



information  
and privacy  
commission  
new south wales

## Guideline 5

Consultation on public interest considerations  
under section 54 and section 54A of the  
*Government Information (Public Access) Act 2009*  
(NSW)

April 2019

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The object of the Government Information (Public Access) Act 2009 (GIPA Act) is to open government information to the public to maintain and advance a system of responsible and representative democratic government.

The GIPA Act places various obligations on agencies within NSW in respect of their publication and release of the information that they create and hold. The GIPA Act also provides rights for citizens to apply for access to government information.

Consultation with the Privacy Commissioner occurred in accordance with section 14(4) of the GIPA Act. A further consultation process occurred in reviewing the Guideline.

The Guideline deals with the Principles that apply to public interest determinations and agencies are required to have regard to this guideline in accordance with section 15(b) of the GIPA Act.

Elizabeth Tydd  
**Information Commissioner**  
**NSW Open Data Advocate**  
**CEO, Information and Privacy Commission NSW**  
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# Overview

When a person requests information from a government agency under the *Government Information (Public Access) Act 2009* (NSW) (the GIPA Act), that information often contains details about other individuals, businesses or agencies. Where the request is a formal access application made under Part 4 of GIPA Act, the agency dealing with that request may need to consult with those third parties<sup>1</sup> in certain circumstances in accordance with section 54 before deciding whether or not to release the information to the access applicant.

Section 54 states that, in dealing with an access application, agencies must take such steps (if any) as are reasonably practicable to consult with a person before providing access to information relating to the person if it appears that:

- (a) the information is of a kind that requires consultation under this section, and
- (b) the person may reasonably be expected to have concerns about the disclosure of the information, and
- (c) 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.

The purpose of this Guideline is to state the Information Commissioner's view on the interpretation of section 54, with the aim of assisting agencies, access applicants and third parties to whom an application under the GIPA Act relates. The aim of the Guideline is to promote greater consistency in the practice among agencies, and to resolve confusion about how, when and with whom to consult under section 54.

This Guideline deals with:

- the types of information that may trigger the requirement to consult (see Part 1)
- the purpose of the consultation requirement in section 54 and section 54A (see Part 1)
- how consultation under section 54 relates to the public interest test (see Part 2)
- whether section 54 and section 54A make consultation mandatory (see Part 3)
- the concept of “reasonableness” as it relates to section 54 (see Part 3)
- the process of consulting with third parties (see Part 4)
- steps agencies need to take following consultation (see Part 5), and
- third party review rights (see Part 6).

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<sup>1</sup> Although section 54 does not use the term “third party”, it is used in this Guideline as a shorthand way of referring to the individuals, businesses or other bodies to whom section 54 applies. For example, third parties may include NGOs, for profit companies, or other government agencies as well as individual persons.

## Part 1: The scope and purpose of section 54 and section 54A

1.1 Section 54 deals with the consultation process and applies only to formal access applications. The requirement for consultation under section 54 extends to individuals, entities and agencies. Consultation with other agencies is provided for in section 54A. That section provides that an agency may consult with another agency to:

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

An agency may be consulted under section 54A even if the agency would not reasonably be expected to have concerns about the disclosure of the information.

1.2 Consultation under section 54A is discretionary. Under section 3(2)(b) 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 reasonably cost, access to government information.

1.3 Section 54(2A) recognises that, following release of information it may be included in an agency's disclosure log and in those circumstances additional requirements regarding consultation apply. The agency must give a written notice to the person advising that:

- a) information concerning the application is likely to be included in the agency's disclosure log and that the person can object to this,
- b) there is a right of review under Part 5 of a decision by the agency to include information in its disclosure log despite the person's objection.

1.4 Consultation about the proposed release of information and the inclusion in the disclosure log may occur concurrently. Importantly, the agency must consider any objections made during the consultation period and determine whether there is an overriding public interest against disclosure of government information.

1.5 When processing formal access applications, agencies must consider the following:

- Is access to information to be provided?
- Is the information about a person<sup>2</sup> other than the access applicant?
- Is the information of the type referred to in section 54(2)?
- Is it reasonable to expect that the person would have concerns about whether the information is disclosed?
- If so, is it reasonable to expect that those concerns would be relevant to any of the public interest considerations against disclosure in the Table at section 14?

If the answer to all of these questions is "yes", then the agency must consult with the relevant third party or parties unless it can show that consultation is not "reasonably practicable".

1.6 A number of issues arise when considering how best to comply with section 54 and this guidance provides general advice and assistance in answering the following questions that may arise.

- What type of information triggers the requirement to consult?
- Why is it important for agencies to consult with third parties?
- When may a third party reasonably be expected to have concerns about information

<sup>2</sup> The term "person" extends beyond individuals to mean an agency in NSW or another jurisdiction, or the government of another jurisdiction: GIPA Act Schedule 4 clause 1. The term can also refer to a corporation or other body corporate or politic: *Interpretation Act 1987* (NSW) section 21(1).

being disclosed?

- Can agencies choose not to consult?
- What steps should agencies take to consult and when will it be “reasonably practicable” for agencies to take those steps?
- How do agencies determine if the views of third parties are relevant to the public interest test?
- How should agencies deal with third party objections?
- What review rights apply?
- How will a review by the Information Commissioner be conducted?

### **Type of information relevant to section 54**

1.7 Section 54(2) provides that information relating to a person is of a kind that requires consultation if the information:

- (a) includes personal information about the person, or
- (b) concerns the person’s business, commercial, professional or financial interests, or
- (c) concerns research that has been, is being, or is intended to be, carried out by or on behalf of the person, or
- (d) concerns the affairs of a government of the Commonwealth or another State (and the person is that government).

