



11 July 2024

Our ref: GIPA24- | 24/

Via email:

Dear

Formal Access Application - Notice of Decision

I refer to the Formal Access Application under the *Government Information (Public Access) Act 2009* (GIPA Act) lodged with the Department of Communities and Justice (the Department) on 4 June 2024.

Summary of application

On 4 June 2024, you requested the following information for the period of 30 June 2023 to 30 June 2024:

I am seeking a number of documents/information related to social housing in the wake of the suspected gas leak/explosion.

I am after the following:

1. *A list of all work requests which have been made for Waikanda Crescent complex over the past five years (the list was compiled by Homes NSW this week).*
2. (a) *The average response times to urgent maintenance requests made by social housing tenants.*

(b) *The number of urgent maintenance requests lodged this financial year.*

(c) *The number of gas leaks reported this financial year.*
3. *Could I also please get the incoming brief or equivalent provided to the Minister when Homes NSW was formed.*

On 14 June 2024, your access application was acknowledged. You were advised that the decision was due by 3 July 2024.

On 18 June 2024, I sought clarification on the meaning of item 2. You confirmed that you sought information in relation to all social housing properties in NSW.

On 28 June 2024, you consented to an extension to the due date until 11 July 2024.

Department of Communities and Justice

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Decision

I am authorised by the Principal Officer of the Department, for the purposes of section 9(3) of the GIPA Act, to decide your Application.

I have made the following decisions on your application:

Item 1: excluded information – judicial functions

I consider that your access application has been made for **excluded information** of the Department because the information relates to the judicial functions of the Coroner.

I have therefore decided that your application is not a valid access application on the basis that the application has been made in contravention of section 43 of the GIPA Act.

Items 2(a) and 3: information not held

Pursuant to section 58(1)(b) of the GIPA Act, the information requested in items 2(a) and 3 is not held by the Department.

Items 2(b) and (c): provide access by way of new record

Pursuant to sections 58(1)(a) and 75(1) of the GIPA Act, I have decided to provide access to the requested information in items 2(b) and (c) by way of the creation of a new record.

These are reviewable decisions under section 80 of the GIPA Act.

Reasons for decision

Item 1: excluded information – judicial functions

Information relating to the judicial functions of a court is excluded information of the court, as provided by Schedule 2(1) to the GIPA Act.

Schedule 4(1) to the GIPA Act provides that, for the purposes of the GIPA Act:

judicial functions, in relation to a court, means such of the functions of the court as relate to the hearing or determination of proceedings before it, and includes –

(a) ...

(b) in relation to a coroner – such of the functions of the coroner as relate to the conduct of inquests and inquiries under the *Coroners Act 2009*.

Miller v Director of Public Prosecutions [2012] NSWADT 38 affirmed the view in *Raethel v Director-General, Department of Education & Training [1999] NSWADT 108* and *Cianfrano v NSW Ombudsman [2007] NSW ADT 273* that the phrase “functions relating to,” with regard to excluded information, should be given a wide meaning.

Further, Schedule 4 of the GIPA Act defines function:

function includes a power, authority or duty.

The functions of the Coroner

The information meets the definition of **judicial function** as the information relates to the functions of the coroner under the *Coroners Act 2009*. Pursuant to section 10 of the *Coroners Act 2009*, relevant to this matter, the functions of the State Coroner include:

10 Functions of State Coroner and Deputy State Coroners

(1)

(b) to ensure that all deaths, suspected deaths, fires and explosions concerning which a coroner has jurisdiction to hold an inquest or inquiry are properly investigated, and

(c) to ensure that an inquest or inquiry is held whenever it is required by this Act to be held or it is, in the State Coroner's opinion, desirable that it be held.

The *Coroners Act 2009* provides the Coroner with the power and authority to hold an inquest into certain deaths. More specifically, the Coroner has the power to hold an inquest into suspicious deaths, which are a "reportable death" within the meaning of section 6 of the current Act.

The information requested in item 1 of your access application requests documents that fall within the schedule to an 'Order for Production' issued in accordance with section 53 of the *Coroners Act 2009* ('section 53 order'). Section 53(1) of the *Coroners Act 2009* provides that:

(1) For the purpose of assisting a coroner in the investigation of a death, suspected death, fire or explosion, the coroner may, by notice in writing served on a person, direct the person to produce a document or other thing to the coroner or another person specified in the notice at a time and place specified in the notice.

