

Government Information (Public Access) Act 2009

NOTICE OF DECISION

Applicant:	Dr Sainath Suryanarayanan
File Ref:	2020/5058
Decision-maker:	Mr David Pacey, Secretary to Senate
Date of decision:	23 March 2021

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Notice of Decision for Internal Review

1. Background

The University received your access application under the *Government Information (Public Access) Act 2009* (“**GIPA Act**”) acknowledged by the University on 9 December 2021. Your application is expressed as follows:

Records maintained by The University of Sydney about Dr. Edward C. Holmes, ARC Australian Laureate Fellow and Professor. We are requesting records of correspondence specifically in relation to following research projects of Professor Holmes:

1. Kristian Andersen, Andrew Rambaut, W. Ian Lipkin, Edward C. Holmes, and Robert F. Garry. *The proximal origin of SARS-CoV-2. Nature Medicine* 26, 450– 452 (2020).

doi: <https://doi.org/10.1038/s41591-020-0820-9>

2. Hong Zhou, Xing Chen, Tao Hu, Juan Li, Hao Song, Yanran Liu, Peihan Wang, Di Liu, Jing Yang, Edward C. Holmes, Alice C. Hughes, Yuhai Bi, and Weifeng Shi. *A novel bat coronavirus closely related to SARS-CoV-2 contains natural insertions at the S1/S2 cleavage site of the spike protein. Current Biology* 30: 2196-2203 (2020).

doi: <https://doi.org/10.1016/j.cub.2020.05.023>

3. Tommy Tsan-Yuk Lam, Na Jia, Ya-Wei Zhang, Marcus Ho-Hin Shum, Jia-Fu Jiang, Hua-Chen Zhu, Yi-Gang Tong, Yong-Xia Shi, Xue-Bing Ni, Yun-Shi Liao, Wen-Juan Li, Bao-Gui Jiang, Wei Wei, Ting-Ting Yuan, Kui Zheng, Xiao-Ming Cui, Jie Li, Guang-Qian Pei, Xin Qiang, William Yiu-Man Cheung, Lian-Feng Li, Fang-Fang Sun, Si Qin, Ji-Cheng Huang, Gabriel M. Leung, Edward C. Holmes, Yan-Ling Hu, Yi Guan & Wu-Chun Cao. *Identifying SARS-CoV-2-related coronaviruses in Malayan pangolins. Nature* 583, 282–285 (2020).

doi: <https://doi.org/10.1038/s41586-020-2169-0>

4. Fan Wu, Su Zhao, Bin Yu, Yan-Mei Chen, Wen Wang, Zhi-Gang Song, Yi Hu, Zhao-Wu Tao, Jun-Hua Tian, Yuan-Yuan Pei, Ming-Li Yuan, Yu-Ling Zhang, Fa-Hui Dai, Yi Liu, Qi-Min Wang, Jiao-Jiao Zheng, Lin Xu, Edward C. Holmes and Yong-Zhen Zhang. *A new coronavirus associated with human respiratory disease in China. Nature* 579, 265–269 (2020). <https://doi.org/10.1038/s41586-020-2008-3>

We request all correspondence about the above projects, with the exception of correspondence of peer-reviewers and editors of the above-named scientific journals, held by The University of Sydney that reflect communications – to or from Professor Holmes – including written correspondence, emails, email attachments, CC and BCC.

The time period covered by this request is from March 1, 2019 to December 2, 2020. Please narrow the search results to exclude any published papers, organizational newsletters or other widely available published materials.

2. Decision

I am authorised by the principal officer, for the purposes of section 9(3) of the GIPA Act, to make this decision.

I have decided under section 58(1)(d) to refuse to provide access to the information requested because there is an overriding public interest against its disclosure.

This is a reviewable decision. Please see Part 5 of this Notice for information concerning your review rights.

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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 requested, with reference to the relevant public interest considerations against disclosure.

3. Searches for information

Under the GIPA Act, we must conduct reasonable searches for the government information you asked for in your application. We made inquiries with Professor Edward Holmes. 192 pdf pages containing relevant information were located.

4. The public interest test

Under section 9(1) of the GIPA Act, you have a legally enforceable right to access the information sought, unless there is an overriding public interest against its disclosure.

Further, under section 5 of the GIPA Act, there is a presumption in favour of disclosing government information unless there is an overriding public interest against its disclosure.

To decide whether or not there is an overriding public interest against disclosure of the information you asked for, I applied the public interest test, which is set out in section 13 of the GIPA Act.

