



5 November 2024

Our ref: OGIP24/3706

Telina Webb

By email: info@nswfreedomofinformation.net

Dear Ms. Webb

Privacy and Personal Information Protection Act 1998
Internal Review

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Summary

1. On 17 July 2024, the Department of Communities and Justice ('the Department'), received your application for an internal review lodged pursuant to section 53 of the Privacy and Personal Information Protection Act 1998 ('PIIP Act').
2. Your application for internal review outlines that your complaint is with respect to the following alleged conduct of the Department:

"This request for review concerns the unlawful access to my personal information, details of which were held by the third-party agency iCARE.

This request for review also concerns the unlawful use of my personal information for a secondary purpose other than what the information was collected for.

My personal information was contained within a Formal Access Application lodged with iCARE.

I first confirmed my personal information had been unlawfully accessed by Ms Cobbin on receipt of her Sworn Affidavit dated 13th June 2023, a document concerning NCAT Matter No: 2023-00125842.

Additionally, it was clear Ms Cobbin had used my personal information for a purpose other than what my personal information was collected for. I thereafter lodged an Access Application with Justice NSW for records I believed were held by the OGIP Unit referencing my personal information with iCARE. Justice determination no records were held resulted in administrative review before the NSW Civil & Administrative Tribunal, Matter No: 2024-00146726 which was heard on 09th July 2024.

On 09th July 2024 whilst under cross examination Ms Cobbin disclosed she'd had a conversation with a staff member of iCARE who disclosed my personal information to her.

3. In summary, you allege that your privacy was breached by unlawful access to your personal information and an alleged unlawful use of your personal information for a secondary purpose other than what the information was collected for.
4. In reviewing the alleged conduct of the Department, I have found that the information the subject of your complaint is not personal information under the PIIP Act.
5. Your review rights are outlined at the end of this report.

Background

6. On 18 July 2024 the Department received your application for an internal review lodged pursuant to section 53 of the PIIP Act.
7. On 4 September 2024, you received a letter acknowledging your application and notifying you that the Department had 60 days to complete the internal review, being 16 September 2024.
8. We apologise for the delay in processing your application.

Internal Review Investigation

9. I have carefully investigated your complaint. I have considered the circumstances leading up to the alleged breach and the existence of any processes or procedures in place with respect to the issues you have raised.
10. An interview was conducted with Jodie Cobbin, the Director of the Open Government Information and Privacy Unit within the Department on 10 October 2024 in which the allegations raised were put to Ms Cobbin for a response.
11. A copy of the transcript of the relevant hearing on 9 September 2023 pertaining to your complaint was obtained from the NSW Civil and Administrative Tribunal (NCAT) and the transcript carefully reviewed.
12. The affidavit of Jodie Cobbin dated 13 June 2023 and produced in the NCAT proceedings 2023-00125842 was reviewed.
13. I reviewed orders and directions made by the NCAT in respect of the relevant case number 2023-00125842.
14. I reviewed the Department's records pertaining to your recent related access application (as noted in your internal review application) and conducted searches for any communications between iCare and Ms Cobbin on DCJ's record management systems.
15. I have confirmed the Department's information/digital technology area does not provide support to iCare. The Department's record management systems are not linked in any way to iCare.
16. I reviewed online publicly available information relating to the subject of your complaint.

Relevant law

17. The PPIP Act regulates the manner in which public sector agencies collect, use, store and disclose personal information. The PPIP Act contains 12 Information Protection Principles (IPPs) set out in Part 2 of the PPIP Act.

What is "personal information"?

18. The definition of "personal information" is contained in section 4 of the PPIP Act, which states:

'In this Act, personal information means 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 whose identity is apparent or can reasonably be ascertained from the information or opinion.'
19. A person's identity can be "apparent" or "reasonably ascertained" if that information is read in conjunction with other information that may be consulted: *Office of Finance and Services v APV and APW* [2014] NSWCATAP 88, at [4].
20. You note in your internal review application that "my personal information was contained within a Formal Access Application lodged with iCARE."
21. I am satisfied that the class of information that is the subject of your complaint, being your identity as a GIPA applicant requesting information from iCare can generally be characterised as personal information.

