



information  
and privacy  
commission  
new south wales

# Information Sheets

## *Government Information (Public Access) Act 2009*

### Master List

as at May 2019

*Please note: This resource has been developed by the IPC to be considered alongside the IPC's review reports. It is not intended as legal advice and agencies should obtain their own independent legal advice. Agencies may wish to refer to this resource to inform decisions under the Government Information (Public Access) Act 2009 (GIPA Act).*

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## Catchwords

GIPA Act section	Catchphrase
<b>General principles</b>	
12	could reasonably be expected to
13	public interest test
53	searches
54	third party consultation
60(1)(a)	unreasonable and substantial diversion of resources
61 + 126	notice of decision
<b>Public interest considerations against disclosure</b>	
14 T(1)(a)	prejudice collective Ministerial responsibility
14T(1)(b)	prejudice Ministerial responsibility to Parliament
14 T(1)(c)	prejudice relations with another government
14 T (1)(d)	prejudice the supply of confidential information
14 T (1)(e)	prejudice a deliberative process
14 T (1)(f)	prejudice the effective exercise of agency's function
14 T (1)(g)	found an action for breach of confidence
14T(1)(h)	prejudice the conduct of any audit, test, investigation or review
14T (2)(a)	reveal the identity of an informant
14T (2)(b)	prejudice law enforcement
14T (2)(c)	public emergency
14T(2)(d)	protecting the life, health or safety of any person
14T(2)(e)	protecting any place, property or vehicle

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GIPA Act section	Catchphrase
14T(2)(f)	facilitate commission of a criminal act
14T(2)(g)	prejudice supervision of, or facilitate escape of person in custody
14T(2)(h)	prejudice security of any correctional facility
14 T (3)(a)	personal information
14 T (3)(b)	contravene an information protection or health protection principle
14T(3)(c)	prejudice any court proceedings
14T(3)(d)	prejudice the fair trial of any person
14T(3)(e)	reveal false or unsubstantiated allegations that are defamatory
14T(3)(f)	expose a person to risk of serious harm, harassment or intimidation
14T(3)(g)	best interests of a child
14 T (4)(a)	undermine competitive neutrality
14 T (4)(b)	commercial-in-confidence provisions of a government contract
14T(4)(c)	diminish the competitive commercial value of any information to any person
14 T (4)(d)	prejudice business interests
14T(4)(e)	prejudice research
14T(5)(a)	protecting the environment
14T(5)(b)	conservation of any place or object of natural cultural or heritage value
14T(5)(c)	protecting the life, health or safety of any animal or other living thing
14T(5)(d)	damage the economy

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GIPA Act section	Catchphrase
14T(5)(e)	unfair advantage or disadvantage to any person
14 T (6)	contravene another Act or statutory rule
14 T (7)	exempt documents under interstate FOI legislation
<b>Reviewable decisions</b>	
80(a)	whether access application is valid
80(e)	whether information is held
80(f)	whether information already available

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## Could reasonably be expected to

Sections 12(2), 14, 32, 54, 55 and 121 of the GIPA Act contain the phrase “could reasonably be expected to”.

The definition of the phrase “could reasonably be expected to” means more than a mere possibility, risk or chance and must be based on real and substantial grounds and not be purely speculative, fanciful, imaginary or contrived.

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# Section 14: Public interest considerations against disclosure

## SECTION 14: Public interest consideration against disclosure

### Consideration 1(a) - prejudice collective Ministerial responsibility

Clause 1(a) of the table at section 14 states:

*There is a public interest consideration against disclosure if disclosure of the information could reasonably be expected to prejudice collective Ministerial responsibility.*

In order to establish that this is a relevant consideration against disclosure, we would expect the Agency to:

- a. describe the collective Ministerial responsibility in question; and
- b. demonstrate that a prejudice to that collective Ministerial responsibility could reasonably be expected if the information was disclosed.

The meaning of the word prejudice is to “cause detriment or disadvantage”.