### **Personal information**

1.8 The most common circumstance where an agency may need to consult with a third party about information requested in an access application is where that application involves personal information about that third party.

1.9 Personal information is defined in Schedule 4[4] to the GIPA Act as “information or an opinion (including information or an opinion forming part of a database and whether or not recorded in a material form) about an individual (whether living or dead) whose identity is apparent or can reasonably be ascertained from the information or opinion”.

1.10 Personal information includes such things as an individual’s fingerprints, retina prints, body samples or genetic characteristics, but does not include:

- (a) information about an individual who has been dead for more than 30 years
- (b) 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, or
- (c) information about an individual that is prescribed by the regulations as not being personal information.

1.11 The type of information that may be classed as “personal” cannot be exhaustively defined and will depend upon the context. However, for the purposes of the GIPA Act and the requirement to consult, it is likely that the following information will be of a personal nature where identity is apparent or can be reasonably ascertained:

- a person’s name and personal contact details, such as home and email address and telephone numbers
- information about the person’s family members

- employment information, including information about salary, disciplinary proceedings, performance contracts and reviews, and referee reports
- health information (defined in section 6 of the *Health Records and Information Privacy Act 2002* (NSW) (HRIP Act))
- information about a person's education
- information about a person's criminal record or history, and
- opinions held by individuals about other people, such as witness reports in an investigation, or referee reports in a recruitment process.<sup>3</sup>

1.12 However, there is a need to consider whether there are circumstances where personal information may have already been publicly disclosed. In *Richards v Commissioner, Department of Corrective Services [2011] NSWADT 98*, the Tribunal considered the operation of the GIPA Act as distinct from its predecessor, the *Freedom of Information Act 1989*; to the issues of redaction of information, disclosure of 'personal information' and 'reveal' personal information. The Tribunal's decision was informed by its finding that the personal information had been publicly disclosed through court proceedings. The Tribunal found at [40]:

It is important to note that the definitions of 'government information', 'personal information', and 'reveal' in the GIPA Act operate on information alone, not, as was the case under the *Freedom of Information Act 1989*, with respect to documents. The issue for consideration is not whether the document has been publicly disclosed, but whether the information they contain has been publicly disclosed. The effect of s 105(1) is to place the burden, of establishing that a decision with respect to an access application is justified, on the agency. In circumstances such as the present, that burden includes establishing that release under the GIPA Act could reasonably be expected to reveal an individual's personal information. Where there is material indicating that the information has already been publicly disclosed, that burden requires the agency to establish that it was not [disclosed].

1.13 If an access application involves an agency deciding whether or not to disclose personal information about a person who is dead, the agency is required to consult with a close relative of the deceased for their views on the release of the information.<sup>4</sup> The GIPA Act does not provide a definition of "close relative", However it is suggested that the term could include:

- A spouse (includes both married and de facto partners, regardless of gender)
- An adult child (who is aged 18 years or more)
- A parent
- An adult sibling.

1.14 Section 3E of *Guardianship Act 1987* may also be useful if seeking guidance on what may be considered a "close relative", although the definition encompasses both close friend and relative and is for the purposes of that Act, and not the GIPA Act.

1.15 If the information sought concerns a person who has been dead for more than 30 years, there is no requirement to consult.

1.16 Guideline 4 addresses the topic of applying the public interest test where personal information is concerned. Clause 4(3)(b) of Schedule 4 to the GIPA Act clearly defines what is not personal information, such as, for example, a public official's name, non-personal contact details.

#### Information concerning the person's business, commercial, professional or financial interests

1.17 Government agencies may hold information that relates to the business, commercial,

<sup>3</sup> The type of information that may be classed as "personal" is discussed in Guideline 4. That Guideline provides guidance on how agencies should approach personal information as a consideration for and against disclosure: see *Guideline 4 – personal information and the public interest test*.

<sup>4</sup> GIPA Act section 54(3).

professional or financial interests of individuals, businesses, other organisations, or government agencies. This information may include contracts with private sector contractors where the contractor is providing services to the public and section 121 of the GIPA Act applies to that contract. Where a formal access application is made requesting such information, section 54(2)(b) provides that the third party to whom that information relates should be consulted if the information is to be released.

- 1.18 Section 54(2)(b) can cover information in a contract that may be commercial-in-confidence as defined in clause 1 of Schedule 4 to the GIPA Act to mean any provisions of the contract that disclose:
- (a) the contractor’s financing arrangements, or
  - (b) the contractor’s cost structure or profit margins, or
  - (c) the contractor’s full base case financial model, or
  - (d) any intellectual property in which the contractor has an interest, or
  - (e) any matter the disclosure of which would place the contractor at a substantial commercial disadvantage in relation to other contractors or potential contractors, whether at present or in the future.
- 1.19 Section 54(2)(b) also includes other types of interests, not necessarily confidential. An example would be where an application is made to NSW Police for information about violent acts committed at licensed premises, or where Treasury receives an application for information that concerns the commercial operation of a State Owned Corporation. In these cases, the information would concern the commercial, business, professional or financial interests of the third parties. Consulting with third parties about this category of information may be relevant to considering public interest considerations against disclosure particularly those relating to “Business interests of agencies and other persons”.<sup>5</sup>

