



Government Information (Public Access) Act 2009
Notice of decision

Applicant: Telina Webb
Decision maker: Jordan Creyson
Date of decision: 29 August 2023
Reference: GIPA23/3166
Keywords: Government information – access to information – partial release – personal factors – prejudice exercise of agency functions – found action for breach of confidence or result in disclosure of information provided in confidence – reveal personal information – consultation – contravene information protection principle – expose a person to serious harassment or intimidation

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Summary

1. Ms. Telina Webb (the Applicant) applied for access to information from the NSW Department of Communities and Justice (the Department) under the *Government Information (Public Access) Act 2009* (NSW) (GIPA Act).
2. I have decided:
 - to provide access to some of the information falling within the scope of the access application; and
 - to refuse to provide access to some of the information falling within the scope of the access application on the basis of an overriding public interest against disclosure.
3. Information on how to seek a review of my decision is set out in paragraphs 92 – 97.

Summary of access application

4. On 1 August 2023 the Applicant applied to the Department under the NSW GIPA Act for access to the following information about an employee relating to item (i) of a previous access application:

I refer to the Department's Notice of Decision dated 31st July 2023.

In particular I Refer to the Decision at Page 9, Consultation.

In this regard this valid access application seeks an unredacted copy of the referenced third-party consultation documents, inclusive of all the two-way communications between the Department and the third party.

5. On 12 May 2023 the Department acknowledged the application as valid.

In this correspondence, the Department sought an extension to the decision period pursuant to section 57(4) of the GIPA Act to 19 December 2023. As of the date of this decision, the Applicant has not objected to the proposed extension.

Decision

6. I am authorised by the principal officer, for the purposes of section 9(3) of the GIPA Act, to decide the access application.
7. I have decided:
 - to provide access to some of the information falling within the scope of the access application; and
 - under section 58(1)(d) of the GIPA Act, to refuse to provide access to some of the information because there is an overriding public interest against disclosure of the information; and
8. These decisions are reviewable under section 80(d) of the GIPA Act.
9. Attached is a Schedule of Documents identifying the records falling within the scope of the access application and the decision made in relation to the records.
10. In this Notice of Decision, I will explain my reasons. To meet the requirements of section 61 of the GIPA Act, I need to tell you:
 - a. the reasons for my decision and the findings on any important questions of fact underlying those reasons, and

- b. the general nature and format of the records containing the information you asked for, with reference to the relevant public interest considerations against disclosure (see the attached Schedule of Documents).

Searches for information

11. Under the GIPA Act, we must conduct reasonable searches for the government information requested in the application.
12. Searches of the Department's records management system were conducted to find any information that falls within the scope of the application.
13. **Open Government, Information and Privacy, Legal** searched the Department's HP Records Manager, OneTrim. Information within the scope of the request was located.
14. I am satisfied that reasonable searches for the information requested by the Applicant have been conducted.

The public interest test

15. 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.
16. 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.
17. Before deciding whether to release or withhold information, the Department must apply the public interest test and decide whether or not an overriding public interest against disclosure exists for the information.
18. I have made my decision in accordance with section 13 of the GIPA Act by:
 - a. identifying relevant public interest considerations in favour of disclosure,
 - b. identifying relevant public interest considerations against disclosure,
 - c. attributing weight to each consideration for and against disclosure, and
 - d. determining whether the balance of the public interest lies in favour of or against disclosure of the government information.
19. I have applied the public interest test in accordance with the principles set out in section 15 of the GIPA Act which are:
 - a. in a way that promotes the objects of the GIPA Act
 - b. with regard to any relevant guidelines issued by the Information Commissioner
 - c. without taking into account the fact that disclosure of information may cause embarrassment to, or a loss of confidence in, the Government (as that fact is irrelevant)

- d. without taking into account the fact that disclosure of information might be misinterpreted or misunderstood by any person (as that fact is irrelevant), and
- e. with regard to the fact that disclosure cannot be made subject to any conditions on the use or disclosure of information.