22. As part of my review, I will carefully consider the threshold question of whether your identity as a GIPA applicant requesting information from iCare maintains its characteristic as personal information for the purposes of the PPIP Act in the course of the alleged conduct.
23. Section 4(3) of the PPIP Act provides various exceptions to what is personal information, including at (b), information about an individual that is contained in a publicly available publication.

Findings

24. My investigation confirms that iCare is a separate public sector agency to the Department.
25. The Department's information/digital technology area does not provide support to iCare. The Department's record management systems are not linked in any way to iCare, and I confirm that Ms Cobbin does not have access to any iCare corporate system.
26. In my interview with Ms Cobbin on 10 October 2024, she re-confirmed the contents of her affidavit dated 13 June 2023. Ms Cobbin also noted that at no stage has she ever had access to any iCare records or an iCare records management systems nor has she worked for iCare. Ms Cobbin confirmed that at no stage before writing her affidavit or giving evidence in NCAT has she ever spoken to anyone from iCare in relation to your GIPA access application or the fact that DCJ was not consulted about your access application.
27. From an independent review of the Department's records contained within its record management system (OneTrim), I could not locate any communications between Ms Cobbin and iCare. This result is consistent with the decision in the NCAT matter of *Webb v Secretary Department of Communities and Justice* [2024] NSWCATAD 251.
28. When determining how Ms Cobbin came to know of your identity as a GIPA applicant to iCare, I am satisfied that Ms Cobbin has not 'accessed' your personal information from either within the Department or from another government agency.
29. Ms Cobbin's affidavit dated 13 June 2023 was furnished to the NCAT as part of evidence and submissions (as directed by the NCAT¹). The substantive proceedings related to your application for external review at NCAT of a decision by the Department under the *Government Information (Public Access Act) 2009* ('GIPA Act').
30. In those GIPA proceedings you sought access to the full and unredacted copy of a PowerPoint slide deck relating to a presentation given to the NSW Right to Information and Privacy Practitioners Network ('NIPPN') about difficult applicants.
31. Paragraph 11 of Ms Cobbin's affidavit dated 13 June 2023 states:
'I understand that the Applicant obtained a copy of the NIPPN Meeting Minutes for 27 March 2019 because of an access application lodged with iCare pursuant to section 41 of the Government Information (Public Access) Act 2009 (GIPA Act). The Department nor I were consulted pursuant to section 54 of the GIPA Act in relation to the proposed release of the NIPPN Meeting Minutes. Had the Department or I been consulted in relation to the release of the NIPPN Meeting Minutes the Department would have raised objections in relation to section 14 clause 1(f) – prejudice the effective exercise by an agency of the agency's functions and clause 2(d) – endanger

¹ Orders of the NCAT dated 15 May 2023 by Senior Member Montgomery

or prejudice any system or procedure for protecting the lie, health or safety of any person. This is because the information captured in the description of Item 3 of the NIPPN Meeting Minutes identifies the Discussion as the Department of Justice - dealing with difficult complainants.'

32. A review of the transcript of the hearing of NCAT proceedings 2023-00125842 on 9 September 2023 provides that Ms Cobbin said (relevant parts extracted):

'I believe this was a verbal conversation with somebody probably within the NIPPN. However, I have no recollection as to who it was because it's so long ago.

...

So I distinctly remember at the time I became aware of the access. After Ms Webb made the access application to NIPPN to iCare via a verbal conversation, I don't remember who the verbal conversation was with, but there are many, many members of NIPPN, and I remember specifically at the time, feeling frustrated that we weren't consulted as an agency as to our views about whether or not we were happy with the release of the meeting minutes. So it's not something that I would have sat down and made a file note about or a diary note about. It was really just a verbal conversation, likely a telephone conversation, I would suggest, and not something I would sit down and make a note about afterwards or file it in a container or file note. It was just really a moment of frustration with wow, I cannot believe they haven't consulted us. That's the context.'