### Information concerning research

- 1.20 Agencies may need to consult with third parties when dealing with an access application for information relating to research being, or intended to be, conducted by, or on behalf of, the third party. This provision includes research that has yet to commence, or that has not been completed. The provision also extends to a third party that funds research if the research is conducted “on behalf of” that party.
- 1.21 Consulting about this category of information may be relevant to establishing whether or not any of the following public interest considerations against disclosure apply:
- prejudicing the conduct, effectiveness or integrity of any research by revealing its purpose, conduct or results (whether or not commenced and whether or not completed)<sup>6</sup> or
  - endangering, or prejudicing any system or procedure for protecting, the environment<sup>7</sup> or
  - prejudicing the conservation of any place or object of natural, cultural or heritage value, or reveal any information relating to Aboriginal or Torres Strait Islander traditional knowledge<sup>8</sup> or
  - endangering, or prejudicing any system or procedure for protecting, the life, health or safety of any animal or other living thing, or threaten the existence of any species,<sup>9</sup> or
  - exposing any person to an unfair advantage or disadvantage as a result of the

<sup>5</sup> See GIPA Act clause 4 of the Table to section 14.

<sup>6</sup> See GIPA Act clause 4(e) of the Table to section 14.

<sup>7</sup> See GIPA Act clause 5(a) of the Table to section 14.

<sup>8</sup> See GIPA Act clause 5(b) of the Table to section 14.

<sup>9</sup> See GIPA Act clause 5(c) of the Table to section 14.

premature disclosure of information concerning any proposed action or inaction of the Government or an agency.<sup>10</sup>

### Information concerning government affairs

1.22 Agencies may need to consult with the Commonwealth or other State or Territory governments to determine their views if an access application relates to information that concerns those governments. Agencies may need to consult with other NSW government agencies, where the information held concerns that other agency and relates to government affairs. Such consultation may help to establish if the following public interest considerations against disclosure apply:

- prejudice relations with, or the obtaining of confidential information from, another NSW agency or another government;<sup>11</sup> or
- prejudice the supply to an agency of confidential information that facilitates the effective exercise of that agency's functions;<sup>12</sup> or
- the documents are exempt documents under interstate Freedom of Information legislation.<sup>13</sup>

### **Purpose of third party consultation**

1.23 The purpose of consultation under section 54 is to ascertain whether the third party to whom the information relates objects to the disclosure of some or all of the information, and the reasons for any such objection.<sup>14</sup> The requirement to consult with third parties is important in balancing information access rights, the right of individuals to protect and control the privacy of their personal information, the rights of individuals or agencies to protect their business, commercial, professional or financial interests, any research proposed or government affairs.

1.24 Business interests relate to the affairs of a business that are undertaken with the purpose of obtaining profit or gain.<sup>15</sup> Business interests will not include the work done by a person as government employee for a salary.<sup>16</sup> Professional interests are those that relate to a profession or vocation, and the disclosure of which could impact on a person's future employment prospects or prejudice professional or personal reputation.<sup>17</sup> Financial interests have been held to include expenditures on external professional services, hourly rates charged, and the actual amounts paid.<sup>18</sup>

1.25 Any consultation should be applied so as to further the object of the GIPA Act, and the discretion to consult should be exercised, as far as possible, so as to facilitate and encourage, promptly and at the lowest reasonable cost, access to government information.<sup>19</sup>

1.26 The need to consult with third parties also bolsters the public interest test by better equipping agencies to decide whether or not there is a public interest consideration against disclosure, and if so, how much weight should be afforded to that consideration. This furthers the object of the GIPA Act by ensuring that an access applicant's enforceable right to government information is only dislodged where there is an overriding public interest against disclosure.<sup>20</sup>

<sup>10</sup> See GIPA Act clause 5(e) of the Table to section 14.

<sup>11</sup> See GIPA Act clause 1(c) of the Table to section 14.

<sup>12</sup> See GIPA Act clause 1(d) of the Table to section 14.

<sup>13</sup> See GIPA Act clause 7 of the Table to section 14.

<sup>14</sup> GIPA Act section 54(4).

<sup>15</sup> See for example *Re Stewart and Department of Transport* (1993) 1 QAR 227.

<sup>16</sup> *Young v Wicks* (1986) 13 FCR 85.

<sup>17</sup> See for example *Pemberton v Macquarie University* [2014] NSWCATAD 76 and *DDL v Mid-Western Regional Council* [2018] NSWCATAD 2.

<sup>18</sup> *Neary v State Rail Authority* [1999] NSWADT 107. *Fulham v Department of Environment & Conservation* [2005] NSWADT 68, *Cianfrano v Department of Commerce* [2007] NSWADT 99.

<sup>19</sup> GIPA Act section 3(2).

<sup>20</sup> GIPA Act section 3.



- 1.27 Only those considerations listed in section 14 are relevant to determining whether there is a public interest against disclosure. Third parties may feel strongly about their information being disclosed. However, third party views are just one of the matters that an agency needs to consider in determining if any public interest considerations against disclosure apply, and if so, how significant they are.

