



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

Applicant: [REDACTED]  
Agency: NSW Ministry of Health  
Report date: 3 November 2022  
IPC reference: IPC22/R000455  
Agency reference: GIPA22/102  
Keywords: Government information – information not held – creating a new record  
Legislation cited: *Government Information (Public Access) Act 2009*  
Cases cited: *Davison v NSW Department of Education and Training* [2013] NSWADT; *Pedestrian Council of Australia v North Sydney Council* [2014] NSWCATAD 80; *Redfern Legal Centre v Commissioner of Police* [2021] NSWCATAD 288; *Wojciechowska v Commissioner of Police* [2020] NSWCATAP 173:

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

### Summary

[REDACTED] (the Applicant) applied for information from the NSW Ministry of Health (the Agency) under the *Government Information (Public Access) Act 2009* (GIPA Act). The information sought by the Applicant related to COVID-19 data.

The Agency decided that the information requested was not held by the Agency and that the Agency would be required to create a new record to respond to the Applicant's request.

The Applicant applied for external review on 6 September 2022. The reviewer obtained information from the Agency including the notice of decision and the Agency's GIPA file.

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

**The reviewer makes no recommendation to the Agency.**

## Background

1. The Applicant applied under the GIPA Act to the Agency for access to the following information:

*"I would like the following information held by the NSW Ministry of Health:  
Covid-19 Weekly Surveillance reports up to and including week 06 ending 12/02/22 in Section 4 broke vaccination status down separately by "No effective dose" and "Unknowns".*

*From the weekly data overview week report, ending 26/02/22 vaccination status on table for these two categories suddenly became blended to **No dose/Unknown***

  - a. *1) I wish to request the reports be reformatted with the prior non-blended categories for the four reports below, placing no dose and unknowns as two separate line items.*

*COVID-19 Weekly Data Overview – Epidemiology week 11, ending 19 March 2022 (25 March 2022)*

*COVID-19 Weekly Data Overview – Epidemiological week 10, ending 12 March 2022*

*COVID-Weekly Data Overview – Epidemiological week 9, ending 5 March 2022*

*COVID-19 Weekly Data Overview – Epidemiological week 8, ending 26 February 2022*
  - b. *I wish to request all documents (emails or/and letters) that relate to the decision to blend unvaccinated and unknown groups in the public facing report for the time period 1<sup>st</sup> Feb 2022 to 28 April 2022"*
2. In its decision at first instance issued on 18 August 2022, the Agency decided that the information requested under points 1 and 2 was not held by the Agency and that the Agency would be required to create a bespoke record of information to be responsive to the Applicant's request.
3. In seeking a review of the decision by the Information Commissioner, the Applicant confirmed his belief that the Agency does hold the requested information and should create the record. The Applicant argues the separation of the no dose and unknown vaccination groups is information that is in the public interest.
4. I understand the Agency was in the process of conducting an internal review of its decision at the time the Information Commissioner (IC) received the Applicant's request for external review. I can confirm the IC requested that the Agency discontinue its internal review on 26 September 2022. This is due to section 82(4) of the GIPA Act, which states:

*(4) There is to be no internal review of a decision that is or has been the subject of review by the Information Commissioner under this Part except internal review conducted on the recommendation of the Information Commissioner.*
5. I note the Applicant's review rights are outlined at the end of this report for his information.

### Decision under review

6. The Information Commissioner has jurisdiction to review the decision made by the Agency pursuant to section 89 of the GIPA Act.
7. The decision under review is the Agency's decision that information is not held by the Agency under section 58(1)(b) of the GIPA Act.
8. This is a reviewable decision under section 80(e) of the GIPA Act.

### Information not held

9. In this matter, the Agency decided on both points that the information requested was not held. For point 1, the Agency stated:  
*"The PHRB have reviewed your request and have advised that no documents exist in the format requested. To meet this request would require a bespoke analysis to create a new document."*
10. For point 2, the Agency stated:  
*"The Epidemiology and Surveillance team further confirmed that there are no documents relating to the decisions to blend unvaccinated and unknown groups in the public facing report. These decisions were made in meeting discussions and there are no documented minutes."*
11. Under section 53 of the GIPA Act, an agency must undertake reasonable searches for information within the scope of an applicant's request.
12. In the matter of *Davison v NSW Department of Education and Training* [2013] NSWADT at [31], the Tribunal acknowledged that whilst the applicant held an expectation that the information requested would be held by the agency, a fundamental question is whether the respondent has met its obligations under section 53(2) of the GIPA Act.
13. I acknowledge the Agency's Notice of Decision specifically states that the decision to blend the unvaccinated and unknown groups of COVID-19 data are made verbally in internal Agency meeting discussions and that minutes are not documented at these kinds of meetings. I accept this may be a kind of internal team meeting where the Agency may not have the need or resources to document minutes of every team discussion held.
14. It is apparent that staff would have requisite knowledge of the Agency's holdings given their participation in these meetings and inherent knowledge of the conduct of the Agency's internal functions. As noted by the Appeal Panel in *Wojciechowska v Commissioner of Police* [2020] NSWCATAP 173:  
*Being familiar with the type of information it holds, its information management and retrieval systems, generally the agency will be best placed to make an assessment about the likelihood that the requested information exists and is held by it.*
15. The fact that the Agency did not find many records of the kind sought by the Applicant does not necessarily mean that the Agency's search was unreasonable (see *Pedestrian Council of Australia v North Sydney Council* [2014] NSWCATAD 80).
16. Therefore, I am satisfied that the Agency has conducted a reasonable search under section 53 of the GIPA Act sufficient to support their decision that no further information is held.

