



What is the public interest test?

Fact sheet
June 2018

The right to information system in New South Wales aims to foster responsible and representative government that is open, accountable, fair and effective.¹

Under the *Government Information (Public Access) Act 2009* (GIPA Act), all government agencies must disclose or release information unless there is an overriding public interest against disclosure.

Fundamental to the obligation to release information is the overarching presumption in favour of disclosure of information.² This is the starting point for all decisions regarding information access by: mandatory proactive disclosure; authorised proactive release, informal release and in response to access applications.³

Accordingly, when deciding whether to release information, decision makers must commence the public interest test from the position of acknowledging the presumption in favour of disclosure of information.⁴

Therefore, unless there is an overriding public interest against disclosure, agencies must provide the information. There are some limited exceptions to this general rule, for example where dealing with an application would constitute a significant and unreasonable diversion of an agency's resources.

Applying the public interest test

The public interest test requires balancing factors for and against disclosure of each piece of government information.⁵ That balancing must be undertaken within the context of the GIPA Act.

Accordingly the:

- object of the GIPA Act;

¹ GIPA Act section 3

² GIPA Act section 5

³ GIPA Act Part 2 Division 1

⁴ GIPA Act section 9

⁵ GIPA Act section 13

- four legislative pathways through which information can be released;
- the presumption in favour of disclosure of information;
- limited factors which operate against disclosure of information;
- identification of irrelevant considerations;⁶ and
- principles that apply to the public interest test

all form part of the legislative context in which the public interest test be undertaken.

Following recognition of the legislative context the public interest test then involves three steps⁷:

1. Identify the relevant public interest considerations in favour of disclosure
2. Identify the relevant public interest considerations against disclosure
3. Determine the weight of the public interest considerations in favour of and against disclosure and come to a conclusion about whether the factors favouring non-disclosure are strong enough to outweigh the factors in favour of disclosure (taking into account the presumption in favour of disclosure).

The public interest test requires that for information to be withheld the factors against disclosure must ultimately **override** public interest considerations in favour of disclosure.⁸

Step 1: Identify the relevant public interest considerations in favour of disclosure

The GIPA Act provides examples of factors that agencies may consider in favour of disclosure.

These are:

⁶ GIPA Act section 15

⁷ *Miskelly v Transport for NSW* [2017] NSWCATAD 75 [12-14]

⁸ GIPA Act section 13

- promoting open discussion of public affairs, enhancing government accountability or contributing to positive and informed debate on issues of public importance;
- informing the public about the operations of agencies and, in particular, their policies and practices for dealing with members of the public;
- ensuring effective oversight of the expenditure of public funds;
- the information is personal information of the person to whom it is to be disclosed; and
- revealing or substantiating that an agency (or a member of an agency) has engaged in misconduct or negligent, improper or unlawful conduct.⁹

This is not an exhaustive list. Accordingly the public interest considerations in favour of disclosure should not be narrowed.

Additionally, in undertaking the public interest test, decision makers are required to consider personal factors in favour of disclosure of information.¹⁰ These factors operate positively in conjunction with other factors in favour of disclosure to foster the release of information.¹¹

The GIPA Act is to be interpreted and applied so as to further the object of the Act and facilitate and encourage, promptly and at the lowest reasonable cost access to government information.¹² Therefore, it is important that decision makers consider additional factors and, where relevant, articulate and apply those additional factors in favour of disclosure. It is also important that decision makers consider contemporary events and materials in identifying public interest factors in favour of disclosure.

The Information Commissioner may also issue guidelines on additional considerations favouring disclosure.

⁹ GIPA Act section 12

¹⁰ GIPA Act section 55

¹¹ *Cousins v Ambulance Service of New South Wales* [2014] NSWCATAD [48]

¹² GIPA Act section 3(2)

Step 2: Identify the relevant public interest considerations against disclosure

The GIPA Act (section 14) provides an exhaustive list of public interest considerations against disclosure. These are the **only** considerations against disclosure that decision makers can consider in applying the public interest test.