I applied the public interest test by:

- (a) identifying any public interest considerations in favour of disclosure;
- (b) identifying any relevant public interest considerations against disclosure; and
- (c) deciding where the balance between them lies.

I did this in the way required by section 15 of the GIPA Act, which is:

- (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.

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4.1. Public interest considerations in favour of disclosure

Under section 12(1) of the GIPA Act, there is a general public interest in favour of disclosing government information. Section 12(2) of the GIPA Act sets out some examples of other public interest considerations in favour of disclosure. However, I am not limited to those considerations in deciding your application.

In my view the following public interest considerations in favour of disclosure apply when considering the information falling within the scope of the application:

- The general public interest in favour of disclosure of government information
- The public interest 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.

4.2. Personal factors of the application

Under section 55 of the GIPA Act, in determining whether there is an overriding public interest against disclosure of information, the University is entitled to take into account the applicant's identity and relationship with any other person and the applicant's motives for making the access application.

I have taken into account that you are connected to the U.S. Right to Know organisation. The aims of the U.S. Right to Know are described on its website as "promoting transparency for public health" (<https://usrtk.org/about/>). I have also taken into account that a significant amount of material obtained through freedom of information processes is posted online on the US Right to Know website and promoted through the Right to Know Twitter account.

4.3. Public interest considerations against disclosure

When applying the public interest test, the only public interest considerations against disclosure that I can take into account are those set out in the Table at section 14 of the GIPA Act. To show that they are relevant to the information you asked for, I need to consider whether they could reasonably be expected to have the effect outlined in the Table. I give the words "could reasonably be expected to" their ordinary meaning; that is reasonable, not irrational, absurd or ridiculous.

Clause 1: Responsible and effective government

It is relevant to consider whether the requested information release could impact the responsibilities and the effective operation of the University.

Clauses 1(d), 1(f) and 1(g) of the Table at section 14 state that:

"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 (whether in a particular case or generally):

- (d) *prejudice the supply to an agency of confidential information that facilitates the effective exercise of that agency's functions,*

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...

- (f) *prejudice the effective exercise by an agency of the agency's functions,*
- (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,*
..."

Section 6(1) of the *University of Sydney Act 1989* sets out the University's object and functions:

"The object of the University is the promotion, within the limits of the University's resources, of scholarship, research, free inquiry, the interaction of research and teaching, and academic excellence."

Section 6(3)(c) of the Act gives the University:

"such general and ancillary functions as may be necessary or convenient for enabling or assisting the University to promote the object and interests of the University, or as may complement or be incidental to the promotion of the object and interests of the University."

Therefore the effective conduct of research is an important means to promote the objects and interest of the University. The requested documents contain confidential information about the conduct of research and confidential information relating to pre-publication of research.

Clause 4: Business interests of agencies and other persons

Clauses 4 (d) and (e) of the Table at section 14 relevantly provide:

"4 Business interests of agencies and other persons

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...:

- (d) prejudice any person's legitimate business, commercial, professional or financial interests
- (e) prejudice the conduct, effectiveness or integrity of any research by revealing its purpose, conduct or results (whether or not commenced and whether or not completed).

The documents identified contain information that is not public information on the conduct of research. The information concerns the private and confidential pre-publication communications of academics and researchers regarding certain publications. These confidential communications concern their professional interests. Disclosure could prejudice the conduct of future research as academics and researchers would be unlikely to participate in research projects or partner in certain international collaborations if they could not be confident that their private communications would be kept confidential.

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Clause 3: Individual rights, judicial processes and natural justice

The GIPA Act states:

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:

- (a) reveal an individual's personal information,*
- (b) contravene an information protection principle under the Privacy and Personal Information Protection Act 1998 (PIIP ACT), ...*
- ...*
- (f) expose a person to a risk of harm or serious harassment or serious intimidation, ..."*

Clause 4 of Schedule 4 to the GIPA Act defines personal information as:

"... personal information means information or an opinion ... about an individual (whether living or dead) whose identity is apparent or can reasonably be ascertained from the information or opinion."

However, in accordance with clause 4(3)(b) of Schedule 4, personal information does not include:

"information about an individual (comprising the individual's name and non-personal contact details, including the individual's position title, public functions and the agency in which the individual works) that reveals nothing more than the fact that the person was engaged in the exercise of public functions, ..."

The definition of "personal information" in section 4 of the *Privacy and Personal Information Protection Act 1998* ("PIIP Act") is broadly similar to that in the GIPA Act, but includes some specific exemptions that are not relevant to the initial application.

