



28 March 2024

Me Me

By email: foi+request-10669-850a60e5@righttoknow.org.au

Dear Me Me

Notice of decision under the *Government Information (Public Access) Act 2009*

I refer to your access application lodged under the *Government Information (Public Access) Act 2009* ('GIPA Act') with the Department of Communities and Justice ('Department').

Summary of access application

Your application was received on 7 September 2023. You requested the following information:

The current or most recent FaCS policy or policies, which are not publicly available, that relate to:

1. *Cha 15 of the Children and Young Persons Act and Protection Act 1998*
2. *Coercive powers available to FaCS to use against foster carers not covered by (1)*
3. *FaCS powers with regards to interviewing foster carers not covered by (1) or (2).*

On 14 September 2023, the Department advised that your application was not a valid access application because the application did not include an application fee of \$30.

On 18 September 2023, you paid the required application fee.

On 22 September 2002, the Department decided that your application was now a valid access application and advised that your application was required to be decided on or before 16 October 2023. However, the due was extended by agreement to 31 January 2024.

In an email dated 30 January 2024, the Department advised that the access application was invalid pursuant to section 41(e) of the GIPA Act because the access application did not include information as it reasonably necessary to enable the government information applied to be identified.

On 23 February 2024, you agreed to amend the scope of the access request to the following:

The current or most recent FaCS policy or policies, which are not publicly available, that relate to:

1. *Ch 15 of the Children and Young Persons Care and Protection Act 1998; and*
2. *Foster carer compliance, integrity or complaints; and*
3. *FaCS and foster care agency agencies, and/or their agents, meeting with foster carers, whether in relation to responding to ROSH, general check-ins, home visiting children in out-of-home care, otherwise attending a foster carer's private residence, and/or about medical issues of foster children, etc that are not covered by item 2.*

On 23 February 2024, the Department decided that your application was now a valid access application and advised that your application was required to be decided on or before 15 March 2024. However, the due was extended by agreement to 28 March 2024.

Decision

I am authorised by the principal officer, for the purposes of section 9(3) of the GIPA Act, to decide your access application. I have decided:

- under section 58(1)(a) of the GIPA Act, to provide access to some of the information sought in your 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 the disclosure of the information.

This decision is reviewable under sections 80(d) – (f) of the GIPA Act.

Attached is a Schedule of Documents identifying those documents to be released to you.

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:

- the reasons for my decision and the findings on any important questions of fact underlying those reasons, and
- 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

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, I can advise you that searches were conducted with the relevant units seeking any documents within the scope of the application.

I am satisfied that reasonable searches for the information requested by the application have been conducted.

Reasons for Decision

The public interest test

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.

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.

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.

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.

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.

Public interest considerations in favour of disclosure

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).

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 promote open discussion of public affairs, enhance Government accountability or contribute to positive and informed debate on issues of public importance.
- d. 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.

Personal factors of the application

I can also take into account any personal factors of your application, under section 55 of the GIPA Act. I have not identified any personal factors relevant to your application.

Public interest considerations against disclosure

The only public interest considerations against disclosure that can be considered are those in schedule 1 and table section 14(2) of the GIPA Act.

In order for the considerations against disclosure set out in the table to section 14(2) 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.

The words “...*could reasonably be expected to have* ...” 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.

In its notice of decision, the Department raised a public interest consideration against disclosure of the information, deciding that its release could reasonably be expected to prejudice the effective exercise by an agency of the agency’s functions – see clause 1(f) of the table to s.14(2) of the GIPA Act.

I will discuss this consideration below.

Consideration 1(f) – prejudice the effective exercise by an agency of the agency’s functions

Clause 1(f) of the table at section 14(2) as a public interest consideration against disclosure states:

“There is a public interest consideration against disclosure if disclosure of the information could reasonably be expected to ...

(f) prejudice the effective exercise by an agency of the agency’s functions, ...”

In order for this to be a relevant consideration against disclosure, I must demonstrate that:

- a. the relevant function of the agency, and
- b. that is or would be prejudiced by release of the information.

The DCJ Reportable Conduct Unit (**RCU**) investigates allegations of reportable conduct made about DCJ carers.

In this instance, the information being withheld under consideration 1(f) are internal DCJ RCU email addresses and telephone numbers.

To provide assistance to members of the public the RCU has external email addresses to which members of the public can direct enquiries. These email addresses are regularly monitored by RCU staff.

Section 73(1) of the GIPA Act provides:

“...an agency is not entitled to impose any conditions on the use or disclosure of information when the agency provides access to the information in response to an access application.”

If internal email addresses were to be released it could reasonably be expected that members of the public may direct emails to internal mailboxes that are designated for other internal work-related purposes and are therefore less frequently monitored by DCJ staff. This could reasonably be expected to have a detrimental impact upon the level of monitoring required of internal mailboxes to ensure that correspondence is directed to the correct staff to be actioned.