Considerations are grouped under the following headings:

- Responsible and effective government (clause 1)
- Law enforcement and security
- Individual rights, judicial processes and natural justice (clause 3)
- Business interests of agencies and other persons
- Environment, culture, economy and general matters
- Secrecy provisions specifically provided in legislation
- Exempt documents under interstate Freedom of Information legislation.

The consideration against disclosure set out in clause 1 and 3 of the Table to section 14 require an objective assessment of whether the effects claimed to operate could be expected to arise. Decision makers must be satisfied that the effect is proven as a fact established to the relevant standard of proof, on the balance of probabilities.¹³

The GIPA Act requires that in applying the public interest test agencies are not to take into account that:

- disclosure might cause embarrassment to, or loss of confidence in, the government or an agency;
- any information disclosed might be misinterpreted or misunderstood by any person.¹⁴

¹³ *Flack v Commissioner of Police, New South Wales Police* [2011] NSWADT 286 [42]

¹⁴ GIPA Act section 15 (c) – (d)

Decision makers must apply the following principles when determining if there is an overriding public interest against disclosure of government information:

- exercise functions to promote the object of the GIPA Act;
- have regard to any guidelines issued by the Information Commissioner;
- observe that disclosure might cause embarrassment to, or loss of confidence in, the government or an agency cannot be taken into account;
- observe that any information disclosed might be misinterpreted or misunderstood by any person cannot be taken into account; and
- in the case of disclosure in response to an access application, disclosure cannot be made subject to any conditions on the use or disclosure of information.

In determining an application decision makers should consider any submissions made by an applicant.

Decision makers may also be required to consult with third parties in relation to an access application.¹⁵

Step 3: Determine the weight of the public interest considerations in favour of and against disclosure and come to a conclusion about whether the factors favouring non-disclosure are strong enough to outweigh the factors in favour of disclosure (taking into account the presumption in favour of disclosing the information).

The identification of one or even several public interest considerations against disclosure is not sufficient justification to refuse to provide information. In each case, decision makers will consider a range of factors, including:

- the nature and context of the information
- any personal factors of the application (under section 55 of the GIPA Act)
- the relative weight of public interest considerations for and against disclosure.

Agencies should refuse to disclose information **if and only if** there is an overriding public interest against

¹⁵ GIPA Act section 54

disclosure.¹⁶ Where considerations on balance favour disclosure, or are evenly balanced, the presumption in favour of disclosure stands, and information should be published or released.

This approach reflects the purpose of the GIPA Act; the principles that apply and the requirements under the Act governing the way in which agencies must undertake their responsibilities under the Act.¹⁷

Other considerations for disclosing information

The GIPA Act contains a number of provisions that may operate to facilitate access to information. These mechanisms may be applied even in circumstances where the decision maker considers that public interest considerations against disclosure **override** the public interest considerations in favour of disclosure.

The provisions are found in sections 72 to 78 of the GIPA Act. They may be applied to mitigate the effect of, or reduce the weight of, public interest considerations against disclosure or even avoid an overriding public interest consideration against disclosure arising, through for example redaction of some information.

It is consistent with the objects of the GIPA Act that these provisions are considered, where relevant, before a decision is made to not disclose information.

Making and communicating a decision

Decision makers are required to provide written reasons for their decision. If access to some or all of the information is refused, a decision maker must:

- provide reasons for the decision;
- set out findings of fact on any material question of fact reference sources of information that informed the findings of fact; and
- set out the general nature and format of the records held by the agency that contain the information concerned.¹⁸

For more information

For more information on consultation see *IPC Guideline 5 Consultation on public interest considerations under section 54* and *Fact Sheet Why consult third parties*.

Contact the Information and Privacy Commission NSW (IPC):

¹⁶ GIPA Act section 13

¹⁷ GIPA Act section 16

¹⁸ GIPA Act section 61

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.