

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

Applicant: Telina Webb
Agency: NSW Police Force
Report date: 30 November 2021
IPC reference: IPC21/R000685
Agency reference: GIPAA-2021-0082410
Keywords: Government information – conclusive presumption of overriding public interest against disclosure – excluded information - Counter Terrorism and Special Tactics Command – processing charge
Legislation cited: *Government Information (Public Access) Act 2009*
Cases cited: Nil

This review has been conducted under delegation by the Information Commissioner pursuant to section 13 of the *Government Information (Information Commissioner) Act 2009*.

Summary

Telina Webb (the Applicant) applied for information from the NSW Police Force (the Agency) under the *Government Information (Public Access) Act 2009* (GIPA Act). The information sought relates to the policies and procedures of the Fixated Persons Unit.

In its decision dated 22 September 2021 the Agency decided to refuse to release the information as it considered there to be a conclusive presumption of overriding public interest against disclosure of that information.

On 23 September 2021 the Applicant applied to the Information and Privacy Commission (IPC) for external review of that decision.

The review of the Agency's information and decision concluded that its decision is justified.

The reviewer makes no recommendation.

Background

1. On 3 September 2021 the Applicant applied under the GIPA Act to the Agency for access to the following information:

I request a full and unedited copy of the Policy and Procedure, inclusive of criteria or category parameters, for the Fixated Persons Unit investigation, inclusion on list, method of investigation, where file information is disseminated to, and any other description or information that is encompassed within the Fixated Persons Unit police process.
2. On 22 September 2021 the Agency decided to refuse access to the information because there is a conclusive presumption of an overriding public interest against disclosure of that information
3. On 18 August 2021 the Applicant applied for external review of that decision. In seeking an external review, the Applicant provided the following:

Enclosed is a Notice of Decision from NSW Police which I ask to be reviewed, inclusive of the charges.

It is noted I have not asked for a completed document which would contain any information.

I have asked for policy documents, uncompleted documents, uncompleted forms. I understand policy documents do not qualify for fees and charges.

Decision under review

4. The Information Commissioner has jurisdiction to review the decision made by the Agency pursuant to section 89 of the GIPA Act.
5. The decisions under review are the Agency's decision that there is an overriding public interest against disclosure of the information not released to the Applicant, and the decision to impose a processing fee of \$90.
6. These are reviewable decisions under section 80(d) and 80(j) of the GIPA Act.

Conclusive presumptions of an overriding public interest consideration against disclosure

7. Section 14(1) of the GIPA Act provides:

(1) It is to be conclusively presumed that there is an overriding public interest against disclosure of any of the government information described in Schedule 1.
8. If information falls within the scope of one of the clauses of schedule 1 to the GIPA Act, then it is conclusively presumed that it is not in the public interest to release this information. This means that when an agency demonstrates that information is of a kind listed under any of the clauses of Schedule 1 to the GIPA Act, the agency is not required to balance the public interest considerations for and against disclosure before refusing access to the information.

Schedule 1 Clause 7 - Documents affecting law enforcement and public safety

9. Schedule 1 clause 7 of the GIPA Act relevantly provides:

7 Documents affecting law enforcement and public safety

It is to be conclusively presumed that there is an overriding public interest against disclosure of information contained in any of the following documents:

...

(b) a document created by the State Intelligence Command or the Counter Terrorism and Special Tactics Command of the NSW Police Force, the former Counter Terrorist Co-ordination Command of the NSW Police Force, the former Protective Security Group of the Police Service, the former Special Branch of the Police Service or the former Bureau of Criminal Intelligence.