## **Part 2: How section 54 relates to the public interest test?**

### **Process of identifying circumstances that may require third party consultation**

- 2.1 The public interest test is central to making decisions about disclosure of information under the GIPA Act. In formal access applications, an applicant has a legally enforceable right to government information unless there is an overriding public interest against the disclosure of that information.<sup>21</sup> In applying the public interest test, to the information sought, agencies identify the relevant considerations in favour of disclosure in section 12 of the GIPA Act, and any other pro-disclosure interests that may apply. Those considerations are then compared against the exhaustive list of public interest considerations against disclosure in section 14, with appropriate weight given to each consideration. If the considerations against disclosure do not outweigh those in favour, the information must be released to the applicant.
- 2.2 In order to apply the public interest test properly, agencies need as much information as possible to identify all of the relevant public interest considerations for and against disclosure, and to know how much weight to give each consideration. In some cases, agencies will be able to make this decision by looking at the documents alone. In other cases, the question of where the public interest lies may be less straightforward. This is especially the case where the information sought involves personal information or the interests of a party or parties other than the applicant.
- 2.3 Section 54 of the GIPA Act supports the need for agencies, when considering providing access to information, to be as fully informed as possible by requiring them to consult with third parties who may reasonably be expected to have concerns about the disclosure of information that affects them. Section 54(1)(c) states that agencies must take such steps (if any) as are reasonably practicable to consult with third parties where their concerns may “reasonably be expected” to be relevant to the question of whether there is a public interest consideration against disclosure of the information.
- 2.4 The Information Commissioner considers that the views of third parties may “reasonably be expected” to be relevant to the question of whether there is a public interest consideration against disclosure in two respects:
1. Third parties can help establish if a public interest consideration against disclosure exists; and
  2. They can assist an agency to decide how much weight to give those considerations.

### **Identifying the existence of a public interest consideration against disclosure**

- 2.5 With some access applications involving information about third parties, it will be clear that at least one public interest consideration against disclosure exists. That is where an application involves personal information about another person. This would automatically identify the public interest consideration against disclosure in 3(a) in the Table at section 14 of the GIPA Act. In this example, consultation would not be required simply to identify the existence of a relevant consideration against disclosure. However, consultation with that person may indicate the existence of further considerations against disclosure that the agency may not be aware of otherwise, such as prejudicing court proceedings (consideration 3(c)) or exposing the person to a risk of harm (consideration 3(f)).

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<sup>21</sup> GIPA Act section 9(1).

- 2.6 In other situations, consultation with third parties will need to occur before any public interest consideration against disclosure can be identified. For example, it would be difficult to determine whether, and how, information about a business would diminish the competitive value of the information (consideration 4(c)), or prejudice legitimate business interests (consideration 4(d)), unless that business is consulted.

### **Attributing weight to a public interest consideration against disclosure**

- 2.7 For agencies to apply the public interest test, identifying the existence of a public interest against disclosure is not sufficient. Agencies need to know how much weight to give each consideration. Consultation with the party to whom the information relates will generally be relevant to considering the appropriate weighting.
- 2.8 Taking personal information about a third party as an example, consultation may reveal that the person has no objection to the release of the information concerning them. This may significantly reduce the weight to be given to that consideration against disclosure.
- 2.9 Agencies should be clear when consulting with third parties about where the information is to be released to the access applicant and / or to be included in the agency's disclosure log.

## **Part 3: Is consultation mandatory?**

- 3.1 The requirement for consultation under section 54 extends to consultation with individuals, entities and agencies. Consultation with other agencies is provided for in section 54A.

### **Part 3.1: Consultation under section 54**

- 3.2 Section 54 provides that agencies 'must take such steps (if any) that are reasonably practicable to consult with third parties before providing access to information if:
- (a) the information is of a kind that requires consultation under the section; and
  - (b) the third party may reasonably be expected to have concerns about the disclosure of the information; and
  - (c) those concerns may reasonably be expected to be relevant to whether there is a public interest consideration against disclosure of the information.
- 3.3 The Information Commissioner is of the view that section 54 places an obligation on agencies to consult with third parties where (a), (b) and (c) above are satisfied, unless it is not reasonably practicable to take steps to consult. This raises the question of what steps might or might not be reasonably practicable when undertaking consultation, and when might third parties reasonably be expected to have concerns relevant to public interests against disclosure.
- 3.4 It is important that an agency does not presume an outcome of consultation without seeking the views of the third party. The outcome of a consultation may be that the third party does not object to the disclosure of the information. If an agency is concerned that the consultation with the third party may result in distress to the third party, the agency may wish to put strategies in place to mitigate or address the possible effect of the consultation.
- 3.5 It is important that the third party understands the basis of an agency seeking their views and how consultation may assist the decision maker in applying the public interest test.
- 3.6 The third party objector is not required to conduct the public interest test; that is the responsibility of the decision maker. Rather they are provided with an opportunity to convey an objection during the course of the section 54 consultation process, with reference to the bases for consultation under that section.
- 3.7 It is important to provide a third party with sufficient information so that the third party is able to understand the issues and make their case to the agency. Accordingly providing sufficient information to facilitate an informed response from the third party will enable the agency to

better assess any objections and apply the public interest test.

