



information
and privacy
commission
new south wales

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

Applicant: Ms Anna Borg
Agency: Housing NSW
Report date: 10 March 2015
IPC reference: IPC14/R000636
Keywords: Government information – personal information–undermine
competitive neutrality – diminish competitive commercial value

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Summary

1. Ms Anna Borg (the Applicant) applied for information from Housing NSW (the Agency) under the *Government Information (Public Access) Act 2009* (GIPA Act).
2. The Agency provided access to the majority of the information in full, withheld access to one document and provided access to nine documents with some redactions.
3. The Information Commissioner makes the following recommendation in relation to the Agency's decision:
 - a. Under section 93 of the GIPA Act the Agency reconsider its decision by way of internal review and give consideration to the guidance in this report in conducting the internal review.

Background

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

Entire tenancy record please. This includes all services delivered to me by a contractor of Housing NSW as per section 121 of Part 7 of the GIPA Act.
5. In its decision issued on 26 September 2014, the Agency identified 404 items which fell within the scope of the Applicants access request. The Agency provided access to the majority of the information in full, withheld the release of one document in full (Folio Number 233) and provided access to nine documents with redactions. The information to which the Applicant did not receive full access is as follows:

Folio No.	Description of Folio	Consideration against disclosure
396	Screen print from HOMES database – information regarding schedule of rates paid to contractors for maintenance work completed	4(a) / 4(c)
99	Screen print of a Combined Shortlist from Housing NSW's IHS database which contains information that identifies another person	3(a)
110	Sign up declaration which contains another person's personal information	3(a)
120	Client service visit report which contains information that identified another person's contact number	3(a)
233 (F)	Letter which contain information relating to another person which was placed on file in error	3(a)

234	Letter which contains another person's personal information	3(a)
300	Email transmission which contains another person's personal information	3(a)
312	Internal email transmission which contains information relating to another person.	3(a)
374	Nomination of Primary Carer Form which contains another person's personal information	3(a)
404	Screen print from Housing NSW's HOMES database which contains information that identified another person's personal information.	3(a)

6. The Agency provided the Information and Privacy Commission (IPC) with access to an un-redacted and redacted copy of the items noted in the table above. However a copy of Folio Number 233 was not provided to the IPC.
7. In seeking a review of the decision by the Information Commissioner, the Applicant confirmed that she is seeking the following:
 - a. Release any guardianship and /or finance orders in place or were in place so I was signed into contacts between "partner agencies" and NGOs without my knowledge or consent.
 - b. Change information sharing under "Accord" partnerships which exploits tenants and breaches their privacy to achieve corporate objectives- this breaches objectives and provisions of community welfare legislation CS-CRAMA
 - c. Provide an apology
 - d. Ensure all future information-sharing meets objectives of CS-CRAMA
8. The outcomes noted above and sought by the Applicant through the external review process under the GIPA Act cannot be achieved as these are outside the scope of the GIPA Act.
9. It would be appropriate for the Agency to advise the Applicant of this information.
10. On 17 December 2014 the Applicant wrote to the Information Commissioner providing further information in relation to the external review and the outcome sought. The Applicant advised that she is seeking the following:
 - a. All information pertaining to the **Guardianship Order** put in place by Housing NSW using incorrect information from my file
 - i. I feel the order is completely inappropriate and violates my human rights and would appreciate it withdrawn ASAP (immediately if possible).
 - b. All information pertaining to me as an "Accord" client where I was "mutually identified" by "partner agencies" to receive "support services" unbeknownst to me and without my consent – to assist in maintaining my tenancy. This includes:

