



What is the public interest test?

Fact sheet
January 2016

The right to information system in New South Wales aims to foster responsible and representative government that is open, accountable, fair and effective.

Under the *Government Information (Public Access) Act 2009* (GIPA Act), all government agencies must disclose or release information unless there is an overriding public interest against disclosure. When deciding whether to release information, staff must apply the public interest test. This means, they must weigh the factors in favour of disclosure against the public interest factors against disclosure.

Unless there is an overriding public interest against disclosure, agencies must provide the information. There are some limited exceptions to this general rule, for example where dealing with an application would constitute a significant and unreasonable diversion of an agency's resources.

Applying the public interest test

The public interest test involves three steps:

1. Identify the relevant public interest considerations in favour of disclosure
2. Identify the relevant public interest considerations against disclosure
3. Determine the weight of the public interest considerations in favour of and against disclosure and where the balance between those interests lies.

Step 1: Identify the relevant public interest considerations in favour of disclosure

The GIPA Act (section 12) provides examples of factors that agencies may consider in favour of disclosure. These are:

- promoting open discussion of public affairs, enhancing government accountability or contributing to positive and informed debate on issues of public importance;
- informing the public about the operations of agencies and, in particular, their policies and practices for dealing with members of the public;
- ensuring effective oversight of the expenditure of public funds;

- the information is personal information of the person to whom it is to be disclosed; and
- revealing or substantiating that an agency (or a member of an agency) has engaged in misconduct or negligent, improper or unlawful conduct.

This is not an exhaustive list and agencies may identify other factors in favour of disclosure.

The Information Commissioner may also issue guidelines on additional considerations favouring disclosure.

Step 2: Identify the relevant public interest considerations against disclosure

The GIPA Act (section 14) provides an exhaustive list of public interest considerations against disclosure. These are the **only** considerations against disclosure that agencies may consider in applying the public interest test.

Considerations are grouped under the following headings:

- Responsible and effective government
- Law enforcement and security
- Individual rights, judicial processes and natural justice
- Business interests of agencies and other persons
- Environment, culture, economy and general matters
- Secrecy provisions specifically provide in other legislation
- Exempt documents under interstate Freedom of Information legislation.

The GIPA Act says that in applying the public interest test, agencies are **not** to take into account:

- that disclosure might cause embarrassment to, or loss of confidence in, the government or an agency
- that any information disclosed might be misinterpreted or misunderstood by any person.

In determining an application agencies should consider any submissions made by an applicant in relation to public interest considerations in accordance with section 15(a) and may consider any factors personal to the application.

Step 3: Determine the weight of the public interest considerations in favour of and against disclosure and where the balance between those interests lies

The identification of one or even several public interest considerations against disclosure is not sufficient justification to refuse to provide information. Agencies will make their decision after balancing the relevant considerations for and against disclosure. In each case, agencies will consider a range of factors, including:

- the nature and context of the information
- any personal factors of the application (under section 55 of the GIPA Act)
- the relative weight of public interest considerations for and against disclosure.

Agencies should refuse to disclose information only where, on balance, there is an overriding public interest against disclosure. Where considerations on balance favour disclosure, or are evenly balanced, the presumption in favour of disclosure stands, and information should be published or released.

Presumption against disclosure in some cases

The 'balancing' approach to the public interest test applies in most circumstances. However, in relation to 13 categories of information, there is always an overriding public interest against disclosure. These are:

1. Information subject to an overriding secrecy law (27 specifically named Acts)
2. Cabinet information
3. Executive Council information
4. Contempt – when there is an overriding interest against disclosure of information the public disclosure of which would, but for any immunity of the Crown:
 5. constitute contempt of court; or
 6. contravene any order or direction of a person or body having power to receive evidence on oath; or
 7. infringe the privilege of Parliament
 8. information subject to legal professional privilege
 9. "excluded information" (judicial and prosecutorial information, information about complaints handling and investigative functions, competitive and market sensitive information, and information in relation to specific functions of the Public Trustee)

10. documents affecting law enforcement and public safety
11. specific information relating to transport safety
12. specific information relation to adoption procedures and records
13. specific reports concerning the care and protection of children
14. information contained in the Register of Interests kept in relation to the Ministerial Code of Conduct
15. specific information relating to Aboriginal and environmental heritage, and
16. specific information provided by the Judicial Commission to the Minister.

Generally, agencies must not publish and must refuse requests to disclose information in the above categories. Formal applications for 'excluded information' are invalid under the GIPA Act.

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.