**“Reasonably practicable to consult”**

- 3.8 What constitutes “reasonably practicable” will differ depending on the nature and scope of the request, and the resources of the agency. Generally, however, it is the Information Commissioner’s view that agencies should where practicable consult with third parties. Theoretically, there may be practical obstacles to consulting in some situations including where:
- there are a large number of third parties
  - the agency is unable to locate the third party’s contact details
  - the third party is long deceased and the agency is unable to locate a relative
  - there are issues arising from bullying, harassment or workplace health and safety issues
  - there are current legal, investigation or other proceedings in place which may be affected by consultation
  - there are particular cultural sensitivities surrounding consultation with Aboriginal or other communities.
- 3.9 Agencies should take whatever steps they can to remove obstacles to consultation. For example, if a particular access application required consultation with a significant number of third parties, the agency could ask the applicant to narrow the scope of the request to make consultation more reasonable, or to agree to an extension of time so that proper consultation could occur.
- 3.10 Agencies are not bound by particular methods of consultation, but may develop their own approaches. The more flexible the consultation methods, the more likely they are to be reasonably practicable. For example, if the contact details of third parties are known, agencies could facilitate consultation with a large number at once by sending a group email. If proposing to consult by group email, consideration should be given to protecting personal information, including by utilising the Bcc function and redacting irrelevant or personal information.
- 3.11 If an agency decides that consultation is not reasonably practicable, it bears the onus of showing why, and should document the reasons for this. Documenting reasons for the decision not to consult assists an administrative decision maker or reviewer in understanding the basis of a decision. The principle of articulating reasons for decision is illustrated by the NSW Civil and Administrative Tribunal Appeal Panel in its decision of *Commissioner of Police v Barrett* [2015] NSWCATAP 68. In this decision, the Appeal Panel commended the desirability of reasons being furnished to persons even where there is no legal duty to do so.

**“Reasonably be expected to have concerns”**

- 3.12 Taking the term “reasonably be expected” to have its ordinary meaning, it would be reasonable for any person to have concerns, or at least to expect to be informed, about the disclosure of their personal or other information to another person, unless it has already been made publicly available. In relation to personal or health information about an individual, this is consistent with the *Privacy and Personal Information Protection Act 1998* (NSW) (PIIP Act) and the *Health Records and Information Privacy Act 2002* (NSW) (HRIP Act), which allow people certain rights regarding access to and the accuracy of such information. In the context of considering an information access request and applying the ‘public interest test’ the GIPA Act must be applied and accordingly section 5 of the PIIP Act must be considered, together with section 20 (5) of the PIIP Act.

**“Reasonably be expected to be relevant” to public interest considerations against disclosure**

- 3.13 The Information Commissioner is of the view that the concerns of third parties are relevant to the identification and consideration of the public interest considerations against disclosure, and

to the appropriate weight to be given to those considerations. Consultation with third parties plays a significant role in agencies properly being able to apply the public interest test, and therefore the Information Commissioner considers that consultation would be **relevant** in most cases.

- 3.14 Since consultation informs the public interest test, agencies should consult *before* weighing up the public interest considerations for and against disclosure. Agencies should not decide the public interest test and then determine if there is a need to consult, unless paragraph 3.15 is relevant.
- 3.15 For an agency to decide that third party views are not expected to be reasonably relevant to whether there is a public interest consideration against disclosure, the agency must be certain that the consideration does or does not apply, and be able to attribute appropriate weight to that consideration, without needing the views of the third party.
- 3.16 This could be the case where a number of considerations against disclosure apply in relation to the information requested by an access applicant, all of which carry such significant weight that the agency decides that it would be contrary to the public interest to release the information, even if the third party were agreeable to the information being disclosed. In this example, the views of the third party would be irrelevant to the public interest test.
- 3.17 If an agency decides that the concerns of third parties are not relevant to the identification of public interest consideration against disclosure, it needs to document the reasons for its decision in the notice of decision. For example, an agency may not need to seek the views of third parties where a conclusive presumption against the disclosure of information exists as identified in Schedule 1 to the GIPA Act.
- 3.18 If there is any uncertainty about the relevance of third party concerns, agencies should consult. The Information Commissioner considers consultation to be an important element in the proper application of the public interest test and the object of the GIPA Act, which provides that access to information is restricted only when there is an overriding public interest against disclosure.

### **Part 3.2: Consultation under section 54A**

- 3.19 An agency may be consulted under section 54A even if the agency would not reasonably be expected to have concerns about the disclosure of the information.
- 3.20 Consultation under section 54A is discretionary. Under section 3(2)(b) 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.

## **Part 4: The consultation process**

- 4.1 The GIPA Act does not prescribe how agencies should consult with third parties. Agencies can, and should, adopt flexible consultation procedures that will allow the best outcomes from the consultation process. Flexible consultation procedures that include discussions with the parties will ensure both context and understanding.
- 4.2 Whatever method is adopted, a record of the consultation endorsed by the third party should be made so that the agency can explain the rationale for its decision if the matter becomes the subject of a review.
- 4.3 Consultation methods may differ depending on how many third parties need to be consulted, and on the nature of the consultation. For example, consulting with one person about the release of their personal information will involve different practical considerations from consulting with a large number of business owners.
- 4.4 Prior to conducting any consultation, it may be appropriate for agencies to clarify the scope of the application with the applicant, since consultation can be time consuming and add to the

processing costs of an access application. This would be especially important where consultation is likely to involve a large number of third parties. Agencies should ensure that the information of other third parties is not released during the consultation process. This can be achieved by partially redacting any information that does not relate to the particular third party prior to providing the information for consultation.