The Information Protection Principle at section 18 of the PIIP Act provides:

- (1) A public sector agency that holds personal information must not disclose the information to a person (other than the individual to whom the information relates) or other body, whether or not such other person or body is a public sector agency, unless:*
 - (a) the disclosure is directly related to the purpose for which the information was collected, and the agency disclosing the information has no reason to believe that the individual concerned would object to the disclosure, or*
 - (b) the individual concerned is reasonably likely to have been aware, or has been made aware in accordance with section 10, that information of that kind is usually disclosed to that other person or body, or*
 - (c) the agency believes on reasonable grounds that the disclosure is necessary to prevent or lessen a serious and imminent threat to the life or health of the individual concerned or another person.*

A significant amount of information contained in the documents is the personal information of individuals.

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Some of the information is the personal contact details of individuals. As this information is their personal information, its disclosure could reasonably be expected to have the effect outlined at clause 3(a) of the Table at section 14 of the GIPA Act.

Much of the information in the emails is information which, although not specifically naming individuals, if taken in the context of the documents could readily identify them. The disclosure of this information therefore could also reasonably be expected to have the effect outlined at clause 3(a) of the Table at section 14 of the GIPA Act.

For consideration 3(b) of the Table at section 14 of the GIPA Act to apply, the affected information must constitute “personal information” as defined in section 4 of the PPIP Act. I am satisfied that the information that is “personal information” for the purposes of the GIPA Act is also “personal information” for the purposes of the PPIP Act.

None of the exceptions in section 18(a) to (c) of the PPIP Act apply to the disclosure of personal information covered by the initial application. None of the individuals concerned are reasonably likely to have been aware, or to have been made aware, that their information would be disclosed by the University.

As none of the exceptions at section 18 of the PPIP Act apply, release of this personal information contained in the requested documents would constitute an unlawful disclosure and breach of the Information Protection Principle in section 18. Therefore, disclosure of some of the information could also reasonably be expected to have the effect outlined at clause 3(b) of the Table at section 14 of the GIPA Act.

The subject of the research contained within the requested information is currently a matter of international comment and controversy. It is well reported that individuals involved in this research area are being subjected to harassment and intimidation. In February 2021, it was reported that the Swedish government is strengthening its laws, after a leading COVID-19 researcher and academic resigned following online attacks, harassment, and intimidation in response to publication of his research findings.¹ In May 2020 it was reported that academics and researchers who published controversial COVID-19 research in Germany received death threats.² The Sydney Morning Herald also reported in December 2020 that people were convicted in China for publishing information about the pandemic response.³ I deem it very relevant to consider whether release of the requested information could impact the privacy and safety of individuals.

¹ <https://www.bmj.com/content/372/bmj.n489>

² <https://www.dw.com/en/scapegoats-virologists-face-death-threats-during-coronavirus-crisis/a-53613193>

³ <https://www.smh.com.au/world/asia/china-jails-citizen-journalist-for-four-years-for-wuhan-reports-20201228-p56qid.html>

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Accordingly, in addition to the general privacy considerations set out above, to disclose the personal information could reasonably be expected to expose those persons to a risk of harm or of serious harassment or serious intimidation.

4.4. Consultation

Some of the information falling within the scope of the application includes the personal or professional information of other people and concerns research. In accordance with section 54 of the GIPA Act, the University must take such steps (if any) as are reasonably practicable to consult with a person before providing access to information relating to them, if the person may reasonably be expected to have concerns about the disclosure of the information, and those concerns may reasonably be expected to be relevant to the question of whether there is a public interest consideration against disclosure of the information.

Five individuals were consulted. I have taken the consultation into account in applying the public interest test and coming to my decision.

4.5. Balancing the public interest test

The object of the GIPA Act is to be achieved by authorising and encouraging proactive release of information, providing an enforceable right of access, and restricting access to government information only where there is an overriding public interest against disclosure. In accordance with section 13, there is an overriding public interest against disclosure of information for the purposes of the GIPA Act if (and only if) there are public interest considerations against disclosure and, on balance, those considerations outweigh the public interest considerations in favour of disclosure.

I have considered the relevant public interest considerations in favour of and against the disclosure of the information that you have requested. The public interest considerations in favour of disclosure are set out in section 4.1 of this Notice. The public interest considerations against disclosure are set out in section 4.3 of this Notice. I have formed the view that disclosure of the information could reasonably be expected to have one or more of the relevant effects listed in the Table at section 14 of the GIPA Act. Accordingly, it is appropriate to take these public interest considerations into account when assessing whether there is an overriding public interest against disclosure.

