion or recommendation;
 - c. in such a way as to prejudice a deliberative process of the agency.
26. 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).*
27. The meaning of the word prejudice is to “cause detriment or disadvantage’.
28. The issue the Agency needs to address is whether there is more than a mere possibility that releasing the information would reveal any deliberation, opinion, advice or recommendations that would be detrimental to, or disadvantage the Agency’s decision making process.
29. The notice of decision states:
- a. the Report is a consultation document that may or may not have been accepted by the Health Network Executive (Executive);
 - b. the Agency sought an independent review by an Expert Advisory Panel to assist with executive decision making regarding the Clinical Care of Children with Congenital Heart Disease;
 - c. release of the Report may affect the decision process of the Agency, the integrity of this review and any further reviews that may take place in the future;
 - d. the Agency has a responsibility to conduct a review of its services on a needs basis;

- e. the review of appropriate and safe care occurs where clinicians and other relevant stakeholders are able to raise their views and ideas; and
 - f. the decision of whether to regard or act on the Report is for the Executive to decide without pressure or prejudice.
30. We have examined the Report and are satisfied there is evidence of consultation with respect to the Clinical Care of Children with Congenital Heart Disease. While the notice of decision states that release of the Report may affect the decision process of the Agency, it has not demonstrated how disclosing the Report would have the prejudicial effect on the Agency's deliberative processes which are anticipated by clause 1(e).
31. We are therefore not satisfied that the Agency has established this is a relevant consideration against disclosure.

Consideration 1(h) – prejudice the conduct of any review by revealing its purpose, conduct or results

32. Clause 1(h) 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 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.)*
33. 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;
 - b. by revealing its purpose, conduct or results; and
 - c. whether or not the investigation is commenced and whether or not it is completed.
34. 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.
35. The notice of decision submits that the integrity of this and any further reviews that may take place in the future may be affected by release of the Report.
36. We are not however satisfied that the Agency has established the requisite prejudicial effect arising from disclosure of the information and on this basis, are not satisfied this is a relevant consideration against disclosure.

Consideration 4(e) – prejudice the conduct, effectiveness or integrity of any research by revealing its purpose, conduct or results

37. Clause 4(e) 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 conduct, effectiveness or integrity of any research by revealing its purpose,*

conduct or results (whether or not commenced and whether or not completed.)

38. In order to establish the relevance of this consideration, an agency must show how all the elements are satisfied, to demonstrate the reasonably expectable effect of the consideration.
39. In particular, the Agency must:
 - a. identify the relevant research; and
 - b. explain how the conduct, effectiveness or integrity of the research would be prejudiced if its purpose, conduct or results were revealed.
40. The Agency must demonstrate the causal nexus between the disclosure of the information and the expected prejudice to the conduct, effectiveness or integrity of the research.
41. Again, the notice of decision has identified the relevant research in question, though we do not consider that the notice adequately establishes how the conduct, effectiveness or integrity of the research would be prejudiced if the Report was released.
42. We are not satisfied that the Agency has established the relevance of this consideration against disclosure.

Personal factors of the application

43. An Agency is entitled to take into account the personal factors of an application under section 55 of the GIPA Act, such as:
 - a. the applicant's identity and relationship with any other person;
 - b. the applicant's motives for making the access application; and
 - c. any other factors particular to the applicant.
44. These factors can be considered as factors in favour of providing the Applicant with access to the information.
45. They can also, pursuant to section 55(3) of the GIPA Act, be considered as factors against providing access if (and only to the extent that) they are relevant to whether disclosure could reasonably be expected to have any of the effects referred to in clauses 2-5 of the table to section 14 of the GIPA Act.
46. In any reconsideration of its decision, the Agency may wish to take into account to the extent available under section 55, that the Applicant is a journalist and her motives for making the access application, when conducting the public interest test.
47. We recommend pursuant to section 95 of the GIPA Act that in dealing with future GIPA applications in which personal factors are relevant, the Agency ensures that it complies with section 55(3) of the GIPA Act and that it contemplates what weight the personal factors have in balancing the public interest.

Balancing the public interest

48. 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.

49. We are not satisfied that the Agency has applied the public interest test in accordance with the requirements of the GIPA Act. We refer to our comments above with respect to:
 - a. the three considerations against disclosure which are not established;
 - b. clause 12(2) of the GIPA Act, discussed in paragraph 18; and
 - c. personal factors of the application, which may be relevant in weighting factors for and against disclosure, in determining where the balance lies.
50. We therefore conclude that the Agency has not justified its decision to refuse access to the information.

Recommendations

51. The Information Commissioner recommends that:
 - a. the Agency make a new decision by way of internal review, pursuant to section 93(1) of the GIPA Act; and
 - b. in making a new decision, have regard to the matters raised and guidance given in this report.
52. We ask that the Agency advise the Applicant and us **within 10 days of the date of this report** of the actions to be taken in response to our recommendations.

Review rights

53. 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.
54. The Applicant has the right to ask the NCAT to review the Agency's decision.
55. 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>

56. 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

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

Elizabeth Tydd
Information Commissioner