



Fundamentals for deciding an access application under the GIPA Act

The purpose of this fact sheet is to provide agency decision makers with practical guidance about their obligations when a formal access application is made under the *Government Information (Public Access) Act 2009* (GIPA Act).

How are access applications decided?

What final decisions can an agency make?

The GIPA Act provides that an agency must make a final¹ decision in response to an access application². The GIPA Act sets the parameters for decision-making authority by limiting the kinds of decisions which an agency can make about access to information.

Section 58(1) of the GIPA Act sets out the available decisions. These decisions include:

- deciding to provide access
- deciding to refuse to provide access because of an overriding public interest against disclosure
- deciding to refuse to deal with the application.

Decisions must also be made in accordance with the relevant mandatory procedures and obligations set out in the GIPA Act. These obligations include certain actions such as:

- conducting the 'public interest test' for public interest determination³
- conducting 'reasonable searches' for government information⁴
- stating the reasons for a decision.⁵

Who can make the decision?

Decisions can be made by the Principal Officer of the agency or by another person with appropriate delegation or authorisation.⁶

How long does an agency have to make the decision?

Agencies are to decide an application within 20 working days unless an extension of time applies.⁷

How is a decision communicated?

Decisions are communicated in writing to the Applicant within a formal notice which includes relevant reasons.⁸

An agency must issue a notice that meets the requirements prescribed by section 126 of the GIPA Act. These requirements apply to both the final decision as well as to any other preliminary decisions an agency makes in processing an application (e.g. when requiring an advance deposit).

Notices must:

- be in writing
- include the date of the decision
- include a statement of the review rights attached to the agency's decision, including details of the time period within which the review rights must be exercised
- include the contact details of an officer to whom inquiries about the decision can be directed; and
- not disclose information for which there is an overriding public interest against disclosure.

Notices are to be posted or sent to the applicant by some other method as has been agreed (e.g. the Applicant's nominated email address)⁹

What statement is needed to justify public interest determination?

The requirement to provide reasons

Section 61 of the GIPA Act provides that when an agency refuses to provide access to information because there is an overriding public interest against disclosure, its notice of decision must include the following:

¹ Commissioner of Police v Danis [2017] NSWCATAP 7 at [18]

² Section 57(1) of the GIPA Act

³ Section 13 of the GIPA Act

⁴ See IPC Fact Sheet – Reasonable searches under the GIPA Act

⁵ See sections 61, 60(5) and 59(2) of the GIPA Act

⁶ See IPC Fact Sheet - Delegation or Authorisation of GIPA Act functions

⁷ See IPC Fact Sheet – Timeframes and extensions for deciding access applications under the GIPA Act

⁸ Section 61(a) of the GIPA Act for example

⁹ Section 126(1A)

- The **reasons** for its decision to refuse access
- The findings on any material questions of fact, and the sources of information on which the findings are based
- The general nature and format of the records that contain the information

The requirement to provide reasons is complementary to the obligation to undertake the 'public interest test'.

The public interest test

The IPC Fact Sheet – [What is the public interest test?](#) – details the steps involved in undertaking the public interest test. Under the GIPA Act there is a presumption in favour of disclosure and clear reasons are required to overcome that presumption. In short, the conduct of the public interest test involves a decision maker considering various public interest factors and coming to a view about where the public interest lies based on the anticipated effects of disclosure. The public interest test is not an exercise in mathematical calculation and by its nature involves the subjective opinions of the individual decision maker.¹⁰

Consistent with good administrative practice¹¹ a decision maker's consideration of the public interest should be reflected in their reasons by way of clear and complete findings which address the material questions of fact and support the reasons provided.

Relevantly, the NSW Civil and Administrative Tribunal (NCAT) decision in *McKinnon v Blacktown City Council* [2012] NSWADT 44 at [44] the NCAT said:

"...the weight of authority establishes that it is necessary for the Agency to **demonstrate**, with respect to each public interest consideration against disclosure upon which it relies, that disclosure could reasonably be expected to have the nominated effect..."

Demonstrating the application of the public interest test

In justifying the reliance on a public interest consideration against disclosure, an agency should address all the elements of a consideration against disclosure, which includes identifying an anticipated prejudicial effect and explaining how the disclosure of the information "could reasonably be expected to" have that effect.¹²

Additionally, a consideration once demonstrated must be weighted and balanced against identified factors in favour of disclosure.

Seven key facts about public interest determination

Finally, decision makers should keep in mind the following seven principles to ensure sound administrative decision making in their practice of public interest determination under the GIPA Act:

1. Ensure you have regard to all relevant Information Commissioner guidelines¹³ as required by the statutory principles for public interest determination set out at section 15 of the GIPA Act
2. Ensure you identify all considerations *favouring* disclosure.¹⁴ The Act contemplates a real account of positive factors.¹⁵ Note: the examples provided by the Act are not an exhaustive list of potential considerations in favour
3. Ensure you do not account for irrelevant factors. The fact that the information might be misinterpreted or that disclosure might cause embarrassment or loss of confidence in the Government must not form part of your consideration¹⁶
4. Support your public interest claims with relevant evidence because "a mere statement that disclosure could reasonably be expected to have a particular effect is insufficient"¹⁷
5. Provide the sources for any information which informed your reasons. For example, by referencing that a view has been informed by consultation with a business area specialist
6. Remember that a consideration against disclosure is not an exemption¹⁸. All relevant considerations must be afforded weight and balanced against the presumption favouring the disclosure of government information^{19, 20}
7. Remember that the public interest test must be applied to the government *information* within each discrete record, rather than to classes or categories of records.²¹ The public interest test can apply in different ways to different information. This is true even where sets of information are of the same essential kind²².

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.

¹⁰ *Hurst v Wagga Wagga City Council* [2011] NSWADT 307

¹¹ See [NSW Ombudsman Good conduct and administrative practice: Guidelines for state and local government](#) (3rd Edition, March 2017).

¹² Section 14 of the GIPA Act

¹³ <https://www.ipc.nsw.gov.au/information-access/agencies/resources>

¹⁴ Section 12 of the GIPA Act

¹⁵ <https://www.ipc.nsw.gov.au/whitaker-v-illawarra-shoalhaven-local-health-district-2018-nswcatad-183>

¹⁶ Sections 15(c) and 15(d)

¹⁷ *Newcastle City Council v Newcastle East Residents Action Group Inc* [2018] NSWCATAP 254 at [59]

¹⁸ *Miskelly v Transport for NSW* [2017] NSWCATAD 75 at [27]

¹⁹ Section 5 of the GIPA Act

²⁰ *McEwan v Port Stephens Council* [2021] NSWCATAD 110 at [142]

²¹ <https://www.ipc.nsw.gov.au/taylor-v-destination-nsw-2020-nswcatad-137>

²² *Destination NSW v Taylor* [2019] NSWCATAP 123 at [69] and see IPC case note <https://www.ipc.nsw.gov.au/destination-nsw-v-taylor-2019-nswcatap-123>