- i. The Shared Operating Agreement between HNSW and partner signatory agencies
 - ii. The Service Level Agreement
 - iii. The consent in writing provided by the legal carer or guardian to share information in relation to my tenancy and support
 - iv. The Accord Client consent form
 - v. The Client information schedule
 - vi. The Cross-Agency working Group that governs the Partnership including the minutes of each of their meetings (including issues logs).
 - vii. Documentation regarding my client referrals, assessment and decisions made in referrals
 - viii. The data outline in the Service Level agreement and shared Operating Agreement that is collected for monitoring the Accord Partnerships
 - ix. The individual Support Plan/ Case Plan
- c. All documentation relating to Housing Communities Program (HCP) from the HCP provider (I was forced to participate in this funding arrangement between my landlord and employer without my knowledge or consent) including:
 - i. Draft and Final Service Plans
 - ii. Six Monthly and annual outcomes Monitoring report
 - iii. Data Collection requirements
 - iv. The Annual Income and Expenditure Statement
 - v. The audited financial statement of HCP expenditure at the conclusion of the contract.
- d. All documentation from the Housing and Mental Health district Implementation and Coordinating Committees (DIACCs) from implementing the May 2012 "Housing and Mental Health Agreement" including:
 - i. The DIACC "Terms of Reference"
 - ii. The DIACC "Work Plans"
 - iii. The reporting of the "deliverables"
- e. Ensure all Future info-sharing meets objectives of CR-CRAMA

Decisions under review

11. The decisions under review are the Agency's decisions to:
- a. Withhold access in full to one document (Folio Number 233)
 - b. Provide partial access to some information.
 - c. Searches conducted in relation to this access application

The public interest test

12. 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.
13. 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.
14. 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.
15. 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.
16. 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

17. 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).
18. In its notice of decision, the Agency listed the following public interest considerations in favour of disclosure of the information in issue:
 - a. The information is personal information of the person to whom it is to be disclosed.
 - b. Disclosure of the information could reasonably be expected to promote open discussion of public affairs, enhance Government accountability or contribute to positive and informed debate on issues of public importance.
 - c. Disclosure of the information 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.
 - d. Disclosure of the information could reasonably be expected to ensure effective oversight of the expenditure of public funds.
 - e. Disclosure of the information could reasonably be expected to reveal or substantiate that an agency (or a member of an agency) has engaged in misconduct or negligent improper or unlawful conduct.

- f. Disclosure of the information could reasonably be expected to advance the fair treatment of individuals in accordance with the law in their dealings with agencies.
- g. Disclosure of the information could reasonably be expected to reveal the reasons for a government decision and any background or contextual information that informed the decision.
- h. Disclosure of the information could reasonably be expected to contribute to the administration of justice generally, including procedural fairness.

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 an individual’s personal information (clause 3(a) of the table to section 14 of the GIPA Act);
 - b. undermine competitive neutrality in connection with any functions of an agency in respect of which it competes with any person or otherwise place an agency at a competitive advantage or disadvantage in any market (clause 4(a) of the table to section 14 of the GIPA Act); and
 - 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).
- 23. I will discuss each of these considerations in turn.

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

- 24. Clause 3(a) of the table at section 14 as a public interest consideration against disclosure 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.
- 25. Personal information is defined in the GIPA Act as being:

...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]

26. 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.
27. The Information Commissioner has published *Guideline 4 – Personal information as a public interest consideration under the GIPA Act* in December 2011. 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.
28. In order to establish that this consideration applies, the Agency has to:
 - a. identify whether the information is personal information
 - b. consider whether the information would be revealed by disclosing it under the GIPA Act.
29. The Agency has identified that the document which was withheld in full (Folio Number 233) and some of the documents partially released (Folio number 99, 110, 120, 234,300,312,374,404) contain personal information.
30. In conducting the external review the Information and Privacy Commission has considered the un-redacted information and confirms that the redacted information is personal information as defined in the GIPA Act.
31. The second element of this consideration requires that the Agency demonstrate how disclosure of this information would reveal the information.
32. The Agency has not provided any additional information to establish how providing the Applicant with access to the redacted information would reveal this information.
33. In conducting the external review the IPC considered the un-redacted information and notes by way of example that Folio Number 374 is a Nomination of Primary Carer form completed by the Applicant and submitted to the Agency. It appears that all of the information provided on the form was supplied by the Applicant and as such was already known to the Applicant. For these reasons it is difficult to establish the second limb of the consideration at clause 3(a) of the table to section 14 of the GIPA Act as the redacted information is known to the Applicant.
34. In relation to Folio Number 234 the Agency has redacted one piece of personal information. As it appears that the Applicant provided the redacted information to the Agency in the first instance it is difficult to demonstrate the second limb of Clause 3(a) of the table at section 14 as the redacted information is known to the Applicant and as such disclosure of the information would not reveal the information.
35. Accordingly the IPC is not satisfied that this is a valid consideration in relation to Folio Number 234 or 374.
36. The IPC recommends that the Agency reconsider its decisions in relation to the application of the consideration contained at clause 3(a) of the table at section 14 in relation to Folio Number 99, 110,120, 234, 300, 312, 374, 404.

