Calculation of time under the GIPA Act

The *Government Information (Public Access) Act 2009* (GIPA Act) specifies time periods for agencies to make decisions about access applications, as well as time restrictions that apply to applicants who seek reviews of agency decisions. This Fact Sheet provides information to the calculation of time for action under the GIPA Act.

When does a time period apply under the GIPA Act?

The GIPA Act imposes time frames according to 'working days' which commence upon an agency's receipt of an access application.

A time period applies to **agencies** in the following circumstances:

- an agency is to decide that an application for access to government information is valid within 5 working days after the application is received[1]

- an agency is to decide an access application within 20 working days after the agency receives the application ("**decision period**"), including any extensions by up to 10 working days, with a maximum extension of 15 working days[2]

- an agency is to give at least 20 working days for payment of an advance deposit of the estimated processing charges on an access application[3]

- an agency is to acknowledge receipt of an application for internal review within 5 working days, and provide notice of the outcome of the internal review within 15 working days ("**review period**").[4]

A time period also applies to **access applicants** and **individuals** in the following ways:

- an access applicant is to access the information within 6 months from when the notice of the decision to grant access is given to the applicant ("**access period**")[5]

- a person is to exercise **review rights** by applying for internal review by the agency no more than 20 working days after notice of the decision[6]

- a person is to exercise review rights by applying for external review of an agency's decision by the Information Commissioner within 40 days after being notified of the agency's decision[7]

- a person is to exercise review rights by applying for external review by the NSW Civil and Administrative Tribunal (NCAT) within 40 days after the notice of the decision, or any time up to 20 days after being notified of the completion of the review by the Information Commissioner.[8]

The **Information Commissoner** also has a statutory time limit for completing reviews of agencies' decisions:

- the Information Commissioner is to complete and make any recommendations on review within 40 days after the Commissioner receives all information considered necessary to complete the review ("**review period**").[9]

What is a working day?

Under the GIPA Act, the required period within which an agency is to make a decision (decision period) or within which an applicant is to apply for review of a decision (review period) is calculated according to **working days**.[10]

A working day means any day that is **not** a Saturday a Sunday, a public holiday, or any day during the period declared by the Premier as the Christmas Closedown period.[11] These dates will not be counted as days when calculating the date of the decision or the date by which an applicant is to apply for internal or external review.

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[1] GIPA Act section 51(2)
[2] GIPA Act section 57
[3] GIPA Act section 68(3)(c)
[4] GIPA Act sections 83(3) and 86(1)
[5] GIPA Act section 77
[6] GIPA Act section 83(1)

[7] GIPA Act sections 90
[8] GIPA Act section 101
[9] GIPA Act section 90A
[10] GIPA Act sections 51(2), 57, 83, 86, 90 and 101
[11] GIPA Act clause 1 of Schedule 4

The Premier's Memorandum for Christmas Closedown declares closedown dates each year between December and January in the following calendar year for agencies not involved in the delivery of front line services.

While these dates are not all public holidays, they will not be counted as "working days" in the required time period.

The Premier's Memorandum identifying the Christmas Closedown is made available on the NSW Department of Premier & Cabinet website each year.

Calculating a working day

In reviewing a decision made under the GIPA Act, the NCAT has stated that where an Act prescribes a period of time dating from a particular event, the day of that event is excluded from the calculation of the prescribed or allowed period of time.[12]

For example:

- In the NCAT decision in *Saleam v Sydney Local Health District* [2020] NSWCATAD 77 at [10]-[15], the NCAT said that in calculating the 40 working day review period for seeking NCAT review of the agency's decision notified to the applicant on 21 August 2019, it was necessary to exclude the day of 21 August as well as Saturdays, Sundays or any public holidays. The review period expired on 17 October 2019 but the application was not made until 4 November 2019 which was outside the 40 working day limit.

- In the NCAT decision in *Hariz v Commissioner of Police, NSW Police Force* [2021] NSWCATAD 353 at [26], the NCAT said that in the calculation of the 20 working day period for seeking NCAT review of the decision dated 27 May 2020 and sent by email on 27 May 2020, it is necessary to exclude 27 May 2020, Saturdays, Sundays and 8 June 2020, being a public holiday. With the exclusion of those days, the 20 working day period expired on 25 June 2020.

- In the NCAT decision in *CCB v Department of Education and Communities* [2015] NSWCATAD 145 at [45]-[48], the NCAT said that the decision deemed to be the original decision on an access application made on 14 February 2014 was the decision dated 12 March 2014. While a new decision was made by the Department following recommendation by the Information Commissioner on 8 December 2014, the NCAT said that this was outside the required 15 working days for making an internal review decision. Therefore, the original

decision dated 12 March 2014 was the only decision under review.

Why is the date of the notice of decision significant?