Furthermore, if internal departmental email addresses were to be obtained by fixated, querulous or vexatious individuals, there is real possibility those emails addresses could be used to direct correspondence to harass and intimidate RCU staff and inhibit their ability to effectively exercise their role by creating additional administrative burden and impact on RCU staff welfare.

The *Work Health and Safety Act 2011* (NSW) provides a legislative framework that relates to all workplaces in NSW. The objects of the Act are set out in section 3 and specifically provide for ‘*protecting workers and other persons against harm to their health, safety and welfare through the elimination or minimisation of risks arising from work...*’ Accordingly, another of the Department’s functions required by this Act imposes a primary duty of care on employers ‘to ensure as far as reasonably practicable, the health and safety of workers...’

Providing fixated, querulous or vexatious litigants with the internal email addresses of RCU staff has the capacity to seriously jeopardise this function because it makes the function of managing staff health and safety inherently more difficult where employees are exposed to the additional trauma of having constant email traffic of this nature impacting their internal work email address rather than these emails being directed to an external email address which will be monitored by a number of staff, which minimises the exposure to emails intended to harass. An external email address provides a layer of protection for the employees who are required to read and respond to these emails. The disclosure of the information withheld could reasonably be expected therefore to prejudice the effective exercise by the department's work health and safety functions by giving fixated, querulous or vexatious litigants direct access to internal email addresses which is significantly more personal and impacting.

I have apportioned very significant weight to this public interest consideration against disclosure as the cost and detriment to the department by inhibiting the ability of staff to effectively exercise their role by creating additional administrative burden hinders the ability of RCU to carry out its functions which is why confidentiality around the information must be maintained. In addition, the functions of managers in the RCU and department who are responsible for taking steps to minimise or eliminate risks to the health and safety of employees in the workplace will be hampered if the information is disclosed.

I have apportioned very significant weigh to this public interest against disclosure as it is likely the disclosure of the information could reasonably be expected to prejudice the effective exercise by the RCU and the department of its functions.

Balancing the public interest test

I have considered the relevant public interest considerations in favour of and against disclosure of the information you requested. On balancing the considerations I find that the public interest lies in not releasing some of the information to you. That information falls under the considerations from the Table at section 14(2) of the GIPA Act.

For these reasons, I am of the view that the public interest in withholding release of some of the information is outweighed by the public interest in releasing this information in response to your access application under the GIPA Act. The public interest consideration relevant to my decision are marked in the records withheld from release.

Form of Access

Access to the information is provided in the form of PDF copies of the relevant documents.

Review rights

If you are aggrieved by my decision, you may seek a review of my decision. You may request:

- internal review by another officer of the Department who is no less senior than me, within 20 working days of this decision, together with the prescribed internal review fee of \$40.00,
- external review by the NSW Information Commissioner, within 40 working days of the date of this decision, or
- external administrative review by the NSW Civil and Administrative Tribunal, within 40 working days of the date of this decision.

I have also **enclosed** a fact sheet which provides further details about your review rights.

Further information

If you have any questions, please do not hesitate to contact me on 02 9716 2662 or by email at infoandprivacy@dcj.nsw.gov.au.

Yours sincerely

J.Creyson

Jordan Creyson

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Law Reform and Legal Services**

Schedule

Pages	Description of Item	Notes on release
1 – 9	Casework Practice Mandate – Removal or assumption of a child (updated 19 December 2020)	Release in full under s.58(1)(a) of the GIPA Act.
10 – 17	Casework Practice Mandate – Placing a child in OOHC and supporting them through their transition (updated 17 January 2023)	Release in full under s.58(1)(a) of the GIPA Act.
18 – 28	Casework Practice Mandate – Case planning in OOHC (updated 22 August 2023)	Release in full under s.58(1)(a) of the GIPA Act.
29 – 67	Casework Practice Mandate – Home visiting children in out-of-home-care (updated 27 July 2022)	Release in full under s.58(1)(a) of the GIPA Act.
68 – 98	Casework Practice Mandate – Health needs of children in OOHC (updated 5 July 2023)	Release in full under s.58(1)(a) of the GIPA Act.
99 - 126	Casework Practice Mandate – Behaviour Support (updated 23 January 2024)	Release in full under s.58(1)(a) of the GIPA Act.
127 – 172	Casework Practice Mandate – Safety in care (updated 29 March 2022)	Withheld in part under cl.1(f) in the Table within s.14 of the GIPA Act.
173 – 181	Casework Practice Mandate – Carer reviews (updated 13 November 2023)	Release in full under s.58(1)(a) of the GIPA Act.
182 – 193	Casework Practice Mandate – Carer support (updated 13 November 2023)	Release in full under s.58(1)(a) of the GIPA Act.
194 – 201	Casework Practice Mandate – Carer authorisations surrender, suspension or cancellation (updated 18 August 2023)	Release in full under s.58(1)(a) of the GIPA Act.