33. It is clear from Ms Cobbin's affidavit that by 13 June 2023 (the date the affidavit was sworn), that she has come to understand that you have previously made an access application under the GIPA Act to iCare for release of NIPPN information.
34. From a review of the transcript of the hearing, it is clear that Ms Cobbin does not recall exactly how and/or when she became aware of your access application to iCare. Ms Cobbin notes it was 'a verbal conversation, likely a telephone conversation.' Notably, the transcript does not indicate any disclosure of information to Ms Cobbin by iCare or any other agency. Thus, the verbal conversation, by telephone or otherwise could have occurred with anyone, including, for example, staff within the Department.
35. In the published decision of *Webb v Secretary Department of Communities and Justice* [2024] NSWCATAD 251 the tribunal confirms at [18] that Ms Cobbin has not stated the identity or source of the verbal conversation.
36. Consequently, your allegation as noted in the internal review application that on '09th July 2024 whilst under cross examination Ms Cobbin disclosed, she'd had a conversation with a staff member of iCARE who disclosed my personal information to her' is simply not correct.
37. Through a review of information published and made publicly available online relating to the subject of this complaint, it is apparent that there are several ways any person could reasonably have become aware or make a reasonable inference that you had previously made an access application under the GIPA Act to iCare regarding NIPPN information.
38. The following information was available online on the publicly available 'NSW Freedom of Information' website on 10 October 2024:
- A media release titled 'NSW Right to Information & Privacy Practitioners Network Deactivates Website After Public Scrutiny' dated 21 December 2021

which notes that a request for information was made regarding NIPPN information and the article references a staff member of iCare.²

- A media release titled 'Valid Request for Review of Agency Decision Denying Existence of Government Information Receives a Gag Order from NSW Civil and Administrative Tribunal' dated 26 September 2022 highlighting proceedings against iCare in relation to a request for information made under the GIPA Act for access to information about NIPPN.³
- A media release titled 'NSW Crown Solicitor Discloses Privacy Statements on Agency Access to Information Forms Mean Nothing' dated 22 March 2023 particularly mentions that 'Ms Webb had requested [that] iCare release information pertaining to the NIPPN'.⁴
- A media release titled 'NSW Crown Solicitor Seeks Method of Protection for Right to Information and Privacy Officers' dated 18 January 2023 which explicitly points out that 'Documents provided to Ms Webb under the GIPA Act 2009 evidence iCare staff disclosing her name and the name of her Site, along with the full details of her request for information'.⁵

39. The website 'NSW Freedom of Information,' as at 10 October 2024 is publicly available and accessible through the following internet address: <https://nswfreedomofinformation.net/>.

40. The website 'NSW Freedom of Information' has a specific page (available from the 'Home' drop down menu) titled 'About the Site Administrator' which provides information about yourself, for example listing your name (Ms Telina Webb) and describing you as a 'freedom of information advocate.' This page is accessible through the following internet address: <https://nswfreedomofinformation.net/site-administrator/>.

41. The following relevant information was available through the NSW Caselaw website as at 10 October 2024:

- A decision of the NCAT in matter of *Webb v iCare NSW* [2023] NSWCATAD 111⁶ published on 15 May 2023 that notes at paragraph 21 that 'Ms Telina Webb obo NSW Freedom of Information' made an access application to iCare under the GIPA Act seeking certain information in relation to NIPPN.' The webpage notes on 10 October 2024 the decision was last updated on 15 May 2023.
- A decision of the NCAT in matter of *Webb v iCare NSW* [2023] NSWCATAD 63⁷ published on 17 March 2023 notes at paragraph 5 that the 'IR Request... concerned the disclosure of Ms Webb's personal information contained in a "Formal Access Application" made to the Respondent iCare on behalf of "NSW Freedom of Information" (a trading name of DraftCom Pty Ltd) under the GIPA Act.' The webpage notes on 10 October 2024 that the decision was last updated on 17 March 2023.

42. The NSW caselaw website is publicly accessible without restriction.

43. As noted above at paragraph 21, pursuant to section 4(3)(b) of the PPIP Act information is not personal information where the information is:

- information about an individual, and

² Link: <https://nswfreedomofinformation.net/media-release-21-december-2021/>. Accessed 10 October 2024.

³ Link: <https://nswfreedomofinformation.net/media-release-26-september-2022/>. Accessed 10 October 2024.

