Fact Sheet **Updated August 2020**

Unreasonable and substantial diversion of agency resources

The *Government Information Public Access Act 2009* (GIPA Act) provides discretion for agencies to refuse to search for information or deal with an application where this would require an unreasonable and substantial diversion of the agency's resources. This fact sheet clarifies what may be considered an unreasonable and substantial diversion of resources and what review rights apply if an agency decides to refuse to deal with an access application.

The object of the GIPA Act is to open government information to the public to maintain and advance a system of responsible and representative democratic government.

Parliament intends that the discretions in the GIPA Act be interpreted and applied to facilitate access to government information promptly and at the lowest reasonable cost.[1]

The GIPA Act provides two discretions where an agency may not search for information or may refuse to deal with an access application if it would require an unreasonable and substantial diversion of resources.[2]

Agencies should consider all information access applications carefully, be specific with any reasons for refusal based on this ground, and document those reasons clearly.

The NSW Civil and Administrative Tribunal (NCAT) cautioned in *Singh v Legal Aid Commission (No 2)* [2015] NSWCATAD 5 that the power of an agency to refuse to deal with an application is a powerful one, and should only be used as a last resort after making every attempt to assist an applicant to narrow their request.[3]

Searches

Section 53 of the GIPA Act outlines the obligations on an agency to search for the government information it holds in response to an access request. These obligations are to consider information the agency holds at the time the application was received and to undertake 'reasonable searches' for the information using any resources available to the agency. The agency is not required to search for information stored in an electronic backup system unless the record containing the information has been destroyed, lost or transferred in contravention of the agency's record management policies or the provisions of the *State Records Act 1998*.

The IPC Fact Sheet: Reasonable Searches under the GIPA Act sets out the obligations of agencies to undertake searches for information requested in an access application.

Section 53(5) of the GIPA Act provides that an agency is not required to undertake any search for information that would require an unreasonable and substantial diversion of the agency's resources.

What constitutes an unreasonable substantial diversion of resources

The GIPA Act does not define what is meant by an unreasonable and substantial diversion of resources.

However, under section 60(3A), in deciding whether dealing with an application would require an unreasonable and substantial diversion of the agency's resources, the agency may, without limitation, take into account the following considerations:

a) the estimated volume of information involved in the request,
b) the agency's size and resources,
c) the decision period under section 57.

Any consideration under section 60(3A) must, on balance, outweigh:

a) the general public interest in favour of the disclosure of government information, and
b) the demonstrable importance of the information to the applicant, including whether the information:
   i. is personal information that relates to the applicant, or
   ii. could assist the applicant in exercising any rights under any Act or law.

NCAT has considered what is meant by an unreasonable and substantial diversion of resources in matters relating

[1] GIPA Act section 3(2)
[2] GIPA Act section 53(5) and section 60(1)(a)
[3] *Singh v Legal Aid Commission (No 2)* [2015] NSWCATAD 5 at [102]

to the former *Freedom of Information Act 1989* as well as more recent decisions under the GIPA Act.

NCAT in the case of (*Cianfrano v Director General, Premier's Department* [2006] NSWADT 137) (*Cianfrano*) identified nine factors to be taken into account in assessing whether a request includes an unreasonable and substantial diversion of resources. These factors are not exhaustive. They include:

1. the terms of the request, especially whether it is of a global kind or a generally expressed request...;
2. the demonstrable importance of the document or documents to the applicant as a factor in determining what in the particular case is a reasonable time and a reasonable effort;
3. whether the request is a reasonably manageable one giving due, but not conclusive, regard to the size of the agency and the extent of its resources usually available for dealing with FOI applications;
4. the agency estimate as to the number of documents affected by the request and, by extension, the number of pages, the amount of officer time and the salary cost;
5. the reasonableness or otherwise of the agency's initial assessment and whether the applicant has taken a co-operative approach in redrawing the boundaries of the application;
6. the timelines that are binding on the agency;
7. the indication found in the annual report reporting requirements suggesting that requests involving more than 40 hours work are seen as lying at the upper end of the range, suggesting at least that the view of government administrators is that a processing time that goes well beyond 40 hours may properly raise concerns;
8. the degree of certainty that can be attached to the estimate made as to documents affected and hours to be consumed, and whether there is a real possibility that processing time may exceed, to some degree, the estimate first made; and
9. the extent, possibly, to which the applicant is a repeat applicant to the agency in respect of applications of the same kind or a repeat applicant across government in respect of applications of the same kind, and the extent to which the present application may have been adequately met by those previous applications.