- 4.5 Regardless of the methods used, any consultation with third parties under section 54 should contain the following steps:
1. Notify the third party or parties that information about them has been requested under a formal GIPA application. Since many third parties will not be familiar with the workings of the GIPA Act, it may be helpful for agencies to provide them with explanatory material. The IPC factsheets on the public interest test and on third party consultation may assist.
  2. Clearly specify the information that is being sought. This may involve showing the third party a copy of the information concerning them that has been requested by the applicant.
  3. Explain to the third party that:
    - a. there is a presumption under the GIPA Act that information held by government agencies should be disclosed unless there is an overriding public interest against disclosure
    - b. the fact that providing the applicant with the information requested in an access application would mean disclosing personal or business information of a third party is a relevant consideration against disclosure, but not necessarily an overriding one
    - c. the purpose of the consultation is to enable an agency to ascertain if the third party objects to the information being released to the applicant, and if so, the third party's reasons for the objection will assist a decision maker in understanding their concerns
    - d. the views of the person consulted will help the agency make a decision about whether or not the information should be released
    - e. the agency can only make a decision not to release information based on the considerations in section 14 of the GIPA Act and where relevant Schedule 1 to the GIPA Act – therefore, some views held by the third party cannot be considered by the agency in making its decision, and
    - f. the information may be released even if the third party objects, if the agency considers that the public interest in disclosing the information outweighs any relevant considerations against. This is subject to paragraph 4.5 (5) below.
  4. Give third parties an opportunity to consider the information and confirm their views.
  5. Inform the third party about their right to seek review if the agency decides to release the information to the applicant despite their objection. Agencies should also note that no information about the third party will be released to the applicant until after their review rights have expired or been exhausted (see Part 5 for further information about notifying third parties of the decision to release information and Part 6 for their rights of review).
- 4.6 Agencies should also be aware of the special considerations that may arise when consulting with people who might require assistance with communication including literacy; people whose first language is other than English; and people with a disability or who have a carer or guardian acting on their behalf. Also, agencies need to have regard to issues of cultural sensitivities when consulting with Aboriginal communities and other communities.
- 4.7 Given the 20 working day time limit agencies have under the GIPA Act to process formal access applications; it is advisable that agencies decide as soon as possible after acknowledging receipt of a valid application if consultation needs to occur. If necessary, section 57(2) enables the 20 working day decision period to be extended by up to:

- 10 working days if consultation is necessary under section 54,
  - 10 working days if records need to be retrieved from archives, or
  - A total of 15 working days if both consultation and retrieval of records is required. The decision period can be further extended if the applicant agrees.
- 4.8 Third parties may ask the name of the access applicant who is requesting their personal or other information. Third parties may be more willing to agree to the disclosure of information concerning them if they know who is requesting the information and the context of that request. Agencies should treat the identity of access applicants like any other personal information they hold. It is advisable for agencies to obtain the consent of the applicant prior to disclosing his or her identity and other particulars to third parties.

### **Keeping a record of the consultations**

- 4.9 Agencies should document the results of any consultations with third parties, recording:
- how the agency decided who should be consulted
  - the names of the people, businesses or organisations with whom they consulted
  - how the consultation was conducted, eg, letter, email, telephone call
  - when the consultation occurred
  - information about any third parties with whom consultation was required but not conducted, and the reasons for this
  - the questions asked of the third party
  - the third party's responses to those questions and any other views the third party conveyed to the agency, and
  - details about any information the agency gave to the third party about the access applicant and the application.

These records will be important should the third party or the applicant seek a review of the agency's decision.

## **Part 5: Dealing with third party objections - actions following consultation**

- 5.1 Following consultation with third parties, there are a number of steps to be taken.

### **Decision-making following consultation**

- 5.2 Section 54(5) provides that an agency must take into account any objection to the release of information made by a third party during the consultation process when the agency is making its decision about the existence of an overriding public interest against disclosure of the information. As noted in Part 2, the views of third parties will generally be relevant to determining whether there is a public interest consideration against disclosure, and whether that consideration carries sufficient weight to make it an overriding one.
- 5.3 It is recognised that agencies may be required to consider complex issues arising from consultation. For example the third party may object on the basis of involvement in an investigation or process into bullying or harassment which has been settled. Further the agency may consider that the process of consultation would have an outcome of re-opening the issues that had been resolved and cause distress or harm.
- 5.4 However the public interest considerations against disclosure are limited to those set out in the Table at section 14 of the GIPA Act.
- 5.5 Additionally the views of third parties do not determine the outcome of the public interest test,

but are an important factor for consideration by the agency in making a decision. An agency will not have discharged its responsibilities regarding the proper application of the public interest test if it makes a decision about release of information based solely on the views of the third parties with whom the agency has consulted.

- 5.6 An agency may make a number of possible decisions following consultation. For example, an agency may decide to:
- release all or part of the information to the applicant where the third party does not object to the release
  - release all or part of the information to the applicant despite the third party's objections
  - withhold all or part of the information from the applicant where the third party objects to the release, or
  - withhold all or part of the information from the applicant even though the third party has no objection to its release.
- 5.7 Agencies may decide to release information concerning a third party to an access applicant despite the third party's objection, as provided for in section 54(6). This can occur even where the information sought is personal information of the third party, and disclosure in these circumstances may be contrary to the PPIP Act. This is because section 5 of the PPIP Act states that nothing in that Act affects the operation of, or agencies' obligations under, the GIPA Act. Likewise section 20(5) of the PPIP Act provides that without limiting the generality of section 5, the provisions of the GIPA Act that impose conditions or limitations (however expressed) with respect to any matter referred to in section 13, 14 or 15 are not affected by the PPIP Act, and those provisions continue to apply in relation to any such matters as if those provisions were part of the PPIP Act.
- 5.8 Dealing with personal information as a public interest consideration against disclosure is discussed in Guideline 4.
- 5.9 The public interest must dictate the outcome of an access application, and the agency's decision must reflect this. Accordingly, in making decisions following consultation, agencies should document:
- the relevant public interest considerations in favour of disclosure of the information
  - the relevant public interest considerations against disclosure of the information
  - details about any consultations with third parties as discussed in paragraph [5.2] above
  - the relevance of the consultations to the existence and weight of public interest considerations against disclosure, and
  - the agency's decision about release of the information after applying the public interest test, taking the views of third parties into consideration.

