



## Applying for workplace investigation information

This fact sheet is designed to assist citizens in seeking access to workplace investigation information under the *Government Information (Public Access) Act 2009* (GIPA Act).

People involved in workplace investigations, either as witnesses or the subject of the investigation, have an interest in the reports and other information prepared in connection with that investigation. As a consequence, an interested person may make an access application seeking access to workplace investigation information.

### Can I apply for information in a workplace investigation?

Yes. The GIPA Act gives a person an enforceable right to apply for access to government information. Access to government information is only restricted where there is, on balance, an overriding public interest consideration against disclosure.<sup>1</sup>

You may ask for the workplace investigation informally<sup>2</sup> or by making a formal access request to the agency.<sup>3</sup>

If you have asked for the investigation informally, the agency may provide access to the investigation with any reasonable conditions it thinks fit to impose<sup>4</sup> or the agency may refuse to release the investigation to you.<sup>5</sup> There are no review rights when an agency refuses to release the investigation to you following your informal request.

However, there are review rights for formal access applications.<sup>6</sup>

### Will I receive everything I ask for?

Not necessarily. If you have made a formal access request, the agency will consider your request for information, identify the information it holds falling within your request and then consider whether the general

presumption that information requested is to be released is in any way limited by any consideration against disclosing the information.<sup>7</sup>

This balancing is known as applying the public interest test.<sup>8</sup>

For more information on the public interest test see the IPC Fact Sheet: [What is the public interest test?](#)

### What are the common reasons for an agency not releasing workplace investigation information?

There are a number of public interest considerations against the disclosure of information. The agency is likely to make reference to one or more considerations listed in the GIPA Act.<sup>9</sup>

Two commonly applied considerations against disclosure are personal information and information provided in confidence.

There may be additional information contained in the investigation report that the agency refuses to release to you because on balance it may:

- affect the effective exercise of the agency's functions;
- affect how the agency conducts an investigation;
- expose a person to the risk of serious harm or intimidation;
- be subject to legal professional privilege; or
- identify or tend to identify a person who has made a public interest disclosure.

### Personal information

There may be some personal information of others, as well as your own in a workplace investigation report. You will generally be given access to your own information.

<sup>1</sup> GIPA Act section 3

<sup>2</sup> GIPA Act section 8

<sup>3</sup> GIPA Act section 9

<sup>4</sup> GIPA Act section 8(2)

<sup>5</sup> GIPA Act section 8(3)

<sup>6</sup> GIPA Act sections 82, 89 and 100

<sup>7</sup> GIPA Act section 12

<sup>8</sup> GIPA Act section 13

<sup>9</sup> GIPA Act section 14 and Schedule 1

However, an agency may find that the public interest is against releasing someone else's personal information to you.<sup>10</sup>

This means you will only receive some of the information you seek and the personal information of others may not be released to you even where you may already know the identity of the other people.

### Information provided in confidence

Agencies may identify that information provided to the workplace investigation was provided in confidence and the release of this type of information may affect a person providing confidential information in the future.<sup>11</sup> This means that you might only receive some part of the information you seek.

### Breach of confidence

Agencies may identify that information provided to the workplace investigation was provided in confidence and the release of this type of information would result in an action for breach of confidence.<sup>12</sup> This means that you might only receive some part of the information you seek.

### Effective exercise of agency functions

Agencies may identify that the release of information provided or prepared in connection with workplace investigations may affect the effective exercise of the agency's functions.<sup>13</sup> This means that you might only receive some of the information you seek.

### Investigations

Agencies may identify that releasing information about a workplace investigation would affect how the agency conducts the investigation.

The Tribunal has, in considering the release of information of a workplace investigation, distinguished between the findings and conclusions and the evidence and analysis of evidence. The balance may favour notifying an employee of the findings and conclusions in an investigation report, however it may not favour disclosing the evidence and the analysis of the evidence.<sup>14</sup>

This means that you might only receive some of the information you seek in respect of findings and outcomes of an investigation report and not the evidence and analysis of that evidence.

### Risk of Harm

Agencies may identify that releasing information would expose a person to a risk of harm, serious harassment or serious intimidation. 'Harm', 'harassment' and 'intimidation' are not defined in the GIPA Act and must be given their ordinary meaning.