Personal factors of the application

20. Under section 55(1) of the GIPA Act, an agency is entitled to take the following personal factors of the application into account:
 - a) The Applicant's identity and relationship with any other person,
 - b) The Applicant's motives for making the access application,
 - c) Any other factors particular to the Applicant.
21. I have considered that the Applicant is the site administrator of publicly available website <https://nswfreedomofinformation.net/> and has authored and published 30 articles relating to the handling of her numerous requests under the GIPA Act to multiple NSW public sector agencies including the Department of Communities and Justice. Additionally, names and contact details of departmental staff, including their work telephone numbers have been posted online alongside the Applicant's articles:
 - <https://nswfreedomofinformation.net/media/>
 - <https://nswfreedomofinformation.net/media-release-03-july-2023/>
 - <https://nswfreedomofinformation.net/media-release-27th-june-2023/>
 - <https://nswfreedomofinformation.net/media-release-2-13-june-2023/>
 - <https://nswfreedomofinformation.net/media-release-24-august-2022/>
22. I have also considered that:
 - the information sought includes the personal information of another individual and is not personal information relating to the Applicant;
 - the individual to whom the information relates is concerned that if their personal information, being their views on the potential release of their employment information to you, is released it may be disclosed publicly or made available to third parties; and
 - the individual to whom the information relates has expressly objected to the release of their personal information, being their views on the potential release of their employment information, to you.
23. Accordingly, I have considered the above personal factors are relevant as factors against providing access to some of the information sought.

Public interest considerations in favour of disclosure

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

25. In my view the following public interest considerations in favour of disclosure apply when considering the documents 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. 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.

Public interest considerations against disclosure

26. The only public interest considerations against disclosure that can be considered are those in schedule 1 and section 14 of the GIPA Act.
27. 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 Department must establish that the disclosure of the information *could reasonably be expected to have the effect* outlined in the table.
28. 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.
29. I have identified five 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);
 - b. found an action against an agency for breach of confidence or otherwise result in the disclosure of information provided to an agency in confidence (clause 1(g) of the table to section 14 of the GIPA Act);
 - c. reveal an individual’s personal information (clause 3(a) of the table to section 14 of the GIPA Act); and
 - d. contravene an information protection principle under the *Privacy and Personal Information Protection Act 1998* (clause 3(b) of the table to section 14 of the GIPA Act)
 - e. Expose a person to a risk of harm or of serious harassment or serious intimidation (clause 3(f) of the table to section 14 of the GIPA Act).
30. I will discuss each of these considerations in turn.

Clause 1(f) - prejudice the effective exercise by an agency of the agency's functions

31. Clause 1(f) of the Table 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*
32. 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.
33. The meaning of the word prejudice is to "cause detriment or disadvantage".
34. In *Camilleri v Commissioner of Police (NSW) [2013] NSWADT 80* the Tribunal held that in relation to cl.1(f) "*the test is not whether a particular person whose confidential information is being considered for disclosure could reasonably be expected to refuse to supply such information in future, but whether the agency would be able to obtain such information in future*".
35. This is a relevant consideration in relation to the third-party consultation information sought, being email correspondence with the individual to whom the subject information relates.

The relevant function of the agency

36. The Department has decision-making functions across its divisions, including Legal which delivers legal services to areas within the Department and manages the delivery of some services directly to members of the public, including administering access to information under the GIPA Act.
37. In order to achieve this function, including making reviewable decisions in relation to formal access applications and ensuring that the Department manages enquiries, requests, applications and feedback under the GIPA Act in a timely and effective manner, the Department interacts with members of the public, applicants, stakeholders and staff to finalise matters. This enables the Department to achieve the objects of the GIPA Act and take any action as required by the GIPA Act.