NCAT in the decision of *Colefax v Department of Education and Communities (NSW) (No 2)* [2013] NSWADT 130 (at [25]) confirmed that the factors identified in *Cianfrano* are equally applicable to a consideration of this issue under the GIPA Act. NCAT considered, however, that caution should be exercised with respect to the 40-hour threshold nominated in *Cianfrano* noting that there are a number of cases in which a greater burden on agency resources has been allowed.

Agency assessment

Whether a diversion of resources would be unreasonable and substantial depends on the nature of the request and the capacity of the agency. It will therefore vary between agencies and should be evaluated on a case by case basis. In deciding whether dealing with an application would require an unreasonable and substantial diversion of an agency's resources, the agency is not required to have regard to any extension by agreement between the applicant and the agency of the period within which the application is required to be decided.[4]

When an agency receives a large access application the agency should first undertake an initial assessment of the access application to determine the estimated processing time and then the extent of its available resources.

An opportunity to amend the access application

Before an agency can refuse to deal with an access application because the agency has identified that it would require an unreasonable and substantial diversion of resources, the agency must give the applicant a reasonable opportunity to amend the application.[5] This means the agency is inviting the applicant to narrow the scope of the access application.

The period of time in which the agency has to decide the access request as set by the GIPA Act will stop running while the applicant is given this opportunity to amend the application.

The agency and the applicant should discuss how the application can be amended to reduce the amount of work involved in processing.

What needs to be amended in an application will depend on what information is sought and the agency's reasons for why they believe that the request is an unreasonable and substantial diversion of their resources.

Some examples of how an agency may gain agreement to a narrowing of an access application include:

- Providing a specific date range for the information sought or reducing the date range for the information sought.
- Excluding particular information or categories of information such as duplicates or copies of information the applicant has sent to the agency
- Providing file references if known
- Excluding personal information of third parties.

If the applicant is unable or does not wish to narrow the application, then the applicant can advise the agency that

[4] GIPA Act section 60(2)

[5] GIPA Act section 60(4)

the original request is maintained. Where this occurs the agency may decide to refuse to deal with the application.

If the applicant agrees to narrow the application, but the scope remains too broad, and there is no further agreement to amend scope, the agency may decide to refuse to deal with the application.

Decision to refuse – considerations

Section 60(1)(a) of the GIPA Act provides that an agency may refuse to deal with an access application, in whole or in part, if dealing with the application would require an unreasonable and substantial diversion of the agency's resources.

Object of the GIPA Act

NCAT in the decision of *Colefax v Department of Education and Communities (NSW) (No 2)* [2013] NSWADT 130 thought that it was relevant to remember in considering whether an application would require an unreasonable and substantial diversion of resources that:

> *"an access applicant under the GIPA Act has a statutory right to access government information and the Act instructs that discretions under it be exercised so as to enhance its objects".* [26]

The impact on the agency of dealing with the access application

NCAT has, in examining issues where an agency has claimed that dealing with an access application would require an unreasonable and substantial diversion of resources, looked for evidence and submissions by the agency of the impact and effect of meeting the access request.

Importantly the decision in *Cianfrano* identified that an agency could seek to avoid the Act by managing its resources in a way that leaves no effective capacity to deal with anything more than requests of a very narrow compass. "This would defeat …. the very real purpose of the Act in providing the community with a mechanism that enables to be exposed to public view complex areas of decision-making" (at [59]).

NCAT confirmed that it did not accept the assumption that the size of the line area unit provides a basis against which the ability of the agency to meet the request should necessarily be measured [61]. On that authority agencies should consider the resources broadly available to the agency. Under contemporary arrangements agencies are located within cluster arrangements which may undertake corporate functions that enable the deployment of the resources available to the cluster.

NCAT seems to encourage a positive/proactive obligation on agencies to have adequate arrangements in place to meet access requests, particularly requests relating matters of public importance. In *Cianfrano* NCAT considered the agency's (the Premier's Department) central place in the making of government decisions and the taking of important government action, and the likelihood that from time to time it will receive complex, multi-document requests (at [62]).

