



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

Applicant: Mr Clyde Thomson  
Agency: Ministry of Health  
Report date: 28 June 2017  
IPC reference: IPC17R/000219  
Agency reference: PA17/5  
Keywords: Government information – information refused in full –  
prejudice the supply of confidential information – reveal a  
deliberation – prejudice the effective exercise of agency  
functions – prejudice the conduct of any audit – searches  
Legislation cited: *Government Information (Public Access) Act 2009*  
Cases cited: nil

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

### Summary

Mr Clyde Thomson (the Applicant) applied for information from the Ministry of Health (the Agency) under the *Government Information (Public Access) Act 2009* (GIPA Act). The information sought by the Applicant relates to the governance audit conducted by Dr Dianne Ball of consultancy firm Communio in 2016.

The Agency decided to refuse access to all information sought in full.

The Applicant applied for external review on 26 April 2017. 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 not justified.

**The reviewer recommends the Agency make a new decision.**

## Background

1. The Applicant applied under the GIPA Act to the Agency for access to the following information:
  - a. *The commissioning of Dr Dianne Ball or Communio Pty Ltd to undertake a Governance Audit of the Far West Local Health District, including:*
    - *Initiation of a process to undertake a Governance Audit of the Far West LHD;*
    - *scope of work sought from Dr Ball or Communio;*
    - *the response or proposal to the request to undertake the project, including the methodology to be applied; and*
    - *emails, briefing notes or other documentation relating to the approval for Dr Ball or Communio to undertake the project.*
  - b. *The conduct of the Governance Audit, including:*
    - *Emails, correspondence, briefing notes, meetings minutes or other documents relating to the approach progress or implementation of the project;*
    - *Emails, correspondence, briefing notes, meetings minutes or other documents related to, or stemming from the independent members of the Far West LHD Audit and Risk Committee's oversight or management of the project or involving the Far West LHD Board Chairperson;*
    - *Emails, correspondence, briefing notes, meetings minutes or other documents relating to control, management and distribution of the draft and final reports for the project;*
    - *Emails, correspondence, briefing notes, meetings minutes or other documents related to the provision of the draft or final report to the Far West LHD Board.*
  - c. *Actions that drew on , or stemmed from the findings of the Governance Audit, including emails, correspondence, briefing notes, meeting minutes or other documents.*
  - d. *A copy of the draft and final reports or review of these documents.*
2. In its decision at first instance issued on 24 March 2017, the Agency decided to refuse access to all the information sought in full.
3. In seeking a review of the decision by the Information Commissioner, the Applicant is of the view that the Agency has not justified the application of considerations 1(d), 1(e), 1(f) and 1(h) and also has not addressed the request for information concerning the appointment of Dr Ball or Communio.

## Decision under review

4. The Information Commissioner has jurisdiction to review the decision made by the Agency pursuant to section 89 of the GIPA Act.
  - a. The decision under review is the Agency's decision to refuse access to all information sought in full.

5. I have also considered whether the Agency conducted appropriate searches for the information sought by the Applicant.
6. This is a reviewable decision under section 80(d) of the GIPA Act.
7. The issues that arise in this review are in relation to the application of the public interest test and whether the Agency has conducted appropriate searches for the information sought.

### **The public interest test**

8. 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. For further information on the public interest test, see the resource information sheet at the end of this report.

### **Public interest considerations in favour of disclosure**

9. In its notice of decision, the Agency listed the following public interest considerations in favour of disclosure of the information in issue:
  - a. The presumption of disclosure of government information (section 5 of the GIPA Act);
  - b. The general public interest in favour of disclosure of government information (section 12(1) of the GIPA Act);
  - 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.
  - e. Disclosure of the information could reasonably be expected to ensure effective oversight of the expenditure of public funds.
  - f. The information is personal information of the person to whom it is to be disclosed.
  - g. Disclosure of the information could reasonably be expected to reveal or substantiate that an agency (or a member of an agency) has engaged in misconduct or negligent, improper or unlawful conduct.