Prejudiced by release of the information

38. The meaning of the word prejudice is to "*cause detriment or disadvantage*" or to "*impede or derogate from*": *Hurst v Wagga Wagga City Council [2011] NSWADT 307* at paragraph [60].
39. The Department relies on the responses and views of relevant third parties as part of the GIPA process relating to the potential release of their personal information or the release of information which concerns an individual's business, commercial, professional or financial interests. Due to the nature of the information being consulted on, third party consultation was carried out on a confidential basis.
40. In *Camilleri v Commissioner of Police (NSW) [2013] NSWADT 80* the Tribunal held that in relation to clause 1(f) "*the test is not whether a particular person whose confidential information is being considered for disclosure could reasonably be expected to refuse to supply such information in future, but whether the agency will be able to obtain such information in future*".
41. I note the Applicant has very recently and extensively authored and published numerous online articles disparaging the handling of her requests under the GIPA Act by various NSW public sector agencies including the Department of Communities and Justice. This includes staff names and telephone numbers alongside her views so, any concerns about how released information will be handled by the Applicant are real and not fanciful.
- 42.
43. If confidential information of a third-party consultation were released under the GIPA process it can reasonably be expected to deter individuals from providing their frank, full and fearless views and/or objections to the Department in the

future. Individuals would be reluctant, or even deterred, to provide their responses to consultation and to participate in the GIPA process in the future. This would have a significant and negative impact on the Department's ability to carry out its function of administering access to information under the GIPA Act.

44. I have placed significant weight on this public interest consideration against disclosure because the inability to undertake third party consultation because of fear that the response could be released under the GIPA process could reasonably be expected to have a substantially adverse effect on the Department's ability to process, decide, review and finalise matters and comply with its obligations under the GIPA Act.

Clause 1(g) - found an action against an agency for breach of confidence or otherwise result in the disclosure of information provided to an agency in confidence

45. Clause 1(g) of the Table states:

There is a public interest consideration against disclosure if disclosure of the information could reasonably be expected to found an action against an agency for breach of confidence or otherwise result in the disclosure of information provided to an agency in confidence (whether in a particular case or generally).

46. To show that this is a relevant consideration against disclosure, I must be satisfied that:
- a. the information was obtained in confidence; and
 - b. disclosure of the information could reasonably be expected to found an action against an agency for breach of confidence; or
 - c. otherwise result in the disclosure of information provided.
47. In raising this public interest consideration against disclosure, I must be satisfied that the information is in fact confidential. Once satisfied that the information is confidential information, I must then address whether release of the information would constitute a breach of confidence.
48. A breach of confidence arises out of an unauthorised disclosure of, or other use of information, which is subject to an obligation of confidentiality.
49. As indicated above the Applicant has very recently and extensively authored and published numerous online articles disparaging the handling of her requests under the GIPA Act by various NSW public sector agencies including the Department of Communities and Justice. This includes publishing staff names and telephone numbers publicly, alongside her views, so any concerns about how released information will be handled by the Applicant are real and not fanciful. The impact of such a release in these circumstances, without consent from the supplier, is more likely to give rise to an action against the Department for an equitable breach of confidence.
50. Clause 1(g) of the Table of the public interest considerations against disclosure is relevant to the third-party consultation information sought, being email correspondence with the individual to whom the subject information relates.
51. The question of whether information was provided to the Department in confidence depends largely on the context in which the information was gathered. Correspondence relating to concerns about the potential release of an individual's personal information is sensitive in nature and context. The

requested information is of a sensitive nature in that they relate to concerns raised by a relevant third party. All correspondence managed by the Department is treated with the strictest of confidence.

52. Accordingly, there is an implicit understanding that the information obtained via third party consultation under the GIPA Act and contained in such records be treated as confidential in order to protect the integrity of information and to prevent the unauthorised disclosure of personal or otherwise sensitive information that if widely dispersed could have ramifications for the relevant individual.
53. Release of the information to the Applicant would amount to a breach of confidence. Failure to observe these assurances of confidentiality could result in the Department facing liability for breach of confidence actions by individuals who have been contacted by the Department on a confidential basis and strongly objected to the release, who have legitimate grounds for relying on the assurance of confidentiality assured in providing information to the Department.
54. Accordingly, I have apportioned significant weight to this public interest consideration against disclosure as the ability of the Department to maintain confidentiality over correspondence is paramount.

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

55. 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.

56. 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]

57. Clause 4(3)(b) of schedule 4 to the GIPA Act provides that personal information does not include:

Information about an individual (comprising the individual's name and non-personal contact details) that reveals nothing more than the fact that the person was engaged in the exercise of public functions

58. In order to establish that this consideration applies, the Department has to:

- a. identify whether the information is personal information for the purposes of the GIPA Act; and
- b. consider whether the information would be revealed by disclosing it under the GIPA Act.