⁴ Link: <https://nswfreedomofinformation.net/media-release-22nd-march-23/>. Accessed 10 October 2024.

⁵ Link: <https://nswfreedomofinformation.net/media-release-18-january-2023/>. Accessed 10 October 2024.

⁶ Link: <https://www.caselaw.nsw.gov.au/decision/1880881c51ceca1fa44bd309>. Accessed 10 October 2024

⁷ Link: <https://www.caselaw.nsw.gov.au/decision/186ec79e2322ed9e71ff9b59>. Accessed 10 October 2024

- the information is available in a publicly available publication.
44. Regarding the first limb of section 4(3)(b), I am satisfied that the information which is the subject of your complaint, being your identity as a GIPA applicant requesting information from iCare is information about you.
 45. I now turn to the question in the second limb of section 4(3)(b) of whether your personal information, being your identity as a GIPA applicant requesting information from iCare, is available in a publicly available publication.
 46. As to what constitutes a publicly available publication, the tribunal has held that decisions that are available to be viewed on the website “www.austlii.edu.au” are ‘publicly available publications’ (*BYW v Commissioner of Police, NSW Police Force* [2014] NSWCATAD 53 (“BYW”) at [13]. Further, information in a letter, which was taken from a decision of the NSW Medical Board, published on the NSW Government ‘Lawlink’ website, was likewise held to be from a ‘publicly available publication’ and thus exempt (*JD v New South Wales Medical Board* [2008] NSWADT 67 at [25]).
 47. Accordingly, it is my view that the ‘NSW Freedom of Information’ and the ‘NSW Caselaw’ websites are publicly available publications. Both websites are ongoing publicly available and access to the information contained on those websites is unrestricted.
 48. In *BYW* at [17] the Tribunal noted that ‘to fall within the exception provided by subsection 4(3)(b) of the PPIP Act the information must be apparent on the face of the publicly available publication or an inevitable inference that would follow.’
 49. Information that you have been the applicant in GIPA applications to iCare is clearly apparent on the face of the publicly available publications as evidenced at paragraphs 37 to 40 above.
 50. The tribunal held in *Webb v iCare NSW* [2023] NSWCATAD 111 that ‘what would otherwise be the personal information of an individual under s 4(1) PPIP Act is only to be excluded by s 4(3)(b) PPIP Act where there is compelling and convincing evidence that the information in question is from a publicly available publication.’
 51. In the present case, I am of the view that compelling and convincing evidence exists in that, the subject information has been published by you on a publicly available website without restriction, a website in which you are the site administrator. Further, the NSW Caselaw website is an official record (without access restriction) of decisions made and published by NSW Courts and Tribunals.
 52. I am therefore satisfied in the context of the course of the conduct subject of this review, that your name/identity and the fact you have made an access application to iCare for NIPPN information is clear and specific information that is contained in the same context in several publicly available publications and thus exempts this information from the PPIP Act under s 4(3)(b).

Privacy Commissioner Submissions

53. On 30 October 2024 the Privacy Commissioner was provided with a copy of the draft internal review report.
54. The Privacy Commissioner did not make a submission in relation to the draft internal review report.
55. A copy of the final report will be provided to the Privacy Commissioner in accordance with section 54(1) of the PPIP Act.

Recommendations

56. With the information and facts available to me, I must find that the Department has not breached your privacy.

Review rights

57. Section 53(8) of the PPIP Act provides that the Applicant be notified of the right to have these findings and proposed action reviewed by the NCAT.

58. If you are dissatisfied with the results of the internal review, you have 28 days to apply for the NCAT to review the conduct or decision complained about: rule 24 of the *Civil and Administrative Tribunal Rules 2014*.

59. The applicant is hereby advised of their rights under section 55 of the PPIP Act to have these findings reviewed by the NCAT. NCAT may be contacted as follows:

Telephone: 1300 006 228

www.ncat.nsw.gov.au

Further information

60. If you have any questions about this notice or would like any further information, please contact me on 02 9716 2662 or infoandprivacy@dcj.nsw.gov.au

Yours sincerely,



Michael McIntosh

Principal Solicitor

Open Government, Information and Privacy Unit

Department of Communities and Justice, Legal