## SECTION 14: Public interest consideration against disclosure

### Consideration 1(b) – prejudice Ministerial responsibility to Parliament

Clause 1(b) of the table at section 14 states:

*There is a public interest consideration against disclosure if disclosure of the information could reasonably be expected to prejudice Ministerial responsibility to Parliament.*

In order to establish that this is a relevant consideration against disclosure, we would expect the Agency to:

- a. describe the Ministerial responsibility to Parliament in question; and
- b. demonstrate that a prejudice to that Ministerial responsibility could reasonably be expected if the information was disclosed.

The meaning of the word prejudice is to “cause detriment or disadvantage”.

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## SECTION 14: Public interest consideration against disclosure

### Consideration 1(c) – prejudice relations with, or the obtaining of confidential information from, another government

Clause 1(c) of the table at section 14 states:

*There is a public interest consideration against disclosure if disclosure of the information could reasonably be expected to prejudice relations with, or the obtaining of confidential information from, another government (whether in a particular case or generally).*

In order for this to be a relevant consideration against disclosure, the Agency must be satisfied that:

- c. disclosure of the information could reasonably be expected to prejudice relations with another government in future; or
- d. disclosure could reasonably be expected to have a prejudicial effect on obtaining confidential information from another government in future.

A way to demonstrate this with reference to the information subject to the information access request is, if the information was either obtained or provided in confidence from another government and disclosure would have a prejudicial effect on obtaining such information in future.

It is commonly understood that information will have a confidential quality if the person was not bound to disclose the information but did so on the basis of an express or inferred understanding that the information would be kept confidential.

Although the GIPA Act does not use the word “future”, the nature of the prejudice that this consideration deems to be contrary to the public interest, is implicit. This future effect is one aspect of the abstract nature of the enquiry. The other abstract elements are relations in a general sense and whether disclosure will impact the agency’s obtaining similar information from another government in the future.

In order to assess the relevance and weight of this consideration, it may be appropriate for the Agency to consult with the other government with respect to any objections to potential release of the information, in order to inform its view as to any prejudicial effect.

The meaning of the word prejudice is to “cause detriment or disadvantage”.

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## SECTION 14: Public interest consideration against disclosure

### Consideration 1(d) – prejudice the supply to an agency of confidential information that facilitates the effective exercise of that agency’s functions

Clause 1(d) of the table at section 14 states:

*There is a public interest consideration against disclosure if disclosure of the information could reasonably be expected to prejudice the supply to an agency of confidential information that facilitates the effective exercise of that agency’s functions (whether in a particular case or generally).*

In order for this to be a relevant consideration against disclosure, the Agency must be satisfied that:

- a. the information was obtained in confidence;
- b. disclosure of the information could reasonably be expected to prejudice the supply of such information to the Agency in future; and
- c. the information facilitates the effective exercise of the Agency’s functions.

Although the GIPA Act does not use the phrase “future supply”, the nature of the prejudice that this consideration deems to be contrary to the public interest, is implicit. This future effect is one aspect of the abstract nature of the enquiry. The other abstract element is supply in a general sense and whether disclosure will impact supply of similar information by persons to the agency in the future.

It is commonly understood that information will have a confidential quality if the person was not bound to disclose the information but did so on the basis of an express or inferred understanding that the information would be kept confidential.

The meaning of the word prejudice is to “cause detriment or disadvantage”.

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## SECTION 14: Public interest consideration against disclosure

**Consideration 1(e) – reveal a deliberation or consultation conducted, or an opinion or recommendation given, in such a way as to prejudice a deliberative process of government or an agency.**

Clause 1(e) of the table at section 14 states:

*There is a public interest consideration against disclosure if disclosure of the information could reasonably be expected to reveal a deliberation or consultation conducted, or an opinion, advice or recommendation given, in such a way as to prejudice a deliberative process of government or an agency (whether in a particular case or generally).*

In order for clause 1(e) to apply, the Agency must establish that disclosing the information could reasonably be expected to ‘reveal’:

- a. a deliberation or consultation conducted; or
- b. an opinion or recommendation;
- c. in such a way as to prejudice a deliberative process of the agency.