The GIPA Act's time frames for decision making by agencies are significant to the GIPA Act's objective to facilitate access to information that is timely, efficient, and not unnecessarily delayed.

The time periods for limiting when a person can make an application for internal or external review of a decision are calculated from the date that the decision is made by an agency, and notice given to an access applicant.

A decision can be made at any time within the standard 20 day working day decision period.

If the 20 working day mark is reached before the agency decides the application and issues a notice the decision period expires and the agency is deemed to have refused to deal with the access application.[13]

While the GIPA Act does not prevent an agency from making a "late decision",[14] agencies are strongly encouraged to comply with the decision period for determining whether to provide access to government information so as to uphold the objects of the GIPA Act.[15]

The decision date is significant to review rights because it identifies the starting date in the calculation of whether an application for internal review[16] or external review[17] is made within the statutory time period for review. The calculation of time starts on the first working day after the notice of decision is posted.

Extension of time periods

The decision period for determining an access application can also be calculated according to any extension of time permitted by the Act. However, this should only be extended where the applicant is consulted and agrees to the extension,[18] or if consultation is required with another person in relation to the access application.[19]

In the NCAT decision in *Walton v Eurobodalla Shire Council* [2022] NSWCATAD 46, the NCAT accepted that the agency had completed the decision in 30 working days by the 10 day extension to the standard 20 working days which is permitted by the GIPA Act. However, the NCAT did not accept the Council's reasons for extending the time period to search email archives of records, and also noted that the applicant had not consented to the extension.

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[12] *Saleam v Sydney Local Health District* [2020] NSWCATAD 77 at [11] –[14].
[13] GIPA Act section 63
[14] GIPA Act section 63(2)
[15] GIPA Act section 3

[16] GIPA Act section 83
[17] GIPA Act section 90 and 100
[18] GIPA Act, sections 57(4), 86(4), 92A(2)
[19] GIPA Act, sections 54, 86(1A) and (2)

Further information about extensions can be found in the IPC [Fact Sheet – Timeframes and extensions for deciding access applications under the GIPA Act](#).

Can a time period 'stop running'?

The calculation of the decision period may require the agency to consider when time will stop running in certain circumstances permitted by the GIPA Act. This includes:

- while the applicant is being given an opportunity to amend an access application that the agency considers would involve an unreasonable and substantial diversion of the agency's resources[20]

- where an agency makes a decision to require an advance deposit of the estimated processing charges. In these circumstances, the period within which the access application is to be decided stops running from when the decision to require an advance deposit is made until payment of the advance deposit is received by the agency.[21]

The notice of the requirement for an advance deposit must specify a date for payment, being a date at least 20 working days after the date the notice is given.[22]

The time period within which the information is to be provided to an access applicant will also be stopped while review rights given to a third party are pending. [23]

What are the requirements for giving notices under the GIPA Act?

Section 126 of the GIPA Act outlines the general requirements for any notices that agencies give under the GIPA Act.

The specific notice requirements concerning decisions made about access applications, include:

- acknowledging receipt of an application as a valid access application[24]

- giving reasons for the decision to refuse to deal with the access application[25]

- giving reasons for the decision to refuse to provide access to information because there is a public interest consideration against disclosure[26]

- notices of fees or charges for determining an access application.[27]

Agencies should set out the reasons for all decisions made about an access application.

Notification by post

Notices may be posted to a person at the address they have provided or by another method as agreed.[28]

When an applicant makes an access application, the applicant must state the postal or email address as the address for correspondence in connection with the application.[29]

For notices posted to the postal address provided by the person in their correspondence, the notice is considered to be given to the person on the date that it is posted by the agency.[30] This means that the date that the notice is "given" is when the particular act to give the notice is performed by the agency.[31]

Notification by email

A notice of decision sent by email is considered to be given to an applicant when the applicant receives it by email.[32]

A notice from the Information Commissioner confirming the conclusion of the external review is also considered to be given when the applicant receives it by email.

In the NCAT decision in *Hariz v Commissioner of Police, NSW Police Force* [2021] NSWCATAD 353 at [22], the NCAT found that the applicant for review was notified of the completion of the Information Commissioner's review on 27 May 2020. This was inferred from the date of the IPC's letter, the fact that it was sent by email, and the absence of any contention by the applicant that the IPC's letter was received by him at a later date. Therefore, section 101(2) required that the application for administrative review be made to the NCAT within 20 working days of 27 May 2020.

What do the words 'given to' mean for a notice?

In the decision by the NCAT in *Choi v University of Technology Sydney* [2017] NSWCATAD 198, the NCAT considered the meaning of the words 'given to' in determining whether an application for internal review had been made within the review period.