### **Public interest considerations against disclosure**

10. In its notice of decision the Agency raised the following public interest consideration/s against disclosure of the information, deciding that its release could reasonably be expected to:
  - a. Prejudice the supply of confidential information (clause 1(d) of the table to section 14 of the GIPA Act);
  - b. Prejudice a deliberative process of government or an agency (clause 1(e) of the table to section 14 of the GIPA Act);

- c. Prejudice the effective exercise of agency functions (clause 1(f) of the table to section 14 of the GIPA Act); and
  - d. Prejudice the conduct of any audit conducted by or on behalf of an agency (clause 1(h) of the table to section 14 of the GIPA Act).
11. I will discuss each of these considerations in turn.

**Consideration 1(d) – prejudice the supply to an agency of confidential information that facilitates the effective exercise of that agency functions**

12. For guidance on the application of clause 1(d) of the table at section 14 as a public interest consideration against disclosure, see the public interest consideration resource at the end of this report.
13. In the notice of decision the Agency states:
- The Ministry takes the view that all correspondence originating from Communio and relating to the audit of FWLHD is confidential in nature...disclosing such information could reasonably be expected to prejudice the supply of confidential information to the Ministry as organisations that provide confidential information, such as Communio, are more likely to be more guarded and selective in responses, or be dissuaded from working with the ministry altogether if they believe that information or methodologies behind their recommendations would be disclosed.*
14. The Applicant provided the following (abbreviated by myself) submissions to the Information and Privacy Commission in relation to clause 1(d):
- The intention of the LHD Board to commission the Governance Review is a matter of public record and was reported by the local media thus it cannot be argued that the Review was occurring in a confidential manner;
  - Much of the information was generated within the correspondence specifically to allow it to be recorded and available to document processes and decisions at a future point;
  - The Review was commissioned by the Far West LHD Board and not by the Ministry of Health;
  - Consultants are expected to provide information to the Agency to meet the terms of reference of the particular contract and therefore there is no threat to the future supply of information to the Agency; and
  - The Agency appears to have ignored the objects of the GIPA Act per section 3 as well as the provisions per section 15 to assist an access applicant.
15. The Agency has applied consideration 1(d) to the records numbered 13, 17, 24, 25, 26 and 31.
16. I note in the notice of decision the Agency advises that it conducted consultation in accordance with section 54 of the GIPA Act. This consultation occurred with former Board members, Communio and the FWLHD. The Agency advised that no objection to the release of the information was received.

17. I have reviewed the records to which this consideration has been applied by the Agency.
18. In the notice of decision the Agency states that it considers all correspondence originating from Communio and relating to the audit of FWLHD is confidential in nature. However records 13, 17, 24, 25, 26 and 31 in my opinion are not records that can be categorised in this manner. In my view none of the records attributed to this clause are correspondence originating from Communio.
19. The Agency advises that it consulted with Communio who did not object to the information being released. Given that Communio did not object to the release of the information I am not satisfied that release of the information could be reasonably expected to prejudice the supply of confidential information from Communio to the Agency.
20. Records 24 and 26 were provided to the Applicant at the time of their creation and therefore have already been revealed to him. Given this I am not satisfied that disclosure of this information in response to the access application could reasonably be expected to prejudice the supply of confidential information to the Agency.
21. The Agency provided information to the IPC which shows that it did consult with the Chair of the Far West Local Health District Board Mr Tom Hynes in relation to these documents. Mr Hynes objected to the release of records 13 and 24 in full and partial objection for records 17, 18 and 31 and to the remainder of records he made no objection.
22. Given that Mr Hynes did not object to the disclosure of some of the information attributed to this clause (records 25 and 26) and objected in part to the release of records 17, 18 and 31 I am not satisfied that the release of the information that was not objected to could reasonably be expected to prejudice the supply of confidential information to the Agency.
23. On the basis of these points I am not satisfied that the Agency's reliance on clause 1(d) as a relevant public interest against disclosure is justified.
24. I recommend the Agency make a new decision in relation to its application of clause 1(d) in relation to records 17, 24, 25, 26 and 31.

