

What is an agency?

The *Government Information (Public Access) Act 2009* (NSW) (GIPA Act) provides the public with a right to access government information held by agencies.

An 'agency' is defined in the GIPA Act¹ as a:

- (a) Public Service agency
- (b) Minister (including a person employed by a Minister under Part 2 of the *Members of Parliament Staff Act 2013*)
- (c) public authority
- (d) public office
- (e) local authority
- (f) court
- (g) person or entity that is an agency pursuant to regulations made under Clause 5 of Schedule 4 of the GIPA Act.

Public Service Agency

The GIPA Act provides that a Public Service Agency has the same meaning as in the *Government Sector Employment Act 2013* (GSE Act). Section 3 of the GSE Act defines a Public Service agency as a:

- Department (listed in Part 1 of Schedule 1 to the Act), or
- Public Service executive agency (being an agency related to a Department), or
- separate Public Service agency.

You will find a current list of Public Service agencies recognised by the GIPA Act under Schedule 1 of the GSE Act.

Each Public Service agency should make it clear to the public how it deals with formal and informal requests for information. For example, some Departments coordinate all requests for information centrally, while others refer requests to the Public Service executive agency that holds the relevant information.

The IPC is of the view that the open access information required to be published on agency websites should be located on the website of the agency where people would be most likely to look for it. In most cases, this would be on the Public Service executive agency website, as it is not always obvious to the public which agencies fall within the umbrella of each Department.

As a matter of good practice, the Department's website should also contain links to the other pages.

Ministers and their staff

Ministers and their staff are considered to be agencies under the GIPA Act. They must comply with the same requirements as other agencies, but do not need to have an agency information guide² or submit an annual report.³

The GIPA Act applies to information held by Ministers and their staff "in the course of the exercise of official functions in, or for any official purpose of, or for the official use of, the office of Minister of the Crown".⁴ However, there is a conclusive presumption of an overriding public interest against disclosure of Cabinet or Executive Council information, or information contained in the Register of Interests kept by or on behalf of the Premier pursuant to the Code of Conduct for Ministers.⁵

Public authorities

A 'public authority' is defined in Clause 2(1) of Schedule 4 to the GIPA Act as:

- (a) a statutory body representing the Crown, or
- (b) a body (whether incorporated or unincorporated) established or continued for a public purpose by or under the provisions of a legislative instrument, or
- (c) the NSW Police Force, or
- (d) the Teaching Service, or
- (e) a State owned corporation, or

¹ GIPA Act section 4(1)

² GIPA Act section 20(1)

³ GIPA Act section 125(1)

⁴ GIPA Act clause 11 of Schedule 4

⁵ GIPA Act clauses 2, 3 and 11 of Schedule 1

- (f) a wholly-owned subsidiary of the Crown in right of the state or of a public authority, or
- (g) a body declared by a regulation to be a public authority⁶, including:
 - NSW Adult Migrant English Service
 - Australian Music Examinations Board NSW
 - Duke of Edinburgh Award Scheme (NSW State Committee)
 - Regional Development Australia.

The following are not public authorities:

- (a) an incorporated company or association (unless declared to be a public authority by a regulation)
- (b) the Legislative Council or the Legislative Assembly or a committee of either or both of those bodies
- (c) a Royal Commission or a Special Commission of Inquiry.

Bodies established or continued for a public purpose by or under the provisions of a legislative instrument

In considering whether a particular entity may be captured by clause 2(1)(b) of Schedule 4 to the GIPA Act, it is necessary to also consider the relevant legislation that establishes the entity to determine whether it is established for a public purpose. An examination of legislation may provide the

- nature or role of the entity
- functions and powers conferred
- any duties imposed and
- any express requirements relating to a public purpose.

This will inform a conclusion that an entity is established for a public purpose and therefore captured by the definition of public authority in clause 2 of Schedule 4 to the GIPA Act. The High Court has defined “public purpose” generally as a purpose relating to the public interest, for the public benefit or of public importance.⁷ A similar term, “established for the public purpose”, appears in the *Freedom of Information Act 1982* (Cth).⁸ The term was defined as incorporating functions that are of a public nature for the benefit of the community, functions to be

exercised for public objects, or statutory powers exercised on behalf of the public or state.⁹

The following agencies are, in the view of the Information Commissioner, established for a public purpose and therefore fall within the definition of public authority:

- Racing NSW; and
- Harness Racing NSW.

The above list is not exhaustive.

State-owned corporations

Section 4 of the GIPA Act defines an agency as including ‘a public authority’. Clause 2(1)(e) of Schedule 4 to the GIPA Act interprets a public authority to mean, a state-owned corporation.

Schedule 5 to the *State Owned Corporations Act 1989* lists the following state-owned corporations:

- Essential Energy
- Hunter Water Corporation
- Landcom
- Newcastle Port Corporation
- Water NSW
- Sydney Water Corporation
- Forestry Corporation
- Transport Asset Holding Entity of New South Wales.

Public offices

A ‘public office’ is defined in clause 3 of Schedule 4 to the GIPA Act to mean:

- (a) an office established or continued for a public purpose by or under the provisions of a legislative instrument, or
- (b) any other office to which an appointment is made by the Governor or by a Minister that is declared by the regulations to be a public office.

A ‘public office’ does **not** include, among others:

- the office of Governor, Lieutenant-Governor or Administrator of the State
- any office associated with either House of Parliament

⁶ GIPA Regulation 2018 clause 12

⁷ *Australian Tape Manufacturers Association Ltd v Commonwealth*(1993) 176 CLR 480

⁸ Section 4(1) FOI Act – Definition of ‘prescribed authority’

⁹ *Re Brennan and the Law Society of the ACT*(1984) 1 AAR 529

- a judicial officer of a court
- an office that is already considered to be an agency under the GIPA Act.

Local authorities

The GIPA Act applies to government information held by all local councils, county councils and joint organisations in NSW.

Courts

A 'court' includes:

- (a) a tribunal, a magistrate and a coroner, and
- (b) a registry or other office of a court and the members of staff of that registry or other office.¹⁰

While information relating to a court's administrative functions is covered under the GIPA Act, there is a conclusive presumption of an overriding public interest against disclosure in relation to the judicial functions of a court.¹¹

Universities

Section 4 of the GIPA Act defines an agency as including 'a public authority'. Clause 2(1)(1) of Schedule 4 to the GIPA Act interprets a public authority to include, a statutory body representing the Crown. Schedule 2 to the *Government Sector Finance Regulation 2018* establishes a list of current statutory bodies.

There are 10 universities specified in that Schedule:

- Board of Trustees of the University of Western Sydney
- Council of the Charles Sturt University
- Council of the Macquarie University
- Council of the Southern Cross University
- Council of the University of New England
- Council of the University of New South Wales
- Council of the University of Newcastle
- Council of the University of Technology Sydney
- Council of the University of Wollongong
- Senate of the University of Sydney.

Agencies declared to be part of other agencies

As prescribed by clause 6 of Schedule 4 to the GIPA Act, the regulations may declare that a specified agency is not to be regarded as a separate agency, but instead is to be regarded (for the purposes of the Act) as part of another specified agency.

Schedule 3 to the GIPA Regulation contains a list of agencies that are considered to be part of other agencies for the purpose of 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.

¹⁰ GIPA Act clause 1 of Schedule 4

¹¹ GIPA Act clause 1 of Schedule 2