



## Fact Sheet

May 2019

# Applying for Government recruitment information

This fact sheet is designed to assist candidates in seeking access to information under the *Government Information (Public Access) Act 2009* (GIPA Act) following their participation in a recruitment process with a NSW government agency.

Candidates involved in a NSW government recruitment process have an interest in information which informed the decision making and candidate selection processes in relation to that recruitment. Following a recruitment process an applicant may make an access application under the GIPA Act seeking access to government recruitment information. A candidate may also seek feedback from the agency or recruitment panel.

## Can I apply for information about a NSW government recruitment process?

Yes. The GIPA Act gives a person an enforceable right to apply for access to government information and access is only restricted when there is an overriding public interest consideration against disclosure.<sup>1</sup>

You may ask for the recruitment information informally<sup>2</sup> or by making a formal access request to the agency.<sup>3</sup>

If you have asked for the recruitment information informally, the agency may provide access to the information and impose any reasonable conditions it thinks fit<sup>4</sup> or the agency may refuse to release the information to you informally.<sup>5</sup> An agency's decision to refuse to release the information to you informally is not reviewable under the GIPA Act.

For formal access applications, which are made under Part 4 of the GIPA Act there are review rights.<sup>6</sup>

## Will I receive everything I ask for?

Not necessarily. If you have made a formal access request, the agency will consider your request for information and identify the information it holds falling within your request. It will then consider whether the general presumption in favour of disclosure that information requested is to be released<sup>7</sup> is in any way limited by any public interest consideration against disclosing the information.

This balancing is known as applying the public interest test.<sup>8</sup>

For more information about the public interest test see the IPC fact sheet for public sector agencies:

[What is the public interest test?](#)

## What information will generally be made available for disclosure?

It is important that candidates are provided with meaningful and effective feedback to preserve the quality and integrity of government recruitment. Feedback can be mutually beneficial to candidates and the agency concerned. This is particularly important for unsuccessful candidates to understand how decisions have been made and the basis for the selection of the successful candidate. The *Government Sector Employment Act 2013* (GSE Act) and the *Government Sector Employment (General) Rules 2014* (GSE Rules) provide discrete review grounds for some public sector agency merit-based recruitment and promotion decisions in respect of the selection process.<sup>9</sup> Other parts of the government sector, including the NSW Police Force, Transport, the Health Service and Education have other legislative requirements and policies that govern recruitment processes. Similarly Councils who also fall within the jurisdiction of the GIPA Act have legislative requirements and policies that govern their recruitment processes.

1 Section 3(1) GIPA Act

2 Section 8 GIPA Act

3 Section 9 GIPA Act

4 Section 8(2) GIPA Act

5 Section 8(3) GIPA Act

6 Sections 82, 89 and 100 GIPA Act

7 Section 12 GIPA Act

8 Section 13 GIPA Act

9 Rule 24 GSE Rules

Some information is generally made available to unsuccessful applicants, usually by way of oral feedback and can include the outcome, and feedback about their application. This can include information created by the selection panel. Any information provided in this context will exclude identifying information of other candidates.

### What information will generally not be made available for disclosure?

Information that will generally not be disclosed in relation to a government recruitment process may include:

- referee reports of other candidates<sup>10</sup>
- the name and personal contact details of referees<sup>11</sup>
- personal information of other candidates including information which may identify other unsuccessful candidates<sup>12</sup>
- information that has been provided in confidence
- information subject to legal professional privilege
- 'employment check' documents in relation to roles within law enforcement agencies (irrespective of whether they concern the applicant directly)<sup>13</sup>
- an interview performance appraisal completed by the panel during the interview process – including questions and responses.<sup>14</sup>

However, these general considerations do not mean that your right to request this information is restricted. Each application must be considered on its merits by the person deciding your application for information. It is also important that the fact that disclosure of information might cause embarrassment to a government agency is irrelevant, as is the fact that disclosure of information might be misinterpreted or misunderstood.<sup>15</sup>

<sup>10</sup> *Van der Wall v University of Sydney* [2008] NSWADT 213 at [40] – [45]; *Kamminga v Australian National University* (1992) 15 AAR 297; 26 ALD 585

<sup>11</sup> *Ain and Medical Council of NSW* [2013] NSWADT 112 at [112]

<sup>12</sup> *Cameron v Commissioner of Police, New South Wales Police Force* [2014] NSWCATAD 13 at [49] – [53]

<sup>13</sup> *Coote v Commissioner of Police (NSW)* [2009] NSWADT 180; *Smolenski v Commissioner of Police, NSW Police* [2015] NSWCATAD 21

<sup>14</sup> *Smolenski v Commissioner of Police, NSW Police* [2015] NSWCATAD 21 [89]; the Tribunal observed that the questions and responses formed an integral part of the NSW Police's processes for vetting suitable candidates.