The coronial jurisdiction is an "inquisitorial process," in which the Coroner is charged to ensure a matter is properly investigated and that an inquest is only held in appropriate circumstances. The compulsive powers at section 53(1) of the *Coroners Act 2009* assist the Commissioner in investigating a matter that qualifies as a 'reportable death' in its preliminary stages. The Local Court Benchbook on Coronial Matters for this reason states that:

'The Act (Coroners Act 2009) provides extensive powers for the coroner to investigate deaths prior to inquest. In cases where an inquest is not mandatory, these powers will most often be exercised with a view to determining whether an inquest is required.'

It follows that the information that is captured by the schedule of an 'Order for Production' is relevant and central to the Coroner's decision as to whether to hold or dispense with a coronial inquest. Accordingly, the information to which the schedule of an 'Order for Production' applies, is information that is directly related to the exercise of the Coroner's functions under section 10 of the *Coroners Act 2009*.

Based on the above, I am satisfied that the exercise of the functions of the Coroner under the *Coroners Act 2009* meets the above definition of **judicial functions** for the purposes of the GIPA Act.

Section 43 of the GIPA Act – “excluded information of the agency”

Section 43 of the GIPA Act makes provisions regarding the validity of access applications to the extent that it is made in relation to excluded information:

43 Access application cannot be made for excluded information

(1) An access application cannot be made to an agency for access to excluded information of the agency.

Note –

Information is excluded information of an agency if it relates to any function specified in Schedule 2 in relation to the agency.

(2) An application for government information is not a valid access application to the extent that the application is made in contravention of this section.

Schedule 3 to the *Government Information (Public Access) Regulation 2018* provides that the State Coroner’s Court are declared to be part of the Department for the purposes of the GIPA Act.

Accordingly, excluded information of the Coroners Court of NSW is considered to be excluded information of the Department.

The Tribunal held in *Betzis v Commissioner of Police* [2020] NSWCATAD 71:

"The consequence of information being subject to a conclusive presumption against disclosure is that an agency is not required to balance the public interests in favour of or against disclosure before refusing access to it and the Tribunal is precluded from considering the public interest test in relation to that information" citing Yee v Medical Council of NSW [2017] NSWCATAD 370 at [41].

As there is a conclusive presumption against disclosure of this kind of information, the Department has no discretion to consider its release or to apply the public interest test. It was the decision of Parliament, in enacting the GIPA Act that this information is not released in response to an access application.

Items 2(a) and 3: Information not held

I have decided that the information requested in items 2(a) and 3 of your application is not held by the Department.

In processing your application, I have considered the obligations referred to in section 53 of the GIPA Act which states:

“53 Searches for information held by agency

(1) The obligation of an agency to provide access to government information in response to an access application is limited to information held by the agency when the application is received.

(2) An agency must undertake such reasonable searches as may be necessary to find any of the government information applied for that was held by the agency when the application was received. The agency’s searches must be conducted using the most efficient means reasonably available to the agency.

- (3) *The obligation of an agency to undertake reasonable searches extends to searches using any resources reasonably available to the agency including resources that facilitate the retrieval of information stored electronically.*
- (4) *An agency is not required to search for information in records held by the agency in an electronic backup system unless a record containing the information has been lost to the agency as a result of having been destroyed, transferred, or otherwise dealt with, in contravention of the State Records Act 1998 or contrary to the agency's established record management procedures.*
- (5) *An agency is not required to undertake any search for information that would require an unreasonable and substantial diversion of the agency's resources."*

In accordance with the obligations outlined in section 53 of the GIPA Act, searches were conducted by Ministerial and Parliamentary Services and NSW Housing Portfolio and Data Verification within Homes NSW.

Item 2(a)

In relation to item 2(a), reasonable searches were conducted by the Data Verification business unit of Homes NSW. Data Verification conducted searches of the database titled 'Ariba'. Data Verification informed me that the data set does not capture the response times for urgent maintenance requests made by social housing tenants. The response time for urgent work orders is overridden by completion times. Therefore, it is not possible to calculate statistics responsive to item 2(a).

Items 3

In relation to item 3, the Ministerial and Parliamentary Services and NSW Housing Portfolio business units advised that reasonable searches were conducted on your application and that it did not hold any government information in the form requested in your application.

Accordingly, the correct position remains that the Department would need to create a new record to answer item 3 and it is not possible for the Department to create a new record to answer item 2(a) of the request.