**Consideration 1(e) – reveal a deliberation or consultation conducted, or an opinion or recommendation given, in such a way as to prejudice a deliberative process of government or an agency.**

25. For guidance on the application of clause 1(e) of the table at section 14 as a public interest consideration against disclosure, see the public interest consideration resource at the end of this report.
26. In the notice of decision the Agency states:

*Deliberative processes are considered to be the thinking processes of the Ministry. The contents of the final FWLHD report, the draft versions of the FWLHD report and the correspondence between Communio and the Ministry are considered by the Ministry to demonstrate the deliberative process of the Ministry and Communio in developing the recommendations for this report. Furthermore, the release of this information would prejudice the deliberative process of the Ministry by revealing information regarding the Board's consideration and implementation of the findings and recommendations contained in the report.*
27. Submissions from the Applicant (summarised by me) include:

- The report was commissioned by the FWLHD and not by the Ministry of Health;
  - Decisions taken by the Minister for Health and Ministry of Health in relation to the report prepared by Dr Ball have already been implemented; and
  - The Agency has not articulated what prejudice will occur if the information was released.
28. The Agency has attributed clause 1(e) to the records numbered 3, 13 through 16, 18 through 22, 27, 28 and 29.
29. The Agency has identified the relevant deliberation as the development of the audit report into the FWLHD. The Agency states that the revelation of information regarding the audit report would prejudice the deliberative process of the Agency.
30. However the Agency does not explain what prejudice it expects to occur to the deliberative processes of the Agency if the information is released in response to the access application.
31. On this basis I am not satisfied that the Agency's reliance on clause 1(e) as a relevant public interest against disclosure is justified.

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

32. For guidance on the application of clause 1(f) of the table at section 14 as a public interest consideration against disclosure, see the public interest consideration resource at the end of this report.
33. In the notice of decision the Agency states:
- The Ministry takes the view that the release of the information could reasonably be expected to prejudice its functions as it would disrupt the relationship between the Ministry and Communio. The Ministry, as part of its function, is to be able to foster working relationships with consultancies like Communio in order to assist the Ministry with its review of organisations throughout NSW Health. These relationships must be built on mutual trust and the idea that confidential information can flow between the parties without interception. The release of this information would not only have a negative impact on Communio by revealing its methodologies and recommendations to the world at large but would greatly impact the ability of the Ministry to develop relationships it requires to review aspects of NSW Health in order to ensure they meet their governance requirements in line with Ministerial expectations. Furthermore, the release of information, prior to release of the report and completion of the audit would act as a disincentive for Communio to work with the Ministry in the future...*
34. Submissions to the IPC the Applicant (and summarised by me) provide:
- The audit was commissioned by FWLHD and not by the Ministry of Health;
  - The Ministry has not identified any documents relating to the basis upon which Dr Ball and Communio were commissioned;
  - No case for the argument that release would detrimentally impact on relations between Communio and the Agency;

- Communio methodologies are not unique and such methodologies are routinely described in any overview of such a consultancy;
  - The audit report was publicly announced as occurring;
  - It is unclear how the release of emails and briefing notes would prejudice the exercise of Agency functions;
  - The Agency does not address how the remainder of the documents could reasonably be expected to prejudice the exercise of Agency functions; and
  - The Agency suggests that the audit is still 'on foot', however there is evidence to suggest that the report was finalised 4 August 2016 and that many of the recommendations in the report have already been adopted.
35. I note that the notice of decision states that consultation took place and Communio did not object to the release of the information sought by the Applicant. In my view this greatly lessens the weight that can be attributed to this consideration. I am not satisfied that Communio would be less likely to provide information to the Agency when it has been commissioned to do so, in circumstances where consultation is undertaken and no objection is received.
36. In this regard I am not satisfied that the release of the information could reasonably be expected to impact on the relations between the consultancy contractor Communio and the Agency.
37. Therefore, I am not satisfied that the Agency's reliance on clause 1(f) as a relevant public interest consideration against disclosure is justified.