<sup>15</sup> Section 15(c) and (d) GIPA Act

### What are the common reasons for an agency not releasing government recruitment information?

There are a number of public interest considerations against the disclosure of information that an agency can consider. These are set out in the GIPA Act and may be referenced in the Agency's decision.<sup>16</sup>

Information about unsuccessful applicants is not generally disclosed to others. Two commonly applied considerations against disclosure of recruitment information are personal information and information provided in confidence.

Other considerations could include that the agency refuses to release information because on balance it may

- prejudice the effective exercise of the agency's functions;
- affect how the agency conducts a recruitment process; or
- be subject to legal professional privilege.

### Personal information

Personal information of others, as well as your own information will be contained in documents generated during a government recruitment process.

It is reasonable to expect that you will be given access to your own personal information, but not to other people's personal information.

This means you might only receive some of the information you seek because the personal information of others may not be released to you even where you may already know the identity of the other people. An agency may take reasonable steps to consult third parties in relation to an access application which seeks access to their personal information.

If the third party is consulted by the agency and they do not object to the disclosure of the information the agency may choose to disclose the information.<sup>17</sup>

An agency may decide to provide access to information even if consultation establishes that a person objects to disclosure.

<sup>16</sup> Table to section 14 and Schedule 1 GIPA Act

<sup>17</sup> Section 54 GIPA Act

However, access is not to be provided until the agency has first given the objector notice of the agency's decision to provide access to the information and notice of the objector's right to have that decision reviewed. Access is not to be provided while review rights on the decision are pending.<sup>18</sup>

In *Polden v University of Sydney* [2016] NSWCATAD 201, for example, the Tribunal found that information regarding employment was personal information, and that clause 3(a) in the table in section 14 of the GIPA Act applied. However, factors raised by the applicant regarding the need to promote accountability and oversight of public funds were given greater weight. The Tribunal considered that there was a strong public interest favouring disclosure of information as to the total cost in salary and related expenses of any job for which a government decides to allocate funding, and that this is even stronger in the case of senior management positions (at [89] – [92]).

It is relevant to note the intersection between the *Privacy and Personal Information Protection Act 1998* (PPIP Act) and the GIPA Act. Section 5 of the PPIP Act provides that nothing in the PPIP Act affects the operation of the GIPA Act. In particular, the PPIP Act does not operate to lessen any obligations under the GIPA Act in respect of a public sector agency. It is also important to note that section 20(5) provides that the PPIP Act does not affect provisions of the GIPA Act which impose conditions or limitations in relation to matters referred to in section 13 (information about personal information held by agencies), section 14 (access to personal information held by agencies) and section 15 (alteration of personal information) of the PPIP Act.

The GIPA incorporates consideration in clause 3 of the table in section 14 of the information protection principles in the PPIP Act and the health privacy principles under the *Health Records and Information Privacy Act 2002*.

### Information provided in confidence

Agencies may identify that information provided to the recruitment panel was provided in confidence and the release of this type of information may affect a person providing confidential information in the future.

This means that you might only receive part of the information you seek.

For example, in *Smolenski v Commissioner of Police, NSW Police* [2015] NSWCATAD 21, the Tribunal found at [73] – [78] that a pro-forma document used by the NSW Police in the course of making enquiries about applicants seeking employment was confidential. The document stated that it contained confidential information. The Tribunal considered that disclosure of the information in the document would prejudice the effective exercise by the NSW Police of its recruiting function for candidates suitable for appointment to a specified position. The Tribunal also noted that the handwritten note on the form was a record of information provided in confidence by a Commonwealth agency as part of the NSW Police's vetting process.