Consideration 4(a) - undermine competitive neutrality in connection with any functions of an agency in respect of which it competes with any person or otherwise place an agency at a competitive advantage or disadvantage in any market,

37. Clause 4(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 have one or more of the following effects:

(a) undermine competitive neutrality in connection with any functions of an agency in respect of which it competes with any person or otherwise place an agency at a competitive advantage or disadvantage in any market,

38. If the Agency decides that this is a consideration against disclosure that applies, the Agency will need to demonstrate how each element of this consideration is met.
39. In order to establish that this consideration applies, the agency must demonstrate that:
- a. the agency competes with another person in a market, and
 - b. disclosing the information would either
 - i. undermine competitive neutrality in connection with a function of the agency in the market, or
 - ii. place the agency at a competitive advantage or disadvantage in the market.

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

40. Clause 4(c) of the table to section 14 of the GIPA Act provides:

4 Business interests of agencies and other persons

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:

*...
(c) diminish the competitive commercial value of any information to any person*

41. 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.
42. The definition of the phrase "could reasonably be expected to" means more than a mere possibility, risk or chance and must be based on real and substantial grounds and not be purely speculative, fanciful, imaginary or contrived.
43. 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.
44. In establishing consideration 4(a) and 4(c) as a relevant consideration against disclosure of the item at folio number 396 the Agency states:

The schedule of rates and other cost –related information are subject to commercial in confidence provisions of a government contract, which if disclosed would diminish the competitive value of the information to companies and an entity of the Department of Family and Community

services. The disclosure of such information could also reasonably prejudice the legitimate business, commercial, professional and financial interests of those Companies contracted to an entity of the Department of Family and Community Services or any other Government Department.

45. In order for the Agency to establish consideration 4(a) and 4(c) as valid public interest considerations against disclosure it would need to identify each as a relevant consideration against disclosure, and show how disclosing the information would have the effects outlined above.
46. The Agency would then have shown that this consideration applies to the information. However, this does not mean that the consideration operates as an exemption, or that demonstrating that this consideration applies would justify a decision to withhold the information.
47. The Agency has identified consideration 4(a) and consideration 4(c) as relevant public interest considerations against disclosure and provided some explanation as to why disclosure of the information could reasonably be expected to diminish the competitive commercial value of the information.
48. The IPC notes the redacted information is subject to commercial in confidence provisions of a government contract.
49. However in order for consideration 4(a) to be a relevant consideration the Agency would be required to demonstrate:
 - a. the **agency competes** with another person in a market, and
 - b. disclosing the information would either:
 - i. **undermine competitive neutrality in connection with a function of the agency** in the market, or
 - ii. **place the agency at a competitive advantage or disadvantage** in the market.
50. In order for consideration 4(c) to be a relevant consideration the Agency would be required to demonstrate how disclosure of the information would *diminish the competitive commercial value of the information*.
51. The relevance of this consideration may be influenced by consultation with the third party concerned. (discussed below).
52. The IPC recommends that the Agency reconsider its decisions in relation to the application of the consideration contained at clause 4(a) and clause 4(c) of the table at section 14 in relation to Folio Number 396.