**Consideration 1(h) – prejudice the conduct, effectiveness or integrity of any audit, test, investigation or review conducted by or on behalf of an agency by revealing its purpose, conduct or results (whether or not commenced and whether or not completed)**

38. For guidance on the application of clause 1(h) of the table at section 14 as a public interest consideration against disclosure, see the public interest consideration resource at the end of this report.
39. In the notice of decision the Agency states:
- It is reasonable to expect that the release of information directly related to this audit would prejudice the conduct and/or effectiveness of the audit, particularly in relation to the disclosure of results and information yet to be fully interrogated and considered as part of the audit's deliberative process. The release of such information would reasonably be expected to disrupt the intended outcome of the audit, creating a real risk of diminishing community confidence in the process. This would not only cause detriment to the conduct and effectiveness of the inquiry, but may damage the integrity of the investigation...*
40. Submissions provided by the Applicant provide:
- *The Ministry argues that application of this clause on the basis that release of the information may (sic) diminish community confidence in the process. The submission of my application in the first place relates to lack of confidence in the process that underpinned the Review, the commissioning of Communio, and the means by which a process initiated by the Far West LHD became controlled by the Ministry of*

*Health. The refusal to provide information has, and continues to undermine confidence in the process; and*

- *It is difficult to accept the Ministry's argument that release of the information will 'disrupt the intended outcome of the audit'...*

41. The Agency attributes clause 1(h) to records numbered 1, 3 through 12, 14 through 16, 18, 20 through 23, and 27 through 31.
42. The Agency identifies the audit report into the FWLHD as the relevant audit.
43. The Agency identifies the prejudice that can reasonably be expected to occur as the disruption to the intended outcome of the audit.
44. The Agency has consulted with the consultancy contractor Communio who did not object to the release of information.
45. I note that the schedule of documents indicates that the audit report was finalised and provided to the relevant section of the Agency on 4 August 2016.
46. On this basis I am not satisfied that an ongoing interrogation of the information provided in the report is still occurring to such a degree as to affect the application of the public interest test.
47. In my view, any weighting attributed to clause 1(h) of the table to section 14 of the GIPA Act because of a disruption to the intended outcome of the audit is lessened as a result of the time that has elapsed and because it is evident that some of the recommendations have been considered and adopted.
48. In this regard I am not satisfied that the Agency has demonstrated the nexus between the anticipated prejudice and the release of the information sought by the Applicant.
49. I hold this view because the Agency has not explained why it believes the anticipated prejudice would occur if the information was to be released in response to the access application.
50. On this basis I am not satisfied that the Agency's reliance on clause 1(h) as a relevant public interest against disclosure is justified.

### **Third party consultation**

51. Under section 54 of the GIPA Act, the Agency may also be required to consult third parties if the information is of a kind requiring consultation. The Information Commissioner has issued a guideline about consultation under section 54 of the GIPA Act, which is available on our website at [www.ipc.nsw.gov.au](http://www.ipc.nsw.gov.au).
52. In the notice of decision the Agency states that it conducted consultation with a number of affected third parties including the FWLHD and Communio. It states also that no objections were received from these sources consulted.
53. The response to the consultation affects the application of the considerations against disclosure. In my view this reduces the weighting and/or applicability of the considerations identified by the Agency.
54. The Agency also provided information that shows that consultation also occurred with the FWLHD Chair Tom Hynes who did maintain an objection to the release of some information.

55. The objections received by the Agency are noted and do impact the public interest test in relation to those documents affected. The objections served to increase the applicability of the considerations identified by the third party.

## Searches

56. For guidance on the application of searches please see the information resource sheet at the end of this report.
57. Before deciding that it does not hold information, an agency must comply with the requirements of section 53(2) of the Act. The requirements are:
- undertake such reasonable searches as necessary to locate the information requested; and
  - use the most efficient means reasonably available to the agency.
58. In submissions made to the IPC the Applicant states:
- As the notice of decision refuses access to all documents identified, and neither confirms or denies existence of documents related to the commissioning of Dr Ball I believe I am entitled to seek a review under Sections 80(d) and 80(e) of the Act...*
59. The scope of the access application relevantly requested the following information at point a:
- The commissioning of Dr Dianne Ball or Communio Pty Ltd to undertake a Governance Audit of the Far West Local Health District, including:*
- *Initiation of a process to undertake a Governance Audit of the Far West LHD;*
  - *scope of work sought from Dr Ball or Communio;*
  - *the response or proposal to the request to undertake the project, including the methodology to be applied; and*
  - *emails, briefing notes or other documentation relating to the approval for Dr Ball or Communio to undertake the project.*
60. With the exception of some very general descriptions within a couple of records, the information withheld from release by the Agency does not appear to contain any detail in relation to the commissioning of the audit into the governance of the FWLHD.
61. The notice of decision identifies the following in regards to the searches conducted:
- A general TRIM search was undertaken against the following terms and their variations: "Dr Dianne Ball", "Communio Pty Ltd", "Governance Audit", "Far West Local Health District", "emails", "briefing note", "other documentation", "meeting minutes", "approach, progress or implementation", "oversight or management of the project", "draft and final reports", and "control, management and distribution".*
62. The notice of decision is silent on whether there are any document relating to part a of the access application. If the Agency did not find any information in its searches relating to point a of the access request then as a matter of course it may identify under section 80(e) of the GIPA Act that the information in this regard is not held.