The term ‘reveal’ is defined in schedule 4, clause 1 of the GIPA Act to mean:

*To disclose information that has not already been publicly disclosed (otherwise than by lawful means).*

The meaning of the word prejudice is to “cause detriment or disadvantage”.

The issue the Agency needs to address is whether there is more than a mere possibility that releasing the information would reveal any deliberation, opinion, advice or recommendations that would be detrimental to, or disadvantage the Agency’s decision making process.

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## SECTION 14: Public interest consideration against disclosure

### Consideration 1(f) – prejudice the effective exercise by an agency of the agency's functions

Clause 1(f) of the table at section 14 states:

*There is a public interest consideration against disclosure if disclosure of the information could reasonably be expected to prejudice the effective exercise by an agency of the agency's functions*

To show that this is a relevant consideration against disclosure, the Agency must establish:

- a. the relevant function of the agency that would be prejudiced by release of the information; and
- b. how that prejudice could reasonably be expected to occur.

Once the relevant function of the Agency has been identified, the Agency needs to establish a substantial adverse effect to the exercise of that function.

This requires a demonstration of the detriment or disadvantage that would occur by the disclosure of the information on the agency's function.

The Tribunal has accepted that the word 'prejudice', in the context of the public interest considerations against disclosure, is to be given its ordinary meaning, namely: 'to cause detriment or disadvantage': see Hurst (supra) at [60], McLennan v University of New England [2013] NSWADT 113 at [38] and Sobh v Victoria Police (1993) 1 VR 41.

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## SECTION 14: Public interest consideration against disclosure

### Consideration 1(g) – found an action against an agency for breach of confidence or otherwise result in the disclosure of information provided to an agency in confidence

Clause 1(g) of the table at section 14 states:

*There is a public interest consideration against disclosure if disclosure of the information could reasonably be expected to found an action against an agency for breach of confidence or otherwise result in the disclosure of information provided to an agency in confidence (whether in a particular case or generally).*

To show that this is a relevant consideration against disclosure, the Agency must establish:

- a. the information was obtained in confidence; and
- b. disclosure of the information could reasonably be expected to found an action against an agency for breach of confidence; or
- c. otherwise result in the disclosure of information provided in confidence.

In raising this public interest consideration against disclosure the Agency needs to ensure the information is in fact confidential.

Once satisfied that the information is confidential information, the agency should then turn its mind to what constitutes a breach of confidence. A breach of confidence arises out of an unauthorised disclosure of, or other use of information, which is subject to an obligation of confidentiality.

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## SECTION 14: Public interest consideration against disclosure

**Consideration 1(h) – prejudice the conduct, effectiveness or integrity of any audit, test, investigation or review conducted by or on behalf of an agency by revealing its purpose, conduct or results (whether or not commenced and whether or not completed)**

Clause 1(h) of the table at section 14 states:

*There is a public interest consideration against disclosure of information if disclosure of the information could reasonably be expected to prejudice the conduct, effectiveness or integrity of any audit, test, investigation or review conducted by or on behalf of an agency by revealing its purpose, conduct or results (whether or not commenced and whether or not completed) (whether in a particular case or generally).*

The meaning of the word prejudice is to “cause detriment or disadvantage”.

To show that this is a relevant consideration against disclosure, the Agency must establish that disclosure of the information would result in:

- a. prejudice to the conduct, effectiveness or integrity of the audit, test, investigation or review conducted by or on behalf of the Agency;
- b. by revealing its purpose, conduct or results; and
- c. whether or not the investigation is commenced and whether or not it is completed.

In particular, the Agency should identify the audit, test, investigation or review that would be prejudiced, and also identify the anticipated prejudice. In order to justify the application of the consideration, the Agency must demonstrate the causal nexus between the disclosure of the information and the prejudice that is expected.