10. In order to establish that the information applied for falls under Clause 7 of Schedule 1 to the GIPA Act, the Agency must demonstrate that the information is a document created by one of the Agency's units listed above.
11. The Agency decided to refuse access to the information sought by the Applicant because it is information created by the Counter Terrorism and Special Tactics Command.
12. The Agency did not provide the IPC with a copy of the information in issue.
13. However, the Agency provided the IPC with a copy of the GIPA Instruction Sheet completed by the Detective Senior Sergeant – Group Coordinator, Anti-Terrorism & Intelligence Group, Counter Terrorism & Special Tactics Command. On this sheet, the Detective Senior Sergeant states:

The Counter Terrorism and Special Tactics Command would rely on Clause 7 of Schedule 1 of the Act (a document created by the Counter Terrorism & Special Tactics Command).
14. For the purposes of this review, I wrote to the Agency to confirm that the entirety of the information applied for is information that is *created* by the Counter Terrorism and Special Tactics Command. The response provided was consistent with the notice of decision and the information provided in the GIPA instruction sheet.
15. I am satisfied that the Detective Senior Sergeant – Group Coordinator, Anti-Terrorism & Intelligence Group, Counter Terrorism & Special Tactics Command is in a position to provide evidence and identify information created by the Counter Terrorism & Special Tactics Command and subject to this review.
16. I have reviewed the information provided by the Agency and I am satisfied that the GIPA Instruction Sheet completed by the Detective Senior Sergeant is persuasive of the fact that the information applied for is information created by the Counter Terrorism and Special Tactics Command of the NSW Police Force.
17. Additionally, I have also considered information that is publicly available, including the NSW Police Force Counter Terrorism Plan 2018. In my view this confirms that the Fixated Persons Unit is operated within the Counter Terrorism and Special Tactics Command. Therefore, in circumstances where the request made is for a type of information in essence that pertains to how the Fixated

Persons Unit exercises its functions, I consider that the information to which access is requested by the Applicant would be created by the Counter Terrorism and Special Tactics Command.

18. I am satisfied that the Agency’s decision that there is an overriding public interest against disclosure of the information applied for is justified.

Processing charge

19. For guidance on processing charges and advance deposits, the GIPA Act Fees and Charges Fact sheet on the IPC website <https://www.ipc.nsw.gov.au/gipa-act-fees-and-charges-0>. Also see the [Information Commissioner’s Guideline 2 – Discounting Charges](#) (Guideline 2).
20. The Applicant sought review of the \$90 processing charge imposed by the Agency. The notice of decision provided the following details of how the processing time was calculated:

Processing time:	<u>Calculations</u>
<p><u>Work undertaken by InfoLink:</u></p> <ul style="list-style-type: none"> - Consideration of the application (scope, where the information could be found); - Sending and receiving requests and instructions to the relevant sections of the NSW Police Force that might hold the information requested; - Collating, Reading and Considering response received; - Consideration of the application of the GIPA Act to the all parts of the information retrieved; - Obtaining advice, as necessary, to understand the significance of the information and how this informs the decision to be made about whether to release the information. - Making a decision on the release of all parts of the information retrieved; - Drafting a Notice of Decision. 	<p>1.5 hours</p>
<p><u>Work Undertaken by other NSWPF areas:</u></p> <ul style="list-style-type: none"> - Receipting request for information and allocating tasks; - Searching for, Retrieving and collating the requested records; - Recording searches undertaken and certifying that reasonable searches were made; - Consideration of whether or not to release the information requested and drafting relevant instructions accordingly. 	<p>2 hours</p>
	<p>TOTAL: 3.5 HOURS</p> <p>Not charged: 30 minutes</p>