59. This a relevant consideration in relation to the third-party consultation information sought, being email correspondence with the individual to whom the subject information relates.
60. 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.
61. The Information Commissioner has published *Guideline 4 – Personal information as a public interest consideration under the GIPA Act* in November

2018. 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. Specifically, the Guideline notes that opinions about individuals which identifies individuals is personal information.

62. I have initially considered whether the information is personal information for the purposes of the GIPA Act. The information sought is email correspondence between the Department's Legal unit and a staff member and contains the opinions of that that individual. Accordingly, I am of the view that the information sought is personal information relating to an individual other than the Applicant.
63. The second limb of the test requires the Department to consider whether the information would be revealed by disclosing it under the GIPA Act.
64. 'Reveal' is defined in Clause 1 of Schedule 4 –
reveal information means to disclose information that has not already been publicly disclosed (otherwise than by unlawful disclosure).
65. The information sought by the Applicant has not been publicly revealed to date. As such, release of third-party consultation information relating to an individual other than the Applicant would reveal their personal information to the Applicant and to the world at large if released pursuant to the GIPA Act.
66. Accordingly, I have given significant weight to this public interest consideration against disclosure on the grounds that the information sought is the personal information of an individual other than the Applicant and would be revealed.

Consultation

67. Section 54 of the GIPA Act requires an agency to consult with a third party before deciding whether to provide access to information if:
 - a. the information to be released includes personal information about the person or concerns that person's business, commercial, professional or financial interests (see sections 54(2)(a) and 54(2)(b)); and
 - b. the person may reasonably be expected to have concerns about the release of the information (section 54(1)(b)); and
 - c. those concerns may reasonably be expected to be relevant to the question of whether there is a public interest consideration against disclosure (section 54(1) (c)).
68. The information sought in this application includes information that is personal information about an individual other than the Applicant. The Department is therefore required, under section 54 of the GIPA Act, to take such steps (if any) as are reasonably practicable to consult before releasing the information.
69. In accordance with section 54 of the GIPA Act, the Department consulted with a third party regarding the potential release of their personal information to the Applicant. Strong objections were raised by the individual regarding the release of their personal information pursuant to the GIPA Act.

Consideration 3(b) – contravene an information protection privacy principle

70. Clause 3(b) of the table to section 14 of the GIPA Act provides:

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:

...

(b) contravene an information protection principle under the Privacy and Personal Information Protection Act 1998

71. If an agency relies on clause 3(b) of the table to section 14 as a consideration against disclosure, it must demonstrate a reasonable expectation that an information protection principle or health privacy principle would be contravened by disclosure of the information.
72. Section 18(a) of the *Privacy and Personal Information Protection Act 1998* (PIIP Act) states:

an organisation that holds personal information must not disclose the information for a purpose other than the purpose for which it was collected.'
73. There are a number of exceptions to this principle however none appear to apply with respect to this application.
74. In the absence of the application of an exception or exemption to section 18 of the PIIP Act which authorises the disclosure of the personal information, disclosure to the Applicant of the personal information contained in the information sought would amount to a breach of the PIIP Act.
75. I have apportioned significant weight to this public interest consideration against disclosure as the personal information contained in the documents are sensitive and individuals should have confidence in the Department's commitment to compliance with legislative obligations and the information protection principles. Further, I place additional weight on this consideration, as the disclosure would be contrary to law, but for the GIPA Act.

Consideration 3(f) – expose a person to a risk of harm or of serious harassment or serious intimidation

76. Clause 3(f) of the table to section 14 of the GIPA Act provides:

There is a public interest consideration against disclosure of information if disclosure of the information could reasonably be expected to expose a person to a risk of harm or of serious harassment or serious intimidation.
77. The relevant aspect of this consideration is the exposure of a person or class of persons to a risk of harm.
78. 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 ground and not be purely speculative, fanciful, imaginary or contrived.
79. I have identified this public interest consideration as relevant to the staff names and contact details including work telephone numbers and email addresses contained in the requested third-party consultation information.
80. I note that the Applicant has very recently and extensively authored and published numerous online articles disparaging the handling of her requests under the GIPA Act by various NSW public sector agencies including the Department of Communities and Justice, including staff names and telephone numbers alongside her views.
81. I also note that concerns have been raised by the individual to whom the subject information relates about the multiple requests lodged by the Applicant for access to their personal information.