Third Party Consultation

53. An Agency may 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. For example, consultation may be required if:

- the information concerns a person (or entity)'s business, commercial, professional or financial interests, and
 - the person (or entity) may reasonably be expected to have concerns about the disclosure of the information, and
 - those concerns may reasonably be expected to be relevant to the question of whether there is a public interest consideration against disclosure.
54. 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.
 55. An agency may decide to release information despite receiving an objection from a third party. However under section 54(6) and (7) the agency must notify the third party of its decision, and not release the information until the third party's review rights have expired.
 56. The Information Commissioner published *Guideline 5: consultation on public interest considerations under section 54 of the GIPA Act*. This Guideline is available on the IPC website. Agencies must have regard to this Guideline pursuant to section 15(b) of the GIPA Act.
 57. The information to which the Applicant seeks access concerns the personal information of third parties and the business, commercial, professional or financial interests of third parties.
 58. However the Notice of Decision does not demonstrate that the Agency engaged in consultation with those whose concerns may reasonably be expected to be relevant to the question of whether there is a public interest consideration against disclosure.
 59. The IPC recommends that the Agency reconsider its decisions in relation to the documents at Folio Number 99, 110, 120, 234, 300, 312, 374, 404 and 396 subsequent to third party consultation.

Searches for information

60. Section 53 of the GIPA Act sets out the requirement to conduct searches.
61. The expression 'government information' is defined in section 4 of the GIPA Act as 'information contained in a record held by an agency.'
62. Before deciding that it does not hold information, an agency must comply with the requirements of section 53(2) of the Act. The requirements are:
 - undertake such reasonable searches as necessary to locate the information requested; and
 - use the most efficient means reasonably available to the agency.
63. In *Smith v Commissioner of Police* [2012] NSWADT 85, Judicial Member Isenberg said at paragraph 27:

In making a decision as to the sufficiency of an agency's search for documents which an applicant claims to exist, there are two questions: (a) are there reasonable grounds to believe that the requested documents exist and are the documents of the agency; and if so, (b) have the search efforts made by the agency to locate such documents been reasonable in all the circumstances of a particular case.


64. When considering whether there are reasonable grounds to believe that information exists and whether searches to locate information were reasonable, the facts, circumstances and context of the application is relevant. Key factors in making an assessment about reasonable searches include “the clarity of the request, the way the agency’s recordkeeping system is organised and the ability to retrieve any documents that are the subject of the request, by reference to the identifiers supplied by the applicant or those that can be inferred reasonably by the agency from any other information supplied by the applicant” (*Miriani v Commissioner of Police, NSW Police Force [2005] NSWADT 187* at [30]).
65. The GIPA Act does not require an agency to include details of its searches in a notice of decision. However, it is good practice for written decisions to clearly explain what the search processes were, what was found, an explanation if no records were found, what was released and what was held back. Details of searches should include where and how the agency searched, a list of any records found – and if appropriate a reference to the business centre holding the records, the key words used to search digital records (including alternative spellings used) and a description of the paper records that were searched.
66. As noted at paragraph 9 (above) the Applicant provided to the IPC a list of information which the Applicant believes is held by the Agency.
67. The IPC recognises that some of the information noted by the Applicant as held by the Agency may not be held by the Agency. However there is limited information contained within the notice of decision regarding the searches conducted by the Agency, the information identified as falling within the scope of the Applicant’s request for access and to which access was provided to the Applicant. For this reason we are unable to assess whether the Agency’s searches were sufficient.
68. Accordingly the IPC recommends that in reconsidering its decision pursuant to section 93 of the GIPA Act the Agency reconsider whether the information identified by the Applicant at paragraph 9 is held by the Agency.

Recommendations

69. The Information Commissioner recommends under section 93 of the GIPA Act that agency make a new decision, by way of internal review.
70. In making a new decision, have regard to the matters raised and guidance given in this report.
71. We ask that the Agency advise the Applicant and us by **20 March 2015** of the actions to be taken in response to our recommendations.

Review rights

72. 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.
73. The Applicant has the right to ask the NCAT to review the Agency’s decision.
74. 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>

75. 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

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

Elizabeth Tydd
Information Commissioner