21. For the purposes of this review, I requested a further breakdown of the Agency's processing time. The Agency provided the following:
- 1 hour - Consideration of the application (scope, where the information could be found, etc);*
- & Sending and receiving requests and instructions to the relevant sections of the NSW Police Force that might hold the information requested. This included conducting initial searches of the intranet to locate any relevant documents before sending the request to the Command to ask for assistance with searches.*
- 2 hours – Searches conducted by the Command (as certified on the GIPA checklist). This work included*
- Receipting request for information and allocating tasks;*
 - Searching for, Retrieving and collating the requested records;*
 - Recording searches undertaken and certifying that reasonable searches were made;*
 - Consideration of whether or not to release the information requested and drafting relevant instructions accordingly.*
- 30 minutes – Preparation of the notice of decision which included:*
- Reading and Considering response received;*
 - Consideration of the application of the GIPA Act to the all parts of the information retrieved;*
 - Obtaining advice, as necessary, to understand the significance of the information and how this informs the decision to be made about whether to release the information.*
 - Making a decision on the release of all parts of the information retrieved;*
 - Drafting a Notice of Decision.*
- I note that while 3.5 hours were spent on this application, the applicant was only charged for 3 hours.*
22. Section 64(2) of the GIPA Act provides that the processing charge covers the total amount of time that it takes an agency to deal efficiently with the application and to provide a response to the application. This includes time expended considering the application, searching for records, consultation, decision-making and any other function exercised in connection with deciding the application.
23. Section 3.9 of Guideline 2, states that the IPC's view is that agencies cannot charge for registering the application, conversations with the Applicant to clarify the request or reduce the scope, drafting file notes, drafting letters (including notification of a valid application, or advance deposit letters however, the determination letter may be charged for), postage, internal conversations,

- printing and other general administration incidental to or associated with processing the application.
24. I have compared the actions taken by the Agency with Guideline 2 and section 64(2) and I am satisfied that all but two of the items are items which the Agency can charge for.
25. The two exceptions are the items:
- “... & Sending and receiving requests and instructions to the relevant sections of the NSW Police Force that might hold the information requested. This included conducting initial searches of the intranet to locate any relevant documents before sending the request to the Command to ask for assistance with searches.”; and*
- “Obtaining advice, as necessary, to understand the significance of the information and how this informs the decision to be made about whether to release the information.”*
26. Based on the manner they are described in the notice of decision and additional information provided to the IPC, it appears that these tasks could be considered “internal conversations”, which according to Guideline 2 cannot be charged for.
27. However, I also note that the Agency has calculated that dealing with the application took 3.5 hours processing time, but only charged for 3 hours. Whilst the Agency imposed a processing time on tasks for which, on the information available to me, it may not be entitled to charge for, I am also satisfied that in the specific circumstances of this matter, those two tasks would fall within the 30 minutes which was not charged by the Agency. I note that the Agency has, as required by section 64(4) of the GIPA Act, taken the application fee into account when determining the final processing charge.
28. In this respect I find no error because any over calculation of the time by the Agency as discussed at paragraphs 25 - 27 above (and the resulting value of the charge), in my view has been negated by the Agency through the reduction of the final processing charge by 30 minutes. I am satisfied that based on the information available that 3 hours is the total amount of time that is necessary to be spent by the Agency in dealing efficiently with the application.
29. I also note that the Applicant contends in her external review that policy documents do not qualify for fees and charges. Section 18(c) of the GIPA Act lists the agency’s policy documents as open access information that is required to be made publicly available by the agency under section 6 of the GIPA Act.
30. Section 6 of the GIPA Act relevantly provides:

6 Mandatory proactive release of certain government information

*(1) An agency must make the government information that is its **open access information** publicly available unless there is an overriding public interest against disclosure of the information.*

Note—

Part 3 lists the information that is open access information.

(2) Open access information is to be made publicly available free of charge on a website maintained by the agency (unless to do so would impose unreasonable additional costs on the agency) and

can be made publicly available in any other way that the agency considers appropriate.

31. While I am satisfied the information applied for may be relevant to open access requirements in so far as they may be characterised as 'policy documents', I am also satisfied that there is an overriding public interest against disclosure of those documents. Therefore, there is no requirement for those documents to be made publicly available. As the documents are not required to be made publicly available, I am satisfied that there is no requirement that the documents be made free of charge according to section 6(2) of the GIPA Act.
32. I am satisfied that the Agency's decision to impose a processing charge of \$90 is justified.

Conclusion

33. I am satisfied that the Agency's decision that there is an overriding public interest against disclosure is justified.
34. I am satisfied that the Agency's decision to impose a processing charge of \$90 is justified.

Recommendations

35. I make no recommendation.

Applicant review rights

36. This review is not binding and is 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.
37. The Applicant has the right to ask the NCAT to review the Agency's decision.
38. 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>



Completion of this review

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

Philip Tran

Senior Regulatory Officer