82. Having regard to the Applicant's behaviour as described above and noting that the GIPA process does not enable the Department to place any conditions or restrictions on information released being further disseminated to the world at large, it can be reasonably expected that release of the information sought under the GIPA Act could result in staff names, telephone numbers and email addresses being published online in a similar manner for access by other disgruntled applicants.
83. Accordingly, I am of the view that release of this information could reasonably be expected to expose staff to a risk of serious harassment or serious intimidation. This risk is very real and not fanciful given the Applicant's propensity to publish material online and provide her own commentary on individuals. Accordingly, I have attributed significant weight to this consideration against release.
84. I place a considerably high degree of weight on this consideration, in respect of the identity of staff. There is a strong public interest in the Department protecting its staff from serious harassment or serious intimidation. Staff should have the confidence in the Department to take reasonable steps to mitigate their exposure to a risk of serious harassment or serious intimidation.

Balancing the public interest test

85. I have considered the relevant public interest considerations in favour of and against disclosure of the information requested, including the identified personal factors.
86. I have also considered that the individual to whom the information relates has not consented to the disclosure of their personal information.
87. On balancing the considerations, whilst I recognise there is a general public interest in releasing the information to the Applicant, I find that on balance the public interest lies in not releasing some of the information to the Applicant. That information falls under the considerations from the Table at section 14 of the GIPA Act. This is summarised in the attached Schedule of Documents.
88. For the reasons provided above I have apportioned significant weight to the public interest considerations against disclosure and less weight to the public interest considerations in favour of disclosure.
89. While I recognise, and place weight, to the general public interest in favour of disclosure, this does not outweigh the consideration that releasing the information to the Applicant would:
- prejudice the effective exercise by the Department of the Department's functions;
 - found an action against the Department for breach of confidence or otherwise result in the disclosure of information provided to the Department in confidence;
 - be disclosing personal information of another individual; and
 - expose staff to serious harassment or serious intimidation.
90. Additionally, releasing the personal information of another individual would be in breach of section 18 of the PPIP Act. Accordingly, the public interest against disclosure has been given more weight.

91. On balance I am satisfied that the balance of the public interest lies in the non-release of some of the information falling within the scope of the access application. As such my decision is to refuse to provide access to the information relating to other individuals because there is an overriding public interest against disclosure of that information.

Review rights

92. If the Applicant disagrees with any of the decisions in this notice that are reviewable, the Applicant may seek a review under Part 5 of the GIPA Act. Before the Applicant does so, I encourage the Applicant to contact me to discuss any concerns. My contact details are set out below.
93. The Applicant has three review options:
- internal review by another officer of this agency, who is no less senior than me
 - external review by the Information Commissioner, or
 - external review by the NSW Civil and Administrative Tribunal (NCAT).
94. The Applicant has 20 working days from the date of this Notice to apply for an internal review.
95. If the Applicant would prefer to have the decision reviewed externally, they have 40 working days from the date of this Notice to apply for a review by the Information Commissioner or the NCAT.
96. To assist the Applicant, I have enclosed a fact sheet published by the Information and Privacy Commission (IPC), entitled *Your review rights under the GIPA Act*. The Applicant will also find some useful information and frequently asked questions on the IPC's website: www.ipc.nsw.gov.au.
97. The Applicant can also contact the IPC on freecall 1800 IPC NSW (1800 472 679).

Further information

98. If the Applicant has any questions about this notice of decision, please contact this unit by email infoandprivacy@dcj.nsw.gov.au

Jordan Creyson

**Open Government, Information and Privacy
Department of Communities and Justice**

Schedule of Documents

| No. | Description of record that contains the information | Third Party Consultation Yes/No | Released or withheld | Relevant public interest consideration(s) against disclosure |
|------------|--|--|-----------------------------|---|
| 1. | Third party consultation documents | Yes | Partial release | 1(f), 1(g), 3(a), 3(b), 3(f) |