The documents are confidential communications regarding the development for publication of research papers and contain confidential information that is not public information regarding the development of those papers. The documents were only communicated to persons involved in the research activity. They have been treated confidentially by the University and have not been more widely distributed. There is an expectation by authors and research partners that this information is treated in confidence and their intellectual property protected. Disclosure could be a disincentive to researchers if they were unable to rely on information being kept confidential, and this would most likely have an adverse effect on the University's research functions. Accordingly, I give significant weight to the public interest considerations against disclosure of the information at clauses 1(d), 1(f), 1(g), 4(d) and 4(e) of the table at section 14 of the GIPA Act.

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The documents contain personal identifying information of individuals and personal comments and views regarding pre-publication research. Disclosure of this information would disclose the personal and professional information of individuals and this would be contrary to the University's privacy obligations under state legislation.

Having regard to the publicly reported harassment of researchers in this area, I am of the strong opinion that a University staff member would be adversely impacted and subject to harassment if the requested communications were disclosed. The University has a strong duty of care, as well as work, health and safety obligations towards its staff members that require it to act to protect staff, including to act to protect them against harassment or intimidation. In this thinking I am influenced by s19 of the *NSW Work Health and Safety Act 2011*, which states that employers have a primary responsibility to 'ensure, so far as is reasonably practicable, the health and safety of workers engaged'.

However, I am also conscious that the GIPA Act and relevant case law have recognised that a high threshold is required to displace the overriding presumption in favour of disclosure of information, as outlined in section 5 of the GIPA Act. Consideration therefore needs to be given to the significance of the threat and whether it is of sufficient gravity or immediacy to displace the presumption in favour of disclosure. Case law suggests that a subjective fear that information release may expose a person to a risk of harm or serious harassment is not sufficient. [*AEZ vs Commissioner of Police* [2013] NSWADT, 90]. To meet the required threshold, 'the intimidation or harassment needs to be heavy, weighty or grave and not trifling or transient'. [*Pallier v NSW State Emergency Service* [2016] NSWCATAD, 293]

I am of the opinion that this risk of harm would reasonably be expected to occur as there have been numerous incidents in the last year of COVID-19 researchers experiencing significant harassment. I understand that researchers have received death threats, in addition to daily online abuse, triggered by information in the public domain about a researcher's findings and the origin of COVID-19.

I understand Professor Holmes has also been subjected to harassment.

The University has a duty of care under the Work, Health and Safety Act to ensure, as far as practicable, the health and safety of staff. The GIPA Act in clause 3(f) of the table at section 14, contains practical measures that the University can use to protect workplace safety.

Given serious harassment and intimidation is already occurring and is likely to increase with any additional information release, I am therefore satisfied that the release of the University's information may reasonably be expected to expose a person or persons to intimidation or harassment that is weighty or grave and not trifling or transient.

Accordingly, I give very significant weight to the public interest considerations against disclosure for this information at clauses 3(a), 3(b) and particularly 3(f) of the table at section 14 of the GIPA Act. In considering issues of harassment and workplace safety, I also give weight to s55(1)(b) of the GIPA Act, which states that an agency is able to take into account the applicant's motives for making the access application.

I also give significant weight to the fact that all of the research Professor Holmes has been involved in has been published in the public domain. The research has been published in

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multiple peer reviewed academic journals and is available online to the public. I consider in this way that the public interest in the disclosure of government information regarding these research projects has been met.

On balance I find that the considerations against disclosure of the information significantly outweigh the considerations in favour of disclosure.

5. Review rights

If you disagree with any of the decisions in this notice that are reviewable, you may seek a review under Part 5 of the GIPA Act. Before you do so, I encourage you to contact Ms Deborah Gibson to discuss your concerns. Her contact details are set out below.

You have 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).

You have 20 working days from the date of this Notice to apply for an internal review. If you would prefer to have the decision reviewed externally, you have 40 working days from the date of this Notice to apply for a review by the Information Commissioner or the NCAT.

To assist you, I have enclosed a fact sheet published by the Information and Privacy Commission (IPC), *Your review rights under the GIPA Act*. You will also find some useful information and frequently asked questions on the IPC's website: www.ipc.nsw.gov.au.

You can also contact the IPC on freecall 1800 IPC NSW (1800 472 679).

6. Further information

If you have any questions about this notice or would like any further information, please contact Ms Debbie Gibson on 9351 7262 or gipa.enquiries@sydney.edu.au.



David Pacey
Secretary to Senate