Harassment requires consideration of how the conduct complained of is experienced by the person alleged to be harassed and whether that person was offended, worried, tormented, distressed or harassed by the conduct.<sup>15</sup>

### Legal Professional Privilege

Agencies may identify that some information in an investigation report is subject to legal professional privilege and that the privilege attached to the information has not been waived.

The Agency will need to show that a lawyer client relationship exists and that advice was produced for the dominant purpose of providing legal advice to a client. Internal lawyers can provide legal advice to the agency which may be subject to a claim of privilege. This means any information that is the subject of a claim of legal professional privilege may not be released to you.

### Public Interest Disclosure

Agencies may identify that releasing information would identify or tend to identify a person who has made public interest disclosure and there is a conclusive presumption against the release of this information.<sup>16</sup>

To satisfy this presumption, there needs to be a disclosure that is a public interest disclosure and the disclosure might identify or tend to identify the person who made the disclosure. In some cases, the Tribunal has found that it does not matter if you already know the identity of the person who made the public interest disclosure.<sup>17</sup> Therefore you may not receive information that identifies or tends to identify a person who has made a public interest disclosure.

## Is the assessment of the public interest based on the whole investigation report?

The assessment of the public interest test is based on the information contained in the report, rather than the report itself.

<sup>10</sup> *Pemberton v Commissioner of Police* [2020] NSWCATAD 135

<sup>11</sup> *Douglas v Commissioner of Police* [2022] NSWCATAD 152

<sup>12</sup> *Pemberton v Commissioner of Police* [2020] NSWCATAD 135

<sup>13</sup> *Douglas v Commissioner of Police* [2022] NSWCATAD 152

<sup>14</sup> *Pallier v NSW State Emergency Service* [2016] NSWCATAD 293

<sup>15</sup> *Dezfouli v Justice Health & Forensic Mental Health Network* [2018] NSWCATAD 11

<sup>16</sup> GIPA Act clause 1 Schedule 1

<sup>17</sup> *Pallier v NSW State Emergency Service* [2016] NSWCATAD 293

It may be that an agency considers releasing some of the information in the report to you and finds the public interest does not favour releasing other information.

### What if I am asking for access to this information to ensure the agency has followed its processes

This is something the agency will consider as supporting the release of the information you are seeking, and the agency will take these types of reasons as factors in favour of release into consideration when applying the public interest test.

### Should I tell the agency my reasons for asking for the workplace investigation?

Providing your reasons for asking for the information will assist the agency in identifying the factors in favour of releasing the information, which is part of the agency applying the public interest test.<sup>18</sup>

However, the GIPA Act does not require you to provide your reasons for asking for the information to the agency.<sup>19</sup>

### Doesn't procedural fairness mean I am entitled to a copy of the report?

Applying for access to information under the GIPA Act is separate to the workplace investigation process.

Providing access to information in a workplace investigation following an access application is about applying the requirements of the GIPA Act, and not those required under a separate disciplinary process where procedural fairness is required.

### An agency tells me that I am asking for excluded information<sup>20</sup> and it cannot be released to me. Is this correct?

The GIPA Act sets out certain kinds of excluded information of a number of agencies including complaints, investigation, inquiry and audit information.

An access application cannot be made to an agency for excluded information of the agency.<sup>21</sup>

Some of the agencies and statutory office holders whose investigation functions are excluded include:

- The Independent Commission Against Corruption
- The Office of the Ombudsman
- Health Care Complaints Commission
- The Information Commissioner

- The Privacy Commissioner

You can review the Agency Information Guide (AIG) on the agency's website to identify if the investigation information you seek may be excluded information. Or you can contact the information access unit before you make an access application.

### Review of agency's decisions

Information on review rights may be found in the IPC Fact Sheet: [Your review rights under the GIPA Act](#).

#### For more information

Contact the Information and Privacy Commission NSW (IPC):

**Freecall:** 1800 472 679

**Email:** [ipcinfo@ipc.nsw.gov.au](mailto:ipcinfo@ipc.nsw.gov.au)

**Website:** [www.ipc.nsw.gov.au](http://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.*

<sup>18</sup> GIPA Act section 42(a)

<sup>19</sup> GIPA Act section 41(1)

<sup>20</sup> GIPA Act clause 2 Schedule 2

<sup>21</sup> GIPA Act section 43