information and privacy commission new south wales

Fact Sheet **Updated August 2020**

Changes to the GIPA Act in 2018 – guidance for agencies

The *Government Information (Public Access) Amendment Act 2018* made a number of amendments to the *Government Information (Public Access) Act 2009* (GIPA Act). These amendments came into effect in November 2018 and must be considered as agencies fulfil their obligations under the GIPA Act.

1.1 Contracts register

When calculating the value of a government contract for the purpose of the contract register under Division 5 of Part 3 the GIPA Act, GST must be included in the total value of the contract: section 27(1).

1.2 Making an access application

The existing requirements under section 41 of the GIPA Act remain, but the section now includes some additional requirements detailed below:

- Section 41(1)(d) now requires that a valid access application must include the name of the applicant and a postal or email address.
- Section 41(1A) provides that an applicant must disclose on their access application whether they have applied to another agency, at any time, for substantially the same information, and if so, they must identify the agency. However, an application will not be invalid if an applicant fails to make this disclosure.
- Under section 41(2), an agency is now able to approve additional facilities for the making of an access application, or payment of an application fee without seeking the approval of the Information Commissioner. Additional facilities may include:
    - electronic lodgment of applications via a website or email, or
    - payment of an application fee via direct transfer or credit card.

1.3 Transfer of applications between agencies

Under section 44(2), an agency may make a partial transfer of an application to one or more agencies. To facilitate this, the agency may split the application into two or more applications. Where an application is split into two or more applications, each part is to be treated as a separate application with separate rights of review.

1.4 Consultation with other agencies

Section 54A clarifies that an agency may consult with any other agency in order to:

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

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

1.5 Proof of identity of the applicant

An agency may require a person to take reasonable steps to prove his or her identity before providing personal information to that person in response to an access application: section 55(5).

1.6 Objection to inclusion in a disclosure log

An authorised objector is now entitled to object to the inclusion of information in an agency's disclosure log where that information concerns research or the compilation or analysis of statistics that has been, is being, or is intended to be, carried out by or on behalf of the objector: section 56(2)(c).

If an authorised objector has objected to the inclusion of information in the agency's disclosure log, the agency must decide:

- whether the authorised objector is entitled to object, and
- if the agency has decided that the authorised objector is entitled to object, whether the objection outweighs the general public interest in including the information in the disclosure log: section 56(3).

1.7 Decisions that information is already available

An agency can now refuse an application on the grounds that the information is already available to the applicant where:

- the information has already been provided to the applicant and there is no reason to believe they are no longer in possession of the information, or

- the information is publicly available on a website, or
- the information is available under a standing rule or order of the Legislative Council or Legislative Assembly.

Where an agency makes the decision to refuse access on the grounds that the information is already available to the applicant, section 59(2) requires the agency to provide a reason for this decision in its notice of decision to the applicant.

1.8 Decision to refuse to deal with an application

Section 60(1)(e) provides that an agency may refuse to deal with an access application where the agency reasonably believes the applicant (or a person acting in concert with the applicant) is:

- a party to current proceedings before a court, and
- is able to apply to the court for the information.

Section 60(3A), added in 2018, provides a non-exhaustive list of factors that decision-makers may take into account when deciding whether an application would involve an unreasonable and substantial diversion of an agency's resources. The agency may, without limitation, take the following factors into consideration:

- the estimated volume of information involved in the request
- the agency's size and resources
- the required period for deciding the application.

Section 60(3B) provides that any consideration under subsection (3A) must, on balance, outweigh:

- the general public interest in favour of the disclosure of government information, and
- the demonstrable importance of the information to the applicant, including whether the information is personal information that relates to the applicant, or could assist the applicant in exercising any legal rights.

1.9 Deemed refusals and refund of fees

Section 63(1) requires an agency to refund an application fee in the event that the agency does not decide an access application within the statutory timeframe under section 57(1). The added subsection 63(5) provides that there is no requirement to provide the applicant with a refund of the application fee in circumstances where the application was transferred to or from another agency.