### **Notifying parties of the decision**

- 5.10 Following the decision about whether or not to release the information, agencies need to notify the applicant and all third parties with whom the agency consulted. If the agency's decision is to refuse to provide access to the information, it must notify the applicant in writing of the reasons for the decision and the basis for those reasons.<sup>22</sup> It is prudent to include in the notice to the applicant, the details about any third party consultations that have occurred and the results of that consultation. Notice to the applicant may not necessarily provide specific details of the third party, particularly for example, where the identity of the third party was the subject of the consultations, or there are obligations restricting the agency from revealing the identity of the third party.

<sup>22</sup> GIPA Act section 61 and section 126.

- 5.11 If the agency decides to disclose the information to the applicant despite the objections of a third party, the agency must notify that party of its decision under section 54(6) of the GIPA Act. That notice would need to be in the form prescribed by section 126 of the Act, and:
- be in writing
  - include the date of the decision
  - provide information about any available review rights and time periods for review
  - relevant agency contact details, and
  - not disclose any information for which there is an overriding public interest against disclosure.
- 5.12 Although not required, agencies should consider giving third parties reasons for the decision to release information. This would give the third party a better understanding of the basis for the decision.
- 5.13 In providing reasons for its decision an agency should seek to ensure that the third party objector has a better understanding of the basis for the decision. Accordingly in notifying the third party objector the agency should include in its decision:
- the agency's understanding of the nature of the third party's objection and the reasons for that objection
  - the agency's consideration of those factors as they relate to the public interest test and in particular what public interest considerations against disclosure the agency considered and applied
  - some explanation of the agency's weighing process of factors for and against disclosure and the ultimate attribution of factors in favour of disclosure that outweighed those factors against disclosure.

#### **Timing of disclosure of information about third parties**

- 5.14 Where an agency has decided that it is in the public interest to disclose information despite third party objections, the agency cannot disclose information to the access applicant while the third party's review rights are pending. Review rights on a decision are pending while the objector is entitled to apply for a review of the decision under Part 5 (ignoring any period that may be available by way of extension of time to apply for review), or any review duly applied for is pending.<sup>23</sup> This could potentially be a considerable length of time if the third party pursues review rights through all available channels.
- 5.15 It may take a number of days for an agency to be notified of an application for external review. It is recommended that agencies, in the notification of the decision request the third party advise them if and when an application for external review is made. This ensures that the information that is the subject of the review is not released prior to review rights being exhausted.
- 5.16 Where the information sought involves a number of third parties, and the information is about the same issue, the agency should not disclose any of the information to the applicant until the review rights of all of the third parties have expired or been exhausted. For example, an applicant may seek information about the salary and working conditions of five employees who all receive the same salary and work under the same conditions. Two of those employees may apply for a review of the decision to release the information. To ensure the integrity of those two reviews, it is the view of the Information Commissioner that the agency should not release the information about any of the five employees until after the reviews have been finalised.
- 5.17 If the agency reasonably believes that more than one person is entitled to an internal review of any reviewable decision for the same access application, the review period does not commence until the expiration of the time within which an internal review can be applied for under Part 5 by

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<sup>23</sup> GIPA Act section 54(7).



any of those persons.<sup>24</sup>

## Part 6 - Third party review rights

- 6.1 The decision of an agency to disclose to an applicant information concerning a third party is reviewable under section 80(d). As outlined at [5.14], where an agency has consulted a third party under section 54 of the GIPA Act and consultation has established that the person objects to disclosure of the information, an agency must not provide access to the information until it has given the third party notice of the decision to provide access to the information and notice of the objector's right to have that decision reviewed, and is not to be provided while review rights on the decision are pending.
- 6.2 Part 5 of the GIPA Act sets out the rights of internal review by the agency, review by the Information Commissioner and administrative review by the NSW Civil and Administrative Tribunal (NCAT).
- 6.3 The third party may ask the agency that made the decision to conduct an internal review of the decision. This must be applied for within 20 working days of the agency giving notice of its decision to the applicant seeking access to the information, unless the agency agrees to accept a late application.<sup>25</sup> The internal review must be completed within 15 working days, which may be extended by up to 10 working days if the agency needs to consult with a person who was not previously consulted while the original application was being considered.<sup>26</sup>
- 6.4 Third parties should seek an internal review by the agency before seeking review by the Information Commissioner unless internal review of the decision is not available.<sup>27</sup> Third parties who are dissatisfied with the agency's decision following the internal review may, within 40 working days of that decision, ask the Information Commissioner to review the agency's internal review decision.<sup>28</sup>
- 6.5 A third party may then, within 20 working days of the completion of the Information Commissioner's review, apply to NCAT for review.
- 6.6 Alternatively, a third party may, within 40 working days of the agency's decision, apply to NCAT for review, without seeking review by the Information Commissioner.<sup>29</sup>
- 6.7 Where internal review is available, third parties must seek an internal review by the agency before seeking review by the Information Commissioner and prior to applying to NCAT for an administrative review. An agency's decision may be made by the principal officer or by a person with the authority of the principal officer. Internal review is not available in respect of a decision:
- made by the principal officer of the agency or a Minister (or a member of the Minister's personal staff);<sup>30</sup>
  - that is or has been the subject of a review by the Information Commissioner, except internal review conducted on the recommendation of the Information Commissioner;<sup>31</sup>
  - that is or has been the subject of administrative review by NCAT,<sup>32</sup> or
  - made on internal review (even where the third party has not previously sought internal review).<sup>33</sup>

<sup>24</sup> GIPA Act section 86(1A).