## Government information and section 75 of the GIPA Act

17. For point 1 of the Applicant's request, the Agency have outlined advice from their Public Health Response Branch (PHRB) that highlights the requested information is not held in a way that can respond to the Applicant's request.
18. As part of this external review, I sought further information from the Agency about the advice received from PHRB. The Agency provided a detailed report regarding the complexities of the data extraction process for the creation of COVID-19 surveillance reports and explained:

*"The Epidemiology and Surveillance team has confirmed the following searches were undertaken and resulting advice provided. In relation to point 1 of the request:*

- *Within the Notifiable Condition Information Management System (NCIMS).*
- *Within the locally held shared drive*

*The Epidemiology and Surveillance team confirmed that data contained in the relevant database is not displayed in the format requested and to respond to the information requested would require extracting the data and conducting new analysis. As such, it was advised that no records were held."*

19. The Agency have also stated that to be responsive to the Applicant's request would require the Agency to create a new record. The Agency have refused to create a new record under section 75(2) of the GIPA Act, which states:

*(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.*

20. Central to the Agency's decision and reasoning to not create a new record is the definition of government information and whether the information requested by the Applicant falls under the definition of government information.

21. In the matter of *Redfern Legal Centre v Commissioner of Police [2021] NSWCATAD 288 (Redfern Legal Centre)*, the Tribunal considered the definition of "government information" in the context of a decision that information was not held as the Agency would be obliged to create a new record to be responsive to the applicant's request:

*[30] The evidence described above establishes that within COPS there exists various sets of data relating to parts of the request in item 3. It is common ground that such data is "government information". However, item 3 does not seek production of those sets of data, but instead asks a question as to the extent to which those sets intersect. Further, the extent of intersection of those sets of data can only be determined by the application of a bespoke computer program.*

*[31] There is authority to the effect that the GIPA Act is not a vehicle for obtaining answers to questions: see *Shvetsova v University of New England [2015] NSWCATAD 49 at [34]* and the authorities there cited. The*

*Tribunal will adopt a benevolent construction of item 3 by treating it as a request for information containing an answer to the question.*

*[32] Thus, it is necessary to determine whether information as to the extent of intersection of sets of existing data and which can only be generated by the application of a bespoke computer program is "government information" for the purposes of the GIPA Act.*

22. The Tribunal preferred the narrower construction of "government information" and found that government information is limited to information which exists at the time of the access application:

*[53] The evidence establishes that at the time of the access application, the NSWPF did not have a record which contained the information sought by the applicant, although it was possible to bring such a record into existence, by the creation and application of a bespoke computer program.*

*[54] It follows that the information sought by item 3 is not "government information".*

*[55] The fact that an SQL program was run in answer to the UNSW Application is beside the point, as the respondent was under no obligation to do so in that case and for the reasons set out above is under no obligation to do so in the present case.*

*[56] In view of the conclusions reached above it is unnecessary to consider the second issue as to whether searching for the information sought would be "an unreasonable and substantial diversion" of the respondent's resources. Further, in circumstances where on one available construction of s 80(e), the existence of "government information" is a jurisdictional fact upon which the Tribunal's jurisdiction depends, it would be inappropriate to consider that issue.*

23. In this instance, the Applicant recalls that the Agency previously provided a separation between 'no dose' and unknown' categories of COVID-19 surveillance data. While it is unclear why the Agency decided to combine these two data fields for several weeks, the Agency is not required to create a new record by extracting and analysing the raw data, to generate a new record of "government information."
24. The evidence before me at review demonstrates that a discrete record of the information sought would need to be created by the Agency. Further, the detailed report provided by the Agency, satisfies me that the information cannot be retrieved by a standard reporting function available to the Agency and generating such a record would require a bespoke computer program.
25. Considering the similarities between this matter and the matter of *Redfern Legal Centre*, I am satisfied that the Agency's decision that the information is not held is justified, especially when examining the definition of government information as outlined in *Redfern Legal Centre*.

## Conclusion

26. On the information available, I am satisfied that the Agency's decisions under review are justified in relation to the decision that information is not held.

## Recommendation

27. I make no recommendations to the Agency.

### Applicant review rights

28. 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.
29. The Applicant has the right to ask the NCAT to review the Agency's decision.
30. 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>

31. If the Agency makes a new reviewable decision because of our review, the Applicant will have new review rights attached to that new decision, and 40 working days from the date of the new decision to request an external review at the IC or NCAT.

### Completion of this review

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



Gabrielle Hendry  
Senior Regulatory Officer