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## SECTION 14: Public interest consideration against disclosure

### Consideration 2(a) – reveal or tend to reveal the identity of an informant or prejudice the future supply of information from an informant

Clause 2(a) of the table at section 14 states:

*There is a public interest consideration against disclosure of information if disclosure of the information could reasonably be expected to reveal or tend to reveal the identity of an informant or prejudice the future supply of information from an informant (whether in a particular case or generally).*

The term ‘reveal’ is defined in schedule 4, clause 1 of the GIPA Act to mean:

*To disclose information that has not already been publicly disclosed (otherwise than by lawful means).*

The meaning of the word prejudice is to “cause detriment or disadvantage”.

To show that this is a relevant consideration against disclosure, the Agency need only establish one of the limbs it contains, not both.

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## SECTION 14: Public interest consideration against disclosure

### Consideration 2(b) – prejudice the prevention, detection or investigation of a contravention or possible contravention of the law or prejudice the enforcement of the law

Clause 2(b) of the table at section 14 states:

*There is a public interest consideration against disclosure of information if disclosure of the information could reasonably be expected to prejudice the prevention, detection or investigation of a contravention or possible contravention of the law or prejudice the enforcement of the law (whether in a particular case or generally).*

The meaning of the word prejudice is to “cause detriment or disadvantage”.

To show that this is a relevant consideration against disclosure, the Agency must establish that disclosure of the information could reasonably be expected to:

- a. prejudice the prevention, detection or investigation of a contravention or a possible contravention of the law; or
- b. prejudice the enforcement of the law.

In its reasons for applying this consideration, an agency should identify the activity that could be prejudiced and how disclosure of the information could reasonably be expected to cause detriment or disadvantage to that activity.

If the nature of the activity is such that it cannot be identified, the agency should provide as much information as it is able to, bearing in mind the requirements in sections 61 and 126 of the GIPA Act. These provisions require an agency to provide reasons for its decision as well as the findings on any material questions of fact underlying those reasons, together with a reference to the sources of information on which those findings are based. However, the agency’s reasons must not disclose any information for which there is an overriding public interest against disclosure. We also note the requirement in section 61 of the GIPA Act for an agency to state the general nature and format of the records held by the agency that contain the information to which access is refused.

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## SECTION 14: Public interest consideration against disclosure

### Consideration 2(c) – increase the likelihood of, or prejudice the prevention of, preparedness against, response to, or recovery from, a public emergency

Clause 2(c) of the table at section 14 states:

*There is a public interest consideration against disclosure of information if disclosure of the information could reasonably be expected to increase the likelihood of, or prejudice the prevention of, preparedness against, response to, or recovery from, a public emergency (including any natural disaster, major accident, civil disturbance or act of terrorism) (whether in a particular case or generally).*

The meaning of the word prejudice is to “cause detriment or disadvantage”.

To show that this is a relevant consideration against disclosure, the Agency must establish that disclosure of the information could reasonably be expected to:

- a. increase the likelihood of a public emergency; or
- b. prejudice the prevention of, preparedness against, response to or recovery from a public emergency.

The Agency needs to explain how disclosure of the information could reasonably be expected to have the anticipated consequence.

It must give reasons, including the findings on any material questions of fact underlying those reasons, together with a reference to the sources of information on which those findings are based (section 61(a) and (b) of the GIPA Act).

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## SECTION 14: Public interest consideration against disclosure

### Consideration 2(d) – endanger, or prejudice any system or procedure for protecting, the life, health or safety of any person

Clause 2(d) of the table at section 14 states:

*There is a public interest consideration against disclosure of information if disclosure of the information could reasonably be expected to endanger, or prejudice any system or procedure for protecting, the life, health or safety of any person (whether in a particular case or generally).*

The meaning of the word prejudice is to “cause detriment or disadvantage”.

To show that this is a relevant consideration against disclosure, the Agency must establish that disclosure of the information could reasonably be expected to:

- a. endanger the life, health or safety of any person; or
- b. prejudice any system or procedure for protecting the life, health or safety of any person.