<sup>25</sup> GIPA Act section 83.

<sup>26</sup> GIPA Act section 86.

<sup>27</sup> GIPA Act section 89(2).

<sup>28</sup> GIPA Act section 90.

<sup>29</sup> GIPA Act section 100, section 101.

<sup>30</sup> GIPA Act section 82(2).

<sup>31</sup> GIPA Act section 82(4).

<sup>32</sup> GIPA Act section 82(5).

<sup>33</sup> GIPA Act section 88.

- 6.8 Where the third party is arguing that the information should not be released, the onus is on the third party to establish that there is an overriding public interest against disclosure.<sup>34</sup>

**The conduct of third party external review applications by the Information Commissioner**

- 6.9 In making an application for external review of a decision to provide access to information the applicant bears the burden of establishing that there is an overriding public interest against disclosure.<sup>35</sup>
- 6.10 However there is no express limitation on the matters that the Information Commissioner may take into account in conducting external reviews under the GIPA Act. In exercising her review function, the Information Commissioner must act in an informal manner as far as possible and in accordance with the substantial merits of the case without undue regard for legal technicalities. Additionally the Information Commissioner may determine the procedures to be followed and is not bound by the rules of evidence and may inform herself in any way she considers just.<sup>36</sup>
- 6.11 Accordingly the Information Commissioner will consider the third party objections together with the reasons for objecting and any other relevant information provided with the application for review. Importantly the Information Commissioner may request additional information for consideration in undertaking the external review.
- 6.12 It is not a precondition that the Information Commissioner is satisfied that there is an overriding public interest against disclosure prior to making a recommendation to the agency. The Information Commissioner may form the view that the recommendation is appropriate based upon information other than that provided by the third party objector.
- 6.13 In conducting the external review the Information Commissioner will consider the notice of decision provided by the agency. The notice of decision is relevant in considering the objections raised by the third party applicant for external review to ensure that the agency's reasons for releasing the information are considered, particularly in light of any new information provided during the course of the external review.
- 6.14 The Information Commissioner is not limited in respect of the recommendations that may be made in conducting an external review but will have regard to the decision that is subject to review.<sup>37</sup>
- 6.15 Agencies are required under section 15(b) of the GIPA Act to have regard to guidelines issued by the Information Commissioner when determining whether there is an overriding public interest consideration against disclosure. The NSW Civil and Administrative Tribunal in the decision of *Imielska v Northern Sydney Local Health Network* [2014] NSWCATAD 216, found that the agency had not complied with a number of steps set out in Guideline 4 (regarding personal information) and Guideline 5, and remitted that part of the decision back to the agency for further consideration having regard to these requirements.

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<sup>34</sup> GIPA Act section 105(2).

<sup>35</sup> GIPA section 97(2).

<sup>36</sup> *Government Information (Information Commissioner) Act 2009* (NSW) section 15.

<sup>37</sup> GIPA section 92(1).

# Appendix A

## Section 54 of the GIPA Act

### 54 Consultation on public interest considerations

- (1) 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:
  - (a) the information is of a kind that requires consultation under this section, and
  - (b) the person may reasonably be expected to have concerns about the disclosure of the information, and
  - (c) 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.
- (2) Information relating to a person is of a kind that requires consultation under this section if the information:
  - (a) includes personal information about the person, or
  - (b) concerns the person's business, commercial, professional or financial interests, or
  - (c) concerns research that has been, is being, or is intended to be, carried out by or on behalf of the person, or
  - (d) concerns the affairs of a government of the Commonwealth or another State (and the person is that government).

Note. The requirement to consult extends to consultation with other agencies and other governments. See the definition of person in Schedule 4

- (2A) If the agency considers that information about a person consulted under this section is likely to be included in the agency's disclosure log in relation to the access application, the agency must give written notice to the person containing the following statements:
  - (a) that information concerning the application is likely to be included in the agency's disclosure log and that the person can object to this,
  - (b) that there is a right of review under Part 5 of a decision by the agency to include information in its disclosure log despite the person's objection.
- (3) If consultation is required concerning the release of personal information about a deceased person, that consultation is to be done by consultation with a close relative of the deceased.
- (4) The purpose of consultation under this section is to ascertain whether the person has an objection to disclosure of some or all of the information and the reasons for any such objection.
- (5) The agency must take any objection to disclosure of information that the agency receives in the course of consultation into account in the course of determining whether there is an overriding public interest against disclosure of government information.
- (6) If consultation establishes that a person objects to the disclosure of information but the agency

decides to provide access to the information in response to the application, access is not to be provided until the agency has first given the objector notice of the agency's decision to provide access to the information and notice of the objector's right to have that decision reviewed, and is not to be provided while review rights on the decision are pending.

- (7) Review rights on a decision are pending while the objector is entitled to apply for a review of the decision under Part 5 (ignoring any period that may be available by way of extension of time to apply for review), or any review duly applied for is pending.

## **Section 54A of the GIPA Act**

### **54A Consultation with other agencies**

- (1) An agency may, in response to an access application, consult with any other agency for the following purposes:
- (a) to determine whether there is an overriding public interest against disclosure of the information,
  - (b) to identify a person that may be required to be consulted under section 54.
- (2) 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.

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