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[20] GIPA Act, section 60(4)
[21] GIPA Act, section 68(2)
[22] GIPA Act, section 68(3)(c)
[23] GIPA Act, section 54(6) and (7)
[24] GIPA Act section 51
[25] GIPA Act section 60(5)
[26] GIPA Act section 61

[27] GIPA Act section
[28] GIPA Act section 126(1A)
[29] GIPA Act section 41(1)(d)
[30] GIPA Act section 126(2)
[31] *Kyogle Shire Council v Muli Muli* (2005) 62 NSWLR 361 at t301-1501
[32] *Choi v University of Technology, Sydney* [2017] NSWCATAD 198 at [26]

The NCAT considered that the words "given to" have their ordinary meaning[33] of "delivered" or "handed over" and found that the notice of decision made on the access application on 25 October 2016 was given to the applicant when it was "received by email" (at [23]) on 25 October 2016.

Can an application for internal review be made more than 20 days after the notice of decision was given to the applicant?

Yes. The GIPA Act allows an agency to agree to accept an application for internal review out of time of the 20 working day limit. However, the agency is not required to do so.[34]

What is the timeframe for seeking an external review by the Information Commissioner?

An application for external review to the Information Commissioner must be made within 40 working days after the notice of decision is given to the applicant.[35]

Can an application for external review be made out of time of the review period?

Information Commissioner review

No. The GIPA Act does not enable the Information Commissioner to accept an application for review made out of time.

Therefore, if a person makes an application to the Information Commissioner after 40 working days of being given notice of the decision, the Commissioner cannot undertake review of the agency's decision.

However, the applicant may still be able to apply for review by the NCAT.

NCAT review

The GIPA Act requires that an application for administrative review must be made to the NCAT within 40 working days after the notice of decision is given to the applicant.[36]

However, if the decision is the subject of review by the Information Commissioner, the application to the NCAT can be made at any time up to 20 working days following the completion of the Information Commissioner's review.[37]

The NCAT has discretion to accept an application for administrative review made out of time and extend the time for making such an application if it is of the opinion that the person has provided a "reasonable excuse" for the delay in making the application.[38]

The GIPA Act sets out certain requirements on late applications, including that the person will be required to make an application in writing to extend the time for the making of the application for review.[39]

The NCAT has stated that the applicant must establish a "causal connection between the excuse and the delay".[40]

The following examples have been accepted by NCAT as a "reasonable excuse" for extending time:

- where the delay was 19 working days and the NCAT was satisfied that the applicant genuinely held the belief that the time for making an application for NCAT review flowed from the date of a decision on a complaint investigated by the Information Commissioner under the *Government Information (Information Commissioner) Act 2009*[41]

- where the delay of 92 working days was not considered substantial where the medical evidence of chronic Post Traumatic Stress Disorder was established to show the causal connection between the psychological condition and the delay in filing the application[42]

- where a 31 working day delay was not considered significant as the NCAT observed that the applicant was distracted by ongoing correspondence and multiple matters with the agency; and the review period intervened with the Christmas/New Year period.[43]

The NCAT did not find a reasonable excuse for the applicant's delay in the following cases:

- where the delay of 4 weeks was due to the applicant saying that she was not aware of an invoice for processing charges attached to the email which notified her of the agency's decision.[44]

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[33] *Melville v Townsville City Council* [2004] 1 Qd R 530 at [27]
[34] GIPA Act section 83(2)
[35] GIPA Act section 90
[36] GIPA Act section 101(1)
[37] GIPA Act section 101(2)
[38] GIPA Act section 101(4)
[39] GIPA Act section 101(5)
[40] *Thomson v Sydney Trains* [2015] NSWCATAD 257 at [31].

[41] *FlyBlue Management Pty Ltd v NSW Crown* Lands *Department* [2021] NSWCATAD 226 at [38]-[40]
[42] *DTB v Commissioner of Police, NSW Police Force* [2019] NSWCATAD 114 at [83].
[43] *O'Grady v Sutherland Shire Council* [2021] NSWCATAD 165 at [30]-[32]
[44] *Choi v University of Technology, Sydney* [2017] NSWCATAD 198 at [29]-[30]

- where the applicant lodged an application for review on 26 April 2021 of a decision notified on 30 August 2020. The NCAT rejected the applicant's submission that he delayed due to being in custody. The NCAT considered that the delay was not reasonable as he made other applications under the GIPA Act during this time and had available supports to assist in making the application to the NCAT.[45]

For more information

Information and Privacy Commission

Contact the Information and Privacy Commission NSW (IPC):

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

NSW Civil and Administrative NCAT (NCAT)

Telephone: 1300 00 NCAT or 1300 006 228
               and follow the prompts

Website: www.ncat.nsw.gov.au

Interpreter Service (TIS): 13 14 50

National Relay Service for TTY Users: 13 36 77

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

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[45] *Eggleton v Secretary, Department of Communities and Justice* [2022] NSWCATAD 67 at [1] and [17]