information and privacy commission new south wales

Fact Sheet **Updated June 2024**

Third party consultation

This fact sheet aims to explain to individuals and organisations why they are being consulted by a government agency and what their rights are under the *Government Information (Public Access) Act 2009* (GIPA Act).

You have received this fact sheet because an agency has received an application under the GIPA Act that may involve your **personal information, business** or **research interests**.

Your views are required to help agencies make the best decision possible about whether or not to release all or part of the information that has been requested.

This fact sheet is not legal advice and should not be taken as such or relied upon as legal advice. You should always consult a solicitor in the event of needing legal advice on the GIPA Act.

What is the GIPA Act?

The GIPA Act commenced on 1 July 2010 and gives individuals a right of access to information held by NSW State Government "agencies", e.g. departments, authorities and local councils. The GIPA Act is focused on making government information more readily available.

The GIPA Act does not, however, allow access to all information at all times. An agency may refuse access to information if there is "overriding public interest against disclosure".

This is determined by seeing whether there are any "public interest considerations against disclosure" and the strength of the considerations. Some of the available considerations against disclosure apply to information that is someone else's personal information, or affects someone's business or research interests.

What are the consultation requirements?

Where an application is received for access to information concerning a third party (that is, someone other than the applicant or the agency that received the application), then the agency is required to take all reasonable steps to consult with the third party to obtain their views. This requirement exists so that sensitive information of third parties is not released without proper consultation and careful consideration.

Under section 54A, an agency may consult with any other agency for the following purposes:

- to determine whether there is an overriding public interest against disclosure of the information,
- to identify a person that may be required to be consulted under section 54.

An agency may be consulted under this section even if the agency would not reasonably be expected to have concerns about the disclosure of the information.

Consultation under section 54A is discretionary. Under section 3(2) of the GIPA Act, this discretion should be exercised to further the object of the Act, and as far as practicable facilitate and encourage, promptly and at the lowest reasonable cost, access to government information.

What is the process?

An agency is generally required to give access to information that it holds that is not subject to an "overriding public interest against disclosure". When access to information is refused under the GIPA Act, the applicant must be advised of the reasons why.

To decide whether information should be released, an agency must apply the public interest test. This is done by balancing any public interest consideration in favour of disclosure with any public interest consideration against disclosure.

For more information about this see our Fact Sheet: What is the public interest test?

Section 14 of the GIPA Act provides a list of public interest considerations that may be taken into account as considerations against disclosure when applying the public interest test.

These include:

Individual rights, judicial processes and natural justice

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 (IPP) under the *Privacy and Personal Information Protection Act 1998* (PPIP Act) or a Health Privacy Principle (HPP) under the *Health Records and Information Privacy Act 2002* (HRIP Act);

(c) prejudice any court proceedings by revealing matters prepared for the purposes of or in relation to current or future proceedings;

(d) prejudice the fair trial of any person, the impartial adjudication of any case or a person's right to procedural fairness;

(e) reveal false or unsubstantiated allegations about a person that are defamatory;

(f) expose a person to a risk of harm or of serious harassment or serious intimidation;

(g) in the case of the disclosure of personal information about a child—the disclosure of information that it would not be in the best interests of the child to have disclosed.[1]

Business and research 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:

(a) undermine competitive neutrality in connection with any functions of an agency in respect of which it competes with any person or otherwise place an agency at a competitive advantage or disadvantage in any market,

(b) reveal commercial-in-confidence provisions of a government contract,

(c) diminish the competitive commercial value of any information to any person,

(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).[2]

Section 54 of the GIPA Act provides the steps to be taken when consulting:

> An agency must take such steps (if any) as are reasonably practicable to consult with a person before providing access to information relating to the person in response to an access application if it appears that:
>
> the information is of a kind that requires consultation under this section, and
>
> 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.
>
> Information relating to a person is of a kind that requires consultation under this section if the information:
>
> includes personal information about the person, or
>
> concerns the person's business, commercial, professional or financial interests, or
>
> concerns research that has been, is being, or is intended to be, carried out by or on behalf of the person, or
>
> concerns the affairs of a government of the Commonwealth or another State (and the person is that government).

What should I tell the agency?

The agency would appreciate your views about how disclosure of the information would affect your interests. It may be that you do not object to the information in question being disclosed. If, however, you have doubts about the release of the information in question, the more detailed information you can provide to the agency, the better.

What if I object to the release of information?

You will need to advise the agency in writing about:

- what information, if any, you are happy for the agency to release
- what information you are most concerned about releasing
- whether the information is available through other means
- the way disclosure would adversely affect you or your business or your research, and
- any other information you believe the agency should know prior to making a decision.

Does the agency have to accept my views?

The agency must take into account your views in making its final decision – but the final decision on release lies with the agency.

[1] Clause 3 of the Table to section 14 of the GIPA Act

[2] Clause 4 of the Table to section 14 of the GIPA Act

What if I object, but the agency decides to release the information anyway?

If it is your view that the information should not be released, but the agency proposes to grant access despite your objections, then the agency must inform you of this decision. If this is the case, you have the following review rights:

1. Internal review

Section 89(2) of the GIPA Act outlined that you must first seek an internal review of the Agency's decision to release information despite your objections, unless an internal review is otherwise unavailable (for instance, if the principal officer of the agency decided the application or if the agency is a Minister).

You have **20 working days** from the date of the decision to ask for an internal review by the agency.

The review must be carried out by an officer not less senior than the person who made the original decision. The review decision must be made as if it was a fresh application.

There is a $40 fee for an internal review application.

This fee is not payable (by the person who applied for a review with the Information Commissioner) where an internal review is recommended by the Information Commissioner under section 93.

The agency must acknowledge your application within **five working days** of receiving it. The agency must decide the internal review within **15 working days** (the *review period*). This can be extended by **10 working days** if the agency has to consult further, or by agreement with you.

If more than one person is entitled to an internal review, the review period does not commence until the expiration of the 20 working day period in which all applications for internal review can be applied for by any of those persons.

2. External review by the Information Commissioner

If you disagree with the outcome of the internal review, you can then ask for a review by the Information Commissioner.

You have **40 working days** from the date of the decision of an internal review to ask for a review by the Information Commissioner.

On reviewing the decision, the Information Commissioner can make recommendations about the decision to the agency.

Note: You cannot ask the Information Commissioner to review a decision that has already been reviewed by the NSW Civil and Administrative Tribunal.

3. External review by the NSW Civil and Administrative Tribunal

If you disagree with either of the decisions listed above, you can ask for a review by NCAT. You are not entitled to apply to NCAT for review if you are still entitled to apply for internal review.[3]

You have **40 working days** from the date of the decision to apply to the NCAT for review. However, if you have applied for review by the Information Commissioner, you have **20 working days** from the date you are notified that the Information Commissioner's review is completed, to apply to NCAT.

The agency cannot release the information until you have exhausted all your review rights. You should also be aware that if the agency agrees with you and denies access to the information, then the GIPA applicant has similar review rights. Fees and charges apply to these review processes.

If the agency discloses the information, can they publish the information on their disclosure log?

An agency may decide to publish information released in their disclosure log because it may of interest to other members of the public.

If the agency is considering publishing the information you've been consulted about, the agency must notify you in writing that:

- the information will be included in the agency's disclosure log and that you can object to this
- you have a right to request a review of the decision to include information in its disclosure log despite your objection.

You would then have the same review rights as discussed above, and the agency cannot publish the information until the period for seeking a review has expired or any review itself is finalised.

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.

[3] GIPA Act section 100(2)