Fact Sheet   **Updated September 2021**

Reasonable searches under the GIPA Act

Section 53 of the *Government Information (Public Access) Act 2009* (GIPA Act) requires NSW public sector agencies to undertake searches for information requested in an access application.

This fact sheet provides guidance to assist agencies to understand their search obligations as well as best practice for how explaining the searches conducted in a notice of decision.

Receiving an access application

A valid access application under the GIPA Act requires an applicant to include such information as is reasonably necessary to enable the government information applied for to be identified by the agency.

Once satisfied that it understands what information has been requested, an agency must then undertake reasonable searches as may be necessary to locate the information and to determine whether or not the information is held.

The GIPA Act defines "government information" as "information contained in a record held by an agency".[1] This means that searches will need to be broadly conducted and include both paper-based and electronic records.

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]

A common concern of applicants in the reviews conducted by the Information Commissioner is that the agency has not properly searched for the information requested.

The guidance provided by this fact sheet on what is a reasonable search under the GIPA Act, and the best practice tips for notices of decisions, can assist agencies to better explain to applicants how they have conducted reasonable searches.

What is a reasonable search?

Agencies are required to undertake a reasonable search for information requested by an access application.

Specifically, the requirements under section 53 are that 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[3]
- must conduct the search using the most efficient means reasonably available to the agency[4]
- uses any resources reasonably available to the agency, including resources that facilitate the retrieval of information stored electronically.[5]

What constitutes a reasonable search will depend on the circumstances.

Agencies are not required to search for information in records held in an electronic backup system unless a record containing the information has been lost, destroyed, transferred or otherwise improperly dealt with.[6]

How to be satisfied that a reasonable search has been conducted

Agencies are generally best placed to assess whether the information requested in an access application exists and is held by them because they are familiar with their records management systems.[7]

If an applicant reasonably believes that the requested information exists and is held by the agency, this may assist the agency in identifying and finding the information. However, there is no requirement that an applicant, who is not familiar with the agency's systems, first satisfy the agency that they reasonably believe the information exists and is held by the agency.[8] An agency must undertake reasonable searches for the information after receiving a valid access application.

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[1] GIPA Act section 4
[2] GIPA Act section 53(1)
[3] GIPA Act section 53(2)
[4] GIPA Act section 53(2)
[5] GIPA Act section 53(3)

[6] GIPA Act section 53(4)
[7] *Wojciechowska v Commissioner of Police* [2020] NSWCATAP 173 at [38]
[8] Ibid

Where an applicant is not able to establish why they believe the information exists and is held by the agency, this should not be considered as affirming the agency's decision that the information is not held.[9]

In those circumstances, the agency's decision will be examined to ascertain if it demonstrates, on its face, that reasonable searches have been conducted. This is consistent with the onus of proof set out at section 105(1) of the GIPA Act.[10]

Notice of decision

Consistent with the decision in *Wojciechowska v Commissioner of Police* [2020] NSWCATAP 173, the Information Commissioner considers that it is good practice for agencies to clearly explain the search processes and what information was located; as well as an explanation if no records were located.

Best practice is for a notice of decision to include the following information about the searches conducted to locate the information:

- an explanation of what the agency understands the applicant's request to be
- how the agency's recordkeeping system is organised
- how information is retrieved from the recordkeeping system
- if the system is electronic, the search terms used by the agency to identify information relevant to the request
- if the system is a paper-based system, how the information is stored and how the agency was able to ascertain what information was relevant to the applicant's request
- the steps taken by the agency to retrieve any documents that are the subject of the request.

Details of searches may include:

- where and how the agency searched
- a list of any records found (including, if appropriate, the relevant business centre)
- the key words used to search electronic records (including any alternative spelling used)
- a description of the paper records that were searched.

External review

In conducting a review, the Information Commissioner will look at whether and how the agency has shown that it has taken reasonable steps to locate the information. The Commissioner may also look at the terms of the access application to determine whether there may be further information within the scope of the access application,

and may recommend search terms to used by the agency.

In administrative review proceedings in the NSW Civil and Administrative Tribunal (NCAT), the agency bears the onus of satisfying the Tribunal that searches conducted were reasonable in the circumstances.[11] When reviewing a decision that the requested information is not held, the NCAT will[12]:

- identify the bases of the agency's reasons and the applicant's submissions, or any factual issues including those derived from section 53 search obligations
- determine whether the agency has proved any relevant factual issues on the balance of probabilities
- consider any evidence that may have emerged since the agency made its decision that the information is not held
- apply those findings to decide the correct and preferrable decision
- affirm, set aside or vary the agency's decision that the information is not held.[13]

For more information

Contact the Information and Privacy Commission NSW (IPC):

Freecall: 1800 472 679
Email: ipcinfo@ipc.nsw.gov.au
Website: www.ipc.nsw.gov.au

NOTE: The information in this Fact Sheet is to be used as a guide only. Legal advice should be sought in relation to individual circumstances.

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[9] Ibid
[10] Ibid at [42]
[11] See, for example, *Zonnevylle v Department of Finance, Services and Innovation* [2017] NSWCATAD 186 at [34]

[12] *Wojciechowska v Commissioner of Police* [2020] NSWCATAP 173 at [44]
[13] *Administrative Decisions Review Act 1997*, section 63(3).