

Unreasonable and substantial diversion of agency resources

Who is this information for?

If you are NSW public sector staff deciding requests for information access.

Why is this information important?

This fact sheet clarifies for you what may be considered an unreasonable and substantial diversion of resources and what review rights apply if your agency decides to refuse to deal with an access application on that basis.

Relevant legislation

This Fact Sheet is based on the following legislative provisions:

Government Information (Public Access) Act 2009 (GIPA Act) pt 4 div 3

Overview

The object of the 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 provides the legislative framework for access applications seeking government information.

The GIPA Act provides two discretions where you may not have to search for information or may refuse to deal with an access application if it would require an 'unreasonable and substantial diversion of resources': ss 53(5), 60(1)(a).

Because a member of the public has a statutory right to access government information, the GIPA Act requires that these discretions be interpreted and applied to facilitate access to government information promptly and at the lowest reasonable cost: s 3(2).

You should consider all information access applications carefully, and only use this ground as a last resort after making every attempt to assist an applicant to narrow their request.

If you rely on this discretion, be specific with any reasons for refusal and document those reasons clearly. This information will be important if the applicant seeks external review or administrative

review as the onus is on your agency to explain the decision: ss 97, 105.

What is an unreasonable substantial diversion of resources?

Section 60(3A) sets out things you can consider in deciding whether dealing with an application would require an unreasonable and substantial diversion of your agency's resources, including:

- the estimated volume of information involved in the request
- the agency's size and resources
- the decision period under s 57.

Section 60(3B) also requires that these must 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 rights under any Act or law.

NCAT has considered what is meant by an unreasonable and substantial diversion of resources. This provides useful guidance.

Colefax v Department of Education and Communities (NSW) (No 2) [2013] NSWADT 130 (at [25]) confirmed a number of non-exclusive factors to be taken into account in assessing whether a request includes an unreasonable and substantial diversion of resources:

- the terms of the request, especially whether it is of a global kind or a generally expressed request
- the demonstrable importance of the document or documents to the applicant as a factor in determining what in the particular case is a reasonable time and a reasonable effort

- whether the request is a reasonably manageable one giving due, but not conclusive, regard to the size of the agency and the extent of its resources usually available for dealing with information access applications
- the agency estimate as to the number of documents affected by the request and, by extension, the number of pages, the amount of officer time and the salary cost
- the reasonableness or otherwise of the agency's initial assessment and whether the applicant has taken a co-operative approach in redrawing the boundaries of the application
- the timelines that are binding on the agency
- the degree of certainty that can be attached to the estimate made as to documents affected and hours to be consumed, and whether there is a real possibility that processing time may exceed, to some degree, the estimate first made
- the extent, possibly, to which the applicant is a repeat applicant to the agency in respect of applications of the same kind or a repeat applicant across government in respect of applications of the same kind, and the extent to which the present application may have been adequately met by those previous applications.

NCAT has also considered processing time as a potential factor. In one case, evidence before the Tribunal included an agency's annual report that suggested a processing time that goes beyond 40 hours may properly raise concerns. NCAT has since noted caution about any 40-hour threshold, as there are a number of cases in which a greater burden on agency resources has been allowed.

The volume of information involved

When you receive a large access application, s 53 sets out what you are required to do:

- consider what information your agency holds *at the time of the application*
- undertake 'reasonable searches' using any resources available to your agency.
- you don't have to search for information stored in an electronic backup system unless the record containing the information has been destroyed, lost or transferred in contravention of your agency's record management policies or the provisions of the *State Records Act 1998*.

See [Fact Sheet – Reasonable Searches under the GIPA Act](#).

Before you can refuse to deal with an access application on the basis of an unreasonable and substantial diversion of resources, you must give the applicant a reasonable opportunity to narrow the scope of their application: s 60(4). The time period will stop running during this time.

Some examples of how you may gain agreement to a narrowing of an access application include:

- providing the applicant a specific date range for the information sought or reducing the date range for the information sought
- proposing to exclude particular information or categories of information such as duplicates or copies of information the applicant has sent to the agency
- asking the applicant to provide file references if known
- proposing to exclude personal information of other people ('third parties').

If the applicant is unable or does not wish to narrow the application, then they can advise you that the original request is maintained. You may then decide to refuse to deal with the application on the basis of an unreasonable and substantial diversion of resources.

If the applicant agrees to narrow the application, but the scope remains too broad, and there is no further agreement to amend scope, the agency may decide to refuse to deal with the application.

Agency's size and resources

NCAT has encouraged a positive/proactive obligation on agencies to have adequate arrangements in place to meet access requests, particularly requests relating to matters of public importance. In *Cianfrano v Director General, Premier's Department* [2006] NSWADT 137, [59], NCAT indicated that where an agency managed its resources so that it effectively limited its capacity to deal with large requests, 'This would defeat the very real purpose of the Act in providing the community with a mechanism that enables to be exposed to public view complex areas of decision-making'.

You will need to evidence of the impact and effect of meeting the access request.

Previous applications

You can consider two or more applications and previous applications as the one application if they are related and made by either the same applicant or persons acting in concert: s 60(3).

You should distinguish between applications made by a representative entity on behalf of clients as opposed to other repeat applications by either the same applicant or persons acting in concert in connection with applications.

Providing reasons for refusal

If you do refuse an access application on the basis of an unreasonable and substantial diversion of resources, you must state your agency's reasons for the refusal in your notice of decision: s 60(5).

Your reasons should include an explanation of the grounds of refusal as outlined by s 60, and to assist the applicant in understanding your decision. For example, you could outline the assessment of processing time and impact on resources or any other factors that were considered as part of the assessment of the application.

Can the applicant get a refund of the application fee?

If you refuse to deal with an access application, including on the basis of an unreasonable and substantial diversion of resources, the applicant is not entitled to a refund of the application fee: s 60(6).

Review of decisions about refusing to deal with access applications

Section 80(c) provides that decisions to refuse to deal with access applications are reviewable by the agency, the Information Commissioner, and the NSW Civil and Administrative Tribunal (NCAT). See IPC [Fact Sheet: Your review rights under the GIPA Act](#).

Other useful resources

Other resources that may be useful on this topic include:

- [IPC Fact Sheet – Reasonable Searches under the GIPA Act](#)
- [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
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.