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

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

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

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

a. the information was obtained in confidence;

b. disclosure of the information could reasonably be expected to prejudice the supply of such information to the Agency in future; and

c. the information facilitates the effective exercise of the Agency's functions.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

a. the relevant function of the agency that would be prejudiced by release of the information; and

b. how that prejudice could reasonably be expected to occur.

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

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

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

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

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

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

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

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

a. prejudice to the conduct, effectiveness or integrity of the audit, test, investigation or review conducted by or on behalf of the Agency;

by revealing its purpose, conduct or results; and

whether or not the investigation is commenced and whether or not it is completed.

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

Searches for information

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

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

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

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

> *In making a decision as to the sufficiency of an agency's search for documents which an applicant claims to exist, there are two questions:*
>
> *(a) are there reasonable grounds to believe that the requested documents exist and are the documents of the agency; and if so,*
>
> *(b) have the search efforts made by the agency to locate such documents been reasonable in all the circumstances of a particular case.*

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

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

information and privacy commission new south wales

What is the public interest test?

Fact sheet
January 2016

The right to information system in New South Wales aims to foster responsible and representative government that is open, accountable, fair and effective.

Under the *Government Information (Public Access) Act 2009* (GIPA Act), all government agencies must disclose or release information unless there is an overriding public interest against disclosure. When deciding whether to release information, staff must apply the public interest test. This means, they must weigh the factors in favour of disclosure against the public interest factors against disclosure.

Unless there is an overriding public interest against disclosure, agencies must provide the information. There are some limited exceptions to this general rule, for example where dealing with an application would constitute a significant and unreasonable diversion of an agency's resources.

Applying the public interest test

The public interest test involves three steps:

1. Identify the relevant public interest considerations in favour of disclosure
2. Identify the relevant public interest considerations against disclosure
3. Determine the weight of the public interest considerations in favour of and against disclosure and where the balance between those interests lies.

Step 1: Identify the relevant public interest considerations in favour of disclosure

The GIPA Act (section 12) provides examples of factors that agencies may consider in favour of disclosure. These are:

- promoting open discussion of public affairs, enhancing government accountability or contributing to positive and informed debate on issues of public importance;
- informing the public about the operations of agencies and, in particular, their policies and practices for dealing with members of the public;
- ensuring effective oversight of the expenditure of public funds;
- the information is personal information of the person to whom it is to be disclosed; and
- revealing or substantiating that an agency (or a member of an agency) has engaged in misconduct or negligent, improper or unlawful conduct.

This is not an exhaustive list and agencies may identify other factors in favour of disclosure.

The Information Commissioner may also issue guidelines on additional considerations favouring disclosure.

Step 2: Identify the relevant public interest considerations against disclosure

The GIPA Act (section 14) provides an exhaustive list of public interest considerations against disclosure. These are the **only** considerations against disclosure that agencies may consider in applying the public interest test.

Considerations are grouped under the following headings:

- Responsible and effective government
- Law enforcement and security
- Individual rights, judicial processes and natural justice
- Business interests of agencies and other persons
- Environment, culture, economy and general matters
- Secrecy provisions specifically provide in other legislation
- Exempt documents under interstate Freedom of Information legislation.

The GIPA Act says that in applying the public interest test, agencies are **not** to take into account:

- that disclosure might cause embarrassment to, or loss of confidence in, the government or an agency
- that any information disclosed might be misinterpreted or misunderstood by any person.

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