1.10 Discounting processing charges

The total discount on any processing charge for dealing with an access application must not be more than 50%. This applies whether the applicant has sought a discount on the grounds of financial hardship under section 65, public benefit under section 66, or where both sections apply: section 64(5).

1.11 Timeframe to complete an internal review

If an agency reasonably believes 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 by any of those persons: new section 86(1A).

1.12 External review by the Information Commissioner

Section 92A provides that the Information Commissioner has 40 working days ('review period') from the day on which all necessary information relating to a review application has been received by the Information Commissioner, to complete the review of a decision and make any recommendations.

The Information Commissioner and the applicant can agree to an extension of time for the review period and the agency must be notified of any extension by the Information Commissioner: section 92A(2).

If the Information Commissioner has not made any recommendations in the review period, the Information Commissioner is deemed to have made no recommendations to the agency: section 92A(3).

The applicant must be notified when the review is completed and advised of any recommendations made by the Information Commissioner: section 92A(4).

1.13 Burden of proof during external review

If review of a decision is to include information in a disclosure log despite an objection by the applicant, the applicant must establish why the objection outweighs the public interest to have the information included: section 97(4) and section 105(4).

1.14 Administrative review of decisions by NCAT

A new subsection 100(2) provides that an aggrieved person, other than the access applicant, must exercise their internal review rights under Division 2 of Part 5 before they are entitled to apply to NCAT for an administrative review.

1.15 Restraint orders

NCAT may make a restraint order that applies to the access applicant and others who are acting in concert with the applicant: new section 110(1).

The added subsection 110(3) sets out the circumstances in which a restraint order may be limited, for example, to a particular time period. Subsection 110(5A) sets out factors that NCAT may consider when deciding whether to approve an access application being made by a person subject to a restraint order.

1.16 Report on improper conduct

If following completion of an administrative review, NCAT is of the opinion that an officer of an agency has failed to exercise, in good faith, a function conferred on the officer by or under the GIPA Act, NCAT may on its own initiative bring the matter to the attention of the relevant Minister, or the Information Commissioner if the relevant Minister was a party to the proceedings.

1.17 Annual reports

An agency may only submit its annual GIPA report to the Information Commissioner after the agency's annual report has been tabled in Parliament by its Minister: section 125(1) and (3).

1.18 Cabinet information

Information is 'Cabinet information' if it is contained entirely, or in part, in a document that reveals information concerning a Cabinet decision, or reveals a position of a Minister on a matter in Cabinet: clause 2(4) of Schedule 1.

1.19 Conclusive presumption of overriding public interest against disclosure

Privilege – there is a conclusive presumption that there is an overriding public interest against disclosure of any information contained in a document that was, in response to a court order, not compelled by a court to be produced on the grounds of privilege: new clause 5A of Schedule 1.

Law enforcement and public safety – there is a conclusive presumption that there is an overriding public interest against disclosure of information if the information is contained in a document concerning law enforcement and public safety created by a law enforcement agency in another jurisdiction, including a jurisdiction outside Australia: new clause 7(f) of Schedule 1.

1.20 Excluded information of particular agencies

The review functions of the Privacy Commissioner are excluded information unless the Privacy Commissioner consents to the disclosure: clause 2 of Schedule 2.

1.21 Definition of "working day"

A 'working day' means any day that is not a Saturday, Sunday, public holiday or any day during the period declared by the Premier as the Christmas closedown period: clause 1 of Schedule 4.

1.22 Personal information

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 they were engaged in the exercise of public functions, is not 'personal information' for the purposes of the GIPA Act: clause 4(3)(b) of Schedule 4.

1.23 Government information held by an agency

Information contained in a record held by an agency that was unsolicited and not relevant to the agency's business or functions, is not government information held by the agency: clause 12(4) of Schedule 4.

Further guidance

Agencies are requested to refer to this fact sheet and the GIPA Act and Regulation before relying on any guidance materials published prior to December 2018. For more information

Contact the Information and Privacy Commission NSW (IPC):

Freecall: 1800 472 679
Email: ipcinfo@ipc.nsw.gov.au
Website: www.ipc.nsw.gov.au

NOTE: The information in this fact sheet is to be used as a guide only. Legal advice should be sought in relation to individual circumstances.