



Why consult third parties

This fact sheet aims to explain to agencies the benefits and requirements of consultation with third parties when considering an application for access to information under the *Government Information (Public Access) Act 2009*.

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 does not, however, allow access to all information at all times. Section 3(1)(c) of the GIPA Act provides that access to government information is restricted only when there is an overriding public interest consideration against disclosure.

Therefore, in response to an access application, an agency may refuse access to information requested if there is overriding public interest against disclosure which outweighs the considerations in favour of the disclosure of the information requested.

What is the benefit in consultation with third parties?

Agencies in assessing a request for government information may identify that some of the information captured may be information relating to another person, whether that person is an individual, a business or another government agency. Agencies are able to consult with those persons as part of the process of dealing with an agency application.

Consultation occurs as a part of the process of an agency dealing with an access application and assists the agency in applying the public interest test to the information sought and making decisions in relation to the access application.

The benefit of consulting third parties lies in the decision maker being able to consider the access application with the full knowledge of any issues or reasons advanced for or against the release of information of a third party. This allows for better decision-making by agencies.

Fact sheet

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Agencies are able to decide whether or not any objections may be mitigated by some form of redaction, allowing as much government information to be released in response to an access application and thereby furthering the objects of the GIPA Act.

It is important that in deciding whether or not to consult on the information that the agency does not assume that a third party may object without seeking their view when reasonably practicable.

For example, an agency may assume that a third party may object to the request by an applicant for access to their personal information and therefore decide that they do not propose to release the information, meaning consultation is not necessary. However, consultation with the third party may well provide a different outcome, and inform the public interest test.

Agencies may need to consider strategies for managing consultations with third parties to facilitate the process, including contact with the third party to discuss the consultation.

What are the steps in consultation?

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

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:
- 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).

Who is a person to be consulted?

A person is defined in Clause 1 to Schedule 4 of the GIPA Act as including

an agency, the government of another jurisdiction (including a jurisdiction outside Australia) and an agency of the government of another jurisdiction.

This means that a third party may be an individual, a business or businesses, agencies in NSW or in other jurisdictions.

What does “reasonably practicable” to consult mean?

As outlined in paragraph 3.7 of the Guideline 5: Consultation on public interest considerations under section 54 of the *Government Information (Public Access) Act 2009*. There may be practical obstacles to consulting in situations such as:

- There are a large number of third parties
- The agency is unable to locate the third party's contact details
- The third party has been dead for some time and the agency is unable to locate a relative or
- There are issues arising from bullying, harassment or workplace health and safety claims
- 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 communities.

Agencies should take whatever steps possible to remove obstacles to consultation. As an illustration, if a particular access application requires consultation with a large number of third parties, the agency may approach the access applicant to ask if the applicant would agree to narrow the scope of their request making consultation more reasonable, or to agree to an extension of time to allow proper consultation to occur.

Guideline 5 provides further information to assist agencies on the consultation process.

How does consultation work in practice?

Where an application is received for access to information and the agency identifies that the information captured by the request includes information concerning a third party or a number of third parties (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 those third parties to obtain their views, if it is considering releasing the information and the information is of a type described in section 54 of the GIPA Act.

This requirement exists so that sensitive information of third parties is not released without proper consultation and careful consideration.

However, consultations should not be used as a mechanism merely to extend the period in which an agency is required to deal with an access application.

There are some circumstances where an agency would not consult third parties, in particular where the agency has already formed a clear view that the information is not to be released, because, for example, there is a conclusive presumption against the agency disclosing it.

If it is reasonably practicable to consult a third party and the requirements of section 54(1) and (2) are met then the agency should consult the third party.

In undertaking the consultation process with a third party it is good practice to contact the third party to explain the process and to answer any questions they may have before sending any correspondence.

In writing to the third party to seek their views, the agency should outline why the person is being consulted and how matters raised by the third party will be considered as part of the decision-making in relation to the access application. Agencies should be clear when consulting with a third party as to the time frame the third party has to respond to the agency with their views.

The IPC has developed templates for agencies to use in third party consultations: Third party consultation letter [**see consultation third party template letters**]; Consultation with another government agency letter [**see consultation third party template letters**]; and Notice to third party regarding decision to release information and inclusion in disclosure log [**see consultation third party template letters**].

Objections received

An agency is required to take into account the terms of any objection raised by the third party. However, for the purposes of conducting the review, the objections are limited to the public interest considerations against disclosure as identified in the table to section 14.

If an objector raises concerns outside the considerations in the table to section 14 of the GIPA Act, the agency is not able to consider these concerns when applying the public interest test to the information.

What should be included to give a third party a better understanding of the basis of the agency's decision?

When an agency provides notice that the agency has decided to provide access to information that the third party has objected to, the types of matters that would assist in giving a third party objector a better understanding of the basis for the decision include:

1. Demonstrating that the agency has an understanding of what the third party's objection is and the reasons for that objection.
2. How the agency had regard to those factors in its consideration of the public interest and in particular what considerations against disclosure it applied as a result of that objection.
3. Some explanation as to why the agency ultimately reached the view that the public interest factors against disclosure did not outweigh those in favour, such that there was not an overriding public interest against disclosure.

What should the original access applicant be told?

Because of the nature of the objection the agency may not be able to disclose the information that is the subject of the objection, for example, the name or names of the persons who objected if the objection relates to personal information.

Agencies should advise applicants of the requirement to consult and the effect of that consultation on decision making timeframes.

The information cannot be released to the original access applicant whilst the review rights of any objector/s are pending, including periods of time for exercising rights of review.

Internal reviews involving third parties

Third parties have the right to seek an internal review of the decision by the agency to release information despite their objections.

A third party has provided more information with a request for an internal review

In some instances when applying for an internal review, a third party objector may provide additional information as to the nature of their objection and the reasons for their objection. This additional information may for example, identify personal factors that were not initially raised by the third party objector.

If this is the case, the person at the agency undertaking the internal review is required to consider this additional information to the extent that it is relevant to the assessment of the public interest test.

Managing multiple third parties seeking an internal review

There may be instances where an agency's decision in response to an access application involves multiple third parties who have review rights attached to that decision.

If the third parties exercise their rights to seek an internal review to the agency then from a practical perspective there is an advantage in the same officer in the agency determining the internal review requests by those third parties.

Agencies who adopt this approach should exercise caution to ensure that the internal reviewer

1. takes into account the objections of each of the third party objectors seeking internal review to extent that the objections are relevant the application of the public interest test
2. does not seek to revisit or vary any other decisions to release information where there has been no application for review by a third party. The internal review is confined to the decision(s) that are the subject of the internal review request
3. does not seek to vary or revisit that part of the decision where access has already been provided to access applicant
4. has regard to the specific interests of each of the third party objectors when providing notification of the outcome of the internal review.

Although review rights of third parties commence at the time the decision is made by the agency to release the information despite the objection of the third parties, individual third parties may exercise their review rights at different times during the review period.

As an illustration in a decision made on 1 August 2016 with four third party objectors (A, B, C and D), each party has 20 working days to seek an internal review of the decision. B seeks a review on 2 August, A, C and D do not exercise their right for review until 21, 23 and 24 August respectively. It should be noted that the internal review in relation to B would be completed prior to the other third parties seeking an internal review.

An agency may seek to manage this time issue by seeking to negotiate an extension of the review period as permitted by section 86(4).

For more information

Contact the Information and Privacy Commission NSW (IPC):

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