63. Given the clarity in the information request at point a of the access application and the apparent lack of information withheld that addresses this part of the request I am not satisfied that the Agency has conducted appropriate searches for all the information applied for in the access application.

### **Conclusion**

64. On the information available, I am not satisfied that the Agency's decisions under review are justified.

### **Recommendation**

65. I recommend under section 93 of the GIPA Act that the Agency make a new decision, by way of internal review.
66. I ask that the Agency advise the Applicant and the IPC by 12 July 2017 of the actions to be taken in response to our recommendations.

### **Applicant review rights**

67. 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.
68. The Applicant has the right to ask the NCAT to review the Agency's decision.
69. 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>

70. If the Agency makes a new reviewable decision as a result 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 IPC or NCAT.

### **Completion of this review**

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

Lee Fisher  
Investigation and Review Officer



### Consideration 1(d) - prejudice the supply to an agency of confidential information that facilitates the effective exercise of that agency's functions

Clause 1(d) of the table at section 14 states:

*There is a public interest consideration against disclosure if disclosure of the information could reasonably be expected to prejudice the supply to an agency of confidential information that facilitates the effective exercise of that agency's functions (whether in a particular case or generally).*

In order for this to be a relevant consideration against disclosure, the Agency must be satisfied that:

- a. the information was obtained in confidence;
- b. disclosure of the information could reasonably be expected to prejudice the supply of such information to the Agency in future; and
- c. the information facilitates the effective exercise of the Agency's functions.

Although the GIPA Act does not use the phrase "future supply", the nature of the prejudice that this consideration deems to be contrary to the public interest, is implicit. This future effect is one aspect of the abstract nature of the enquiry. The other abstract element is supply in a general sense and whether disclosure will impact supply of similar information by persons to the agency in the future.

It is commonly understood that information will have a confidential quality if the person was not bound to disclose the information but did so on the basis of an express or inferred understanding that the information would be kept confidential.

The meaning of the word prejudice is to "cause detriment or disadvantage".

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**Consideration 1(e) - reveal a deliberation or consultation conducted, or an opinion or recommendation given, in such a way as to prejudice a deliberative process of government or an agency.**

Clause 1(e) of the table at section 14 states:

*There is a public interest consideration against disclosure if disclosure of the information could reasonably be expected to reveal a deliberation or consultation conducted, or an opinion, advice or recommendation given, in such a way as to prejudice a deliberative process of government or an agency (whether in a particular case or generally).*

In order for clause 1(e) to apply, the Agency must establish that disclosing the information could reasonably be expected to:

- a. 'reveal' a deliberation or consultation conducted an opinion or recommendation in such a way as to;
- b. prejudice a deliberative process of the agency.

Once the relevant deliberation, consultation, opinion or recommendation is identified the Agency needs to establish the substantial adverse effect (prejudice) to its deliberative process that would occur if the information was released to the Applicant.

This requires a demonstration of the link between the detriment to the Agency's deliberative process and the disclosure of information to the Applicant.

The term 'reveal' is defined in Schedule 4, clause 1 of the GIPA Act to mean:

*To disclose information that has not already been publicly disclosed (otherwise than by lawful means).*

The Tribunal has accepted that the word 'prejudice', in the context of the public interest considerations against disclosure, is to be given its ordinary meaning, namely: 'to cause detriment or disadvantage': see Hurst at [60], McLennan v University of New England [2013] NSWADT 113 at [38].

In *Watt v Department of Planning and Environment* [2016] NSWCATAD 42, the tribunal considered that no prejudice could arise where the relevant deliberation had already concluded. In this regard the tribunal supported the approach set out in *AOJ v University of NSW* [2013] NSWADT 306 which considered whether disclosure would impact the effective exercise of the Agency's functions.