The Agency needs to explain how disclosure of the information could reasonably be expected to have the anticipated consequence. If relevant, the Agency may identify the system or procedure designed to protect the life, health or safety of any person and demonstrate how disclosure would likely result in harm or prejudice to that system.

It must give reasons, including the findings on any material questions of fact underlying those reasons, together with a reference to the sources of information on which those findings are based (section 61(a) and (b) of the GIPA Act).

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## SECTION 14: Public interest consideration against disclosure

### Consideration 2(e) – endanger the security of, or prejudice any system or procedure for protecting, any place, property or vehicle

Clause 2(e) of the table at section 14 states:

*There is a public interest consideration against disclosure of information if disclosure of the information could reasonably be expected to endanger the security of, or prejudice any system or procedure for protecting, any place, property or vehicle (whether in a particular case or generally).*

The meaning of the word prejudice is to “cause detriment or disadvantage”.

To show that this is a relevant consideration against disclosure, the Agency must establish that disclosure of the information could reasonably be expected to:

- a. endanger the security of any place, property or vehicle; or
- b. prejudice any system or procedure for protecting any place, property or vehicle.

The Agency needs to explain how disclosure of the information could reasonably be expected to have the anticipated consequence. If relevant, the Agency may identify the system or procedure designed to protect any place, property or vehicle and demonstrate how disclosure would likely result in harm or prejudice to that system.

It must give reasons, including the findings on any material questions of fact underlying those reasons, together with a reference to the sources of information on which those findings are based (section 61(a) and (b) of the GIPA Act).

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## SECTION 14: Public interest consideration against disclosure

### Consideration 2(f) – facilitate the commission of a criminal act (including a terrorist act within the meaning of the Terrorism (Police Powers) Act 2002)

Clause 2(f) of the table at section 14 states:

*There is a public interest consideration against disclosure of information if disclosure of the information could reasonably be expected to facilitate the commission of a criminal act (including a terrorist act within the meaning of the Terrorism (Police Powers) Act 2002 (whether in a particular case or generally)).*

To show that this is a relevant consideration against disclosure, the Agency must establish that disclosure of the information could reasonably be expected to facilitate the commission of a criminal act.

The Agency needs to explain how disclosure of the information could reasonably be expected to have the anticipated consequence.

It must give reasons, including the findings on any material questions of fact underlying those reasons, together with a reference to the sources of information on which those findings are based (section 61(a) and (b) of the GIPA Act).

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## SECTION 14: Public interest consideration against disclosure

### Consideration 2(g) – prejudice the supervision of, or facilitate the escape of, any person in lawful custody

Clause 2(g) of the table at section 14 states:

*There is a public interest consideration against disclosure of information if disclosure of the information could reasonably be expected to prejudice the supervision of, or facilitate the escape of, any person in lawful custody (whether in a particular case or generally).*

The meaning of the word prejudice is to “cause detriment or disadvantage”.

To show that this is a relevant consideration against disclosure, the Agency must establish that disclosure of the information could reasonably be expected to:

- a. prejudice the supervision of any person in lawful custody; or
- b. facilitate the escape of any person in lawful custody.

The Agency needs to explain how disclosure of the information could reasonably be expected to have the anticipated consequence.

It must give reasons, including the findings on any material questions of fact underlying those reasons, together with a reference to the sources of information on which those findings are based (section 61(a) and (b) of the GIPA Act).

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## SECTION 14: Public interest consideration against disclosure

### Consideration 2(h) – prejudice the security, discipline or good order of any correctional facility

Clause 2(h) of the table at section 14 states:

*There is a public interest consideration against disclosure of information if disclosure of the information could reasonably be expected to prejudice the security, discipline or good order of any correctional facility (whether in a particular case or generally).*

The meaning of the word prejudice is to “cause detriment or disadvantage”.

To show that this is a relevant consideration against disclosure, the Agency must establish that disclosure of the information could reasonably be expected to prejudice the security, discipline or good order of any correctional facility.

The Agency needs to explain how disclosure of the information could reasonably be expected to have the anticipated consequence.