Although the I have created new records to answer items 2(b) and 2(c) of your application, I note that it was not required to do so. Relevantly, section 75 of the GIPA Act provides:

"75 Providing access by creating new record

- (1) *An agency is not prevented from providing access in response to an access application to government information held by the agency by making and providing access to a new record of that information.*
- (2) *An agency's obligation to provide access to government information in response to an access application does not require the agency to do any of the following —*
 - (a) *make a new record of information held by the agency,*
 - (b) *update or verify information held by the agency,*
 - (c) *create new information, or produce a new record of information, by deduction, inference or calculation from information held by the agency or by any other use or application of information held by the agency".*

Accordingly, I have decided that the information requested in items 2(a) and 3 your application is not held by the Department, as the Department does not hold any government information in the form requested and would be required to create a new record to respond to your application.

Items 2(b) and 2(c): grant access to information by way of the creation of a new record

Following searches on your application, Homes NSW advised that it did not hold any government information in the form requested in items 2(b) and 2(c) of your application.

Section 75(1) of the GIPA Act provides that an agency is not prevented from providing access in response to an access application for government information held by the agency by making and providing access to a new record of that information. Consequently, I have decided to provide access to items 2(b) and 2(c) by way of responses to these questions at Appendix A to this decision.

I have carefully considered this new information in view of the objectives of the GIPA Act where you have a legally enforceable right to obtain information, unless there is an overriding public interest against disclosure of the subject information.

In considering this information, I was required to conduct a “public interest test” where the public interest considerations favouring disclosure of government information were weighed against those factors that do not favour disclosure. I considered that 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.

In relation to items 2(b) and 2(c), reasonable searches were conducted by the Data Verification business unit of NSW Homes. You will notice that the responses to Appendix A are for the period of 1 July 2023 to 31 May 2024 and not the requested 2024 financial year. Homes NSW informed me that the data for the month of June 2024 was not able to be retrieved as the business unit was transitioning to a new database/information management system. I was advised that the information released in Appendix A existed as a government record at the time of your application. In accordance with section 75(2) of the GIPA Act, the Department is not required to create and/or update a record in response to an access application.

Public interest considerations against disclosure

I can only consider the public interest consideration against disclosure contained in Schedule 1 and the Table to section 14 of the GIPA Act (“Table”). I do not consider that any of the considerations in Schedule 1 nor any clauses within the Table to section 14 apply. As no considerations against disclosure apply, I have decided that the public interest lies in releasing this information to you.

Searches

Item 1

In relation to item 1, I note the decision of *Christopher v Independent Commission Against Corruption* [2021] NSWCATAD 256. In this case, it was stated at [84] that:

“...where an agency relies on s 43(2), there is no obligation on the agency to first conduct a search for the information it holds that is responsive to the access application of the applicant.”

The question as to whether information is excluded information is a question of fact. It is established that no obligation exists which requires the Department to search for information that the Department considers to be excluded information. Therefore, whether the information exists, or otherwise is or is not held by the Department, was not a relevant consideration in this decision.

Items 2 and 3

The Department is required under section 53 of the GIPA Act to conduct reasonable searches for the information requested in your application. I arranged for searches to be conducted by Ministerial and Parliamentary Services and NSW Housing Portfolio, including Data Verification within Homes NSW. Searches of internal databases, including OneTRIM, MiniApp and Homes NSW database, Ariba were unable to locate any records responsive to your application. However, I decided to create a new record in response to items 2(b) and (c) of your application.

This information is released in a new record that I have created as Appendix A to this decision.

Review rights

If you are aggrieved by any of the reviewable decisions in this notice of decision, you may seek a review under Part 5 of the GIPA Act, by requesting any one of the following:

- An internal review that must be lodged with Open Government, Information and Privacy within 20 working days of this notice of decision. You must lodge your internal review at the address shown at the bottom of the first page and must be accompanied by the appropriate application fee of \$40.
- Alternatively, a request for an external review may be lodged with either the Information and Privacy Commission, or the NSW Civil and Administrative Tribunal. Please note that you must lodge your request for an external review within 8 weeks of this notice of decision.

If you have any questions or concerns in relation to this matter, please contact me at Jonathathan.Franklin@dcj.nsw.gov.au.

Yours sincerely

Jonathan Franklin
Solicitor
Open Government, Information and Privacy Unit
Department of Communities and Justice

Appendix A

Item 2(b): *The number of urgent maintenance requests lodged this financial year.*

Answer: 30,943 urgent work orders were logged between 1 July 2023 to 31 May 2024.

Item 2(c): *The number of gas leaks reported this financial year.*

Answer: 614 gas related requests were raised between 1 July 2023 to 31 May 2024.