Any claim that this consideration applies needs to be supported by clear and credible evidence, which goes beyond the suggestion that the public officers may simply be more considered and less spontaneous in their advice *Fitzpatrick v Office of Liquor and Gaming (NSW)* [2010] NSWADT 72.



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

Clause 1(f) of the table at section 14 states:

*There is a public interest consideration against disclosure if disclosure of the information could reasonably be expected to prejudice the effective exercise by an agency of the agency's functions*

To show that this is a relevant consideration against disclosure, the Agency must establish:

- a. the relevant function of the agency that would be prejudiced by release of the information; and
- b. how that prejudice could reasonably be expected to occur.

Once the relevant function of the Agency has been identified, the Agency needs to establish a substantial adverse effect to the exercise of that function.

This requires a demonstration of the detriment or disadvantage that would occur by the disclosure of the information on the agency's function.

The Tribunal has accepted that the word 'prejudice', in the context of the public interest considerations against disclosure, is to be given its ordinary meaning, namely: 'to cause detriment or disadvantage': see *Hurst* (supra) at [60], *McLennan v University of New England* [2013] NSWADT 113 at [38] and *Sobh v Victoria Police* (1993) 1 VR 41.

**Consideration 1(h) – prejudice the conduct, effectiveness or integrity of any audit, test, investigation or review conducted by or on behalf of an agency by revealing its purpose, conduct or results (whether or not commenced and whether or not completed)**

Clause 1(h) of the table at section 14 states:

*There is a public interest consideration against disclosure of information if disclosure of the information could reasonably be expected to prejudice the conduct, effectiveness or integrity of any audit, test, investigation or review conducted by or on behalf of an agency by revealing its purpose, conduct or results (whether or not commenced and whether or not completed) (whether in a particular case or generally).*

The meaning of the word prejudice is to “cause detriment or disadvantage”.

To show that this is a relevant consideration against disclosure, the Agency must establish that disclosure of the information would result in:

- a. prejudice to the conduct, effectiveness or integrity of the audit, test, investigation or review conducted by or on behalf of the Agency;  
by revealing its purpose, conduct or results; and  
whether or not the investigation is commenced and whether or not it is completed.

In particular, the Agency should identify the audit, test, investigation or review that would be prejudiced, and also identify the anticipated prejudice. In order to justify the application of the consideration, the Agency must demonstrate the causal nexus between the disclosure of the information and the prejudice that is expected.

## ***Searches for information***

The expression 'government information' is defined in section 4 of the GIPA Act as 'information contained in a record held by an agency.'

Before deciding that it does not hold information, an agency must comply with the requirements of section 53(2) of the Act. The requirements are:

- undertake such reasonable searches as necessary to locate the information requested; and
- use the most efficient means reasonably available to the agency.

In *Smith v Commissioner of Police [2012] NSWADT 85*, Judicial Member Isenberg said at paragraph 27:

*In making a decision as to the sufficiency of an agency's search for documents which an applicant claims to exist, there are two questions:*

*(a) are there reasonable grounds to believe that the requested documents exist and are the documents of the agency; and if so,*

*(b) have the search efforts made by the agency to locate such documents been reasonable in all the circumstances of a particular case.*

When considering whether there are reasonable grounds to believe that information exists and whether searches to locate information were reasonable, the facts, circumstances and context of the application is relevant. Key factors in making an assessment about reasonable searches include "the clarity of the request, the way the agency's recordkeeping system is organised and the ability to retrieve any documents that are the subject of the request, by reference to the identifiers supplied by the applicant or those that can be inferred reasonably by the agency from any other information supplied by the applicant" (*Miriani v Commissioner of Police, NSW Police Force [2005] NSWADT 187* at [30]).

The GIPA Act does not require an agency to include details of its searches in a notice of decision. However, it is good practice for written decisions to clearly explain what the search processes were, what was found; an explanation if no records were found, what was released and what was held back. Details of searches should include where and how the agency searched, a list of any records found – and if appropriate a reference to the business centre holding the records, the key words used to search digital records (including alternative spellings used) and a description of the paper records that were searched.



## 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.