It must give reasons, including the findings on any material questions of fact underlying those reasons, together with a reference to the sources of information on which those findings are based (section 61(a) and (b) of the GIPA Act).

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## SECTION 14: Public interest consideration against disclosure

### Consideration 3(a) – reveal an individual’s personal information

Clause 3(a) of the table at section 14 states:

*There is a public interest consideration against disclosure of information if disclosure of the information could reasonably be expected to reveal an individual’s personal information.*

Personal information is defined in the GIPA Act as:

*...information or an opinion (including information or an opinion forming part of a database and whether or not recorded in a material form) about an individual (whether living or dead) whose identity is apparent or can reasonably be ascertained from the information or opinion. [Schedule 4(4)(1) GIPA Act]*

The term ‘reveal’ is defined in schedule 4, clause 1 of the GIPA Act to mean:

To disclose information that has not already been publicly disclosed (otherwise than by lawful means).

Section 15(b) of the GIPA Act provides that agencies must have regard to any relevant guidelines issued by the Information Commissioner when determining whether there is an overriding public interest against disclosure.

The Information Commissioner has published *Guideline 4 – Personal information as a public interest consideration under the GIPA Act*. This Guideline sets out what is meant by ‘personal information’ in the GIPA Act and includes (in paragraph 1.2) examples of what should be considered personal information.

In order to establish that this consideration applies, the Agency has to:

- a. identify whether the information is personal information,
- b. consider whether the information would be revealed by disclosing it under the GIPA Act.

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## SECTION 14: Public interest consideration against disclosure

### Consideration 3(b) – contravene an information protection or health privacy principle

Clause 3(b) of the table at section 14 of the GIPA Act provides:

*There is a public interest consideration against disclosure of information if disclosure of the information could reasonably be expected to contravene an information protection principle under the Privacy and Personal Information Protection Act 1998 or a Health Privacy Principle under the Health Records and Information Privacy Act 2002*

If an agency relies on clause 3(b) of the table to section 14 as a consideration against disclosure, it must demonstrate a reasonable expectation that an information protection principle or health privacy principle would be contravened by disclosure of the information.

It is not sufficient to simply assert that such a contravention would occur. The agency must identify the principle/s that would be contravened and show how the disclosure would breach the principle.

## SECTION 14: Public interest consideration against disclosure

### Consideration 3(c) – prejudice any court proceedings

Clause 3(c) of the table at section 14 of the GIPA Act provides:

*There is a public interest consideration against disclosure of information if disclosure of the information could reasonably be expected to prejudice any court proceedings by revealing matter prepared for the purposes of or in relation to current or future proceedings*

To show this is a relevant consideration against disclosure, the Agency may need to consider such questions as:

- a. which court proceedings would be prejudiced?
- b. how would the court proceedings be prejudiced?
- c. what event was the information prepared in response to?

The Agency needs to provide sufficient detail with respect to the anticipated prejudicial effect, and base this on relevant facts.

It must give reasons, including the findings on any material questions of fact underlying those reasons, together with a reference to the sources of information on which those findings are based (section 61(a) and (b) of the GIPA Act).

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## SECTION 14: Public interest consideration against disclosure

### Consideration 3(d) – prejudice the fair trial of any person

Clause 3(d) of the table at section 14 states:

- *There is a public interest consideration against disclosure if disclosure of the information could reasonably be expected to prejudice the fair trial of any person, the impartial adjudication of any case or a person's right to procedural fairness.*

The meaning of the word prejudice is to “cause detriment or disadvantage”.

To establish that this consideration applies, the Agency must show that there is a reasonable expectation of prejudice occurring to a case or trial which is pending or current.

The Agency needs to provide sufficient detail with respect to the anticipated prejudicial effect, and base this on relevant facts.

It must give reasons, including the findings on any material questions of fact underlying those reasons, together with a reference to the sources of information on which those findings are based (section 61(a) and (b) of the GIPA Act).

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## SECTION 14: Public interest consideration against disclosure

### Consideration 3(e) – reveal false or unsubstantiated allegations