In *Smolenski v Commissioner of Police* [2015] NSWCATAP 235, the Appeal Panel observed at [40]:

*There is a clear public interest in the protection of confidential advice given to interview panels as to the rating, grading or weight to be given to answers, and as to the identification by the interviewee of matters seen as relevant to the position. Similarly, it is not unusual for protection to be afforded on privacy grounds to personal information about private individuals (as distinct from officers engaging in their official functions) who are referred to in records that also refer to the access applicant.*

### Breach of confidence

Agencies may identify that information provided to the recruitment panel was provided in confidence and the release of this type of information would result in an action for breach of confidence, which means the agency could be sued for a breach. Therefore, you might only receive part of the information you seek and not confidential information.

### Effective exercise of agency functions

Agencies may identify that the release of information provided or prepared in connection with a recruitment process may prejudice the effective exercise of the agency's functions.

In *Jenkinson v Department of Education and Communities (NSW)* [2013] NSWADT 280, the Tribunal found that disclosure of information given in the investigation of a complaint could reasonably be

<sup>18</sup> Section 54(6) GIPA Act

expected to prejudice the effective exercise by the agency of its functions in respect of the health and wellbeing of staff (at [46]). In considering this issue, the Tribunal will generally examine how the disclosure of information would adversely impact an agency's exercise of its functions.

### Recruitment

Agencies may identify that releasing information about a recruitment process would affect how the agency conducts the process.

This means that you might only receive some of the information you seek in respect of assessments and outcomes of a recruitment process and not the analysis of the decision making process.

### Legal Professional Privilege

Agencies may identify that some information in a recruitment process is subject to legal professional privilege and that the privilege attached to the information has not been waived.

The Agency will need to show that a lawyer client relationship exists and that advice was produced for the dominant purpose of providing legal advice to a client. In-house lawyers can provide legal advice to the agency which may be subject to a claim of privilege. This means any information that is the subject of a claim of legal professional privilege may not be released.

### Is the assessment of the public interest based on all information in relation to a recruitment process?

The assessment of the public interest is based on consideration of the information generated in relation to the recruitment process. It may be that an agency releases some of the information to you and finds the public interest does not favour releasing other information.

### Should I tell the agency my reasons for asking for the information?

Providing your reasons for asking for the information will assist the agency in identifying the factors in favour of releasing the information, which is part of the agency applying the public interest test.<sup>19</sup>

<sup>19</sup> Section 42(a) GIPA Act

Some of the relevant factors in favour of disclosure that are identified in the GIPA Act include:

- that disclosure of the information could reasonably be expected to ensure effective oversight of the expenditure of public funds<sup>20</sup>
- the information is your personal information<sup>21</sup>
- that disclosure of the information could reasonably be expected to reveal or substantiate that an agency has engaged in misconduct or negligent, improper or unlawful conduct.<sup>22</sup>

There is no limit to the considerations in favour of disclosure that can be raised in an application for information under the GIPA Act.

These factors must be considered by the agency in deciding your application.<sup>23</sup>

However the GIPA Act does not require you to provide your reasons for asking for the information in order to make a valid access application.<sup>24</sup>

### What if I am asking for access to information to ensure the agency has followed its processes?

You should state this in your application and the agency will take these types of reasons into consideration as factors in favour of release when applying the public interest test.<sup>25</sup>

Under section 55(1), an agency may have regard to the personal factors of the application, including

- the applicant's identity and relationship with any other person
- the applicant's motives for making the access application
- any other factors particular to the applicant.

### Doesn't procedural fairness mean I am entitled to a copy of any documents?

Providing access to information following an access application is about applying the requirements of the GIPA Act.

There are separate requirements under the GSE Act, and government policies and procedures for a fair and transparent recruitment process based on

<sup>20</sup> Note to Section 12(2) - (c) GIPA Act

<sup>21</sup> Note to Section 12(2) - (d) GIPA Act

<sup>22</sup> Note to Section 12(2) - (e) GIPA Act

<sup>23</sup> Section 12(2) GIPA Act

<sup>24</sup> Section 41(1) GIPA Act

<sup>25</sup> Sections 12 and 55 GIPA Act

merit selection. Importantly, procedural fairness has a particular legal meaning and is different from the requirements of a merit based recruitment process (although it may be an element of such recruitment).

### Review of agency's decisions

Information on review rights can be found in the IPC fact sheet for citizens: [Your review rights under the GIPA Act](#).

### For more information

Contact the Information and Privacy Commission  
NSW

Freecall: 1800 472 679

Email: [ipcinfo@ipc.nsw.gov.au](mailto:ipcinfo@ipc.nsw.gov.au)

Website: [www.ipc.nsw.gov.au](http://www.ipc.nsw.gov.au)