Previous applications

Section 60(3) of the GIPA Act provides that an agency, in deciding whether dealing with an access application would require an unreasonable and substantial diversion of resources, is entitled to consider two or more applications including previous applications, as the one application if the agency determines the applications are related and are made by either the same applicant or persons acting in concert in connection with access applications.

NCAT established that considering previous formal access applications is a factor in an agency assessment of unreasonable and substantial diversion of resources in the decision of *Cianfrano* and later confirmed in *Colefax*. However, this assessment of the application of section 60(3) is a matter of degree and based on the particular circumstances of the case. Agencies, when considering repeat applications, should distinguish between applications made by a representative entity on behalf of clients as opposed to other repeat applications by either the same applicant or persons acting in concert in connection with applications.

Providing reasons for refusal

Section 60(5) of the GIPA Act provides that the notice of an agency's decision to refuse to deal with an access application must state the agency's reasons for the refusal.

The reasons provided should include an explanation of the grounds of refusal as outlined by section 60, and should assist the applicant in understanding why the agency has made the decision to refuse to deal with the application.

If the decision to refuse to deal with the access application is based upon the unreasonable and substantial diversion of the agency's resources, the agency may wish to outline the assessment of processing time and impact on resources or any other factors that were considered as part of the assessment of the application.

Entitlement to a refund of the application fee

Section 60(6) of the GIPA Act provides that an applicant is not entitled to a refund of the application fee when the agency refuses to deal with the access application on the grounds provided for in section 60(1) of the GIPA Act, which includes dealing with the access application would

require an unreasonable and substantial diversion of resources.[6]

Review of decisions about refusing to deal with access applications

Section 80(c) provides that decisions to refuse to deal with access applications are reviewable by the agency, the Information Commissioner, and the NSW Civil and Administrative Tribunal (NCAT).

Internal review

An access applicant has 20 working days after the notice of a decision has been posted to request an internal review by the agency that made the decision.[7]

There is a $40 fee for an internal review application. No fee applies for an internal review if the decision is a ‘deemed refusal’ or the internal review is conducted because the Information Commissioner has recommended the agency reconsider its decision.[8]

External review

If the access applicant disagrees with the decision and wishes to have the decision reviewed externally the access applicant has two options: a review by the Information Commissioner or a review by NCAT.[9]

If the access applicant requests an external review by the Information Commissioner no fee is payable.

The person seeking an external review has 40 working days from being notified of the decision to ask for a review by the Information Commissioner.[10] The Information Commissioner cannot agree to accept an application for external review out of time.

The Information Commissioner must complete the review, and make any recommendations to the agency, within 40 working days (the review period) after the Information Commissioner receives all information the Information Commissioner considers necessary to complete the review.[11] The review period may be extended by the Information Commissioner on agreement with the applicant.[12]

If the Information Commissioner has not made any recommendations within the review period, the Information Commissioner is deemed to have made no recommendations to the agency.[13]

Note: A person cannot ask the Information Commissioner to review a decision that has already been reviewed by the NCAT.[14]

If the person chooses, the person may wish to ask for a review by NCAT.[15] If the person is the access applicant, they do not have to have the decision reviewed internally, or by the Information Commissioner before applying for review by NCAT.

The person has 40 working days from being notified of the decision to apply to NCAT for review.[16] However, if the person has applied for review by the Information Commissioner, then the person has 20 working days from being notified of the Information Commission’s review outcome to apply to NCAT.

For review by NCAT filing fee applies. For further details, please refer to NCAT website: www.ncat.nsw.gov.au

Further information on review rights may be found in the IPC Fact Sheet: Your review rights under the GIPA Act.

For more information

Information and Privacy Commission NSW (IPC):

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

NSW Civil and Administrative NCAT (NCAT)

Telephone: 1300 00 NCAT or 1300 006 228 and follow the prompts

Website: www.ncat.nsw.gov.au

Interpreter Service (TIS): 13 14 50

National Relay Service for TTY Users: 1300 555 727

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.

[6] GIPA Act section 60(1)(a)
[7] GIPA Act section 83
[8] GIPA Act section 85
[9] GIPA Act section 99 and section 100
[10] GIPA Act section 90
[11] GIPA Act section 92A(1)
[12] GIPA Act section 92A(2)
[13] GIPA Act section 92A(3)
[14] GIPA Act section 98
[15] GIPA Act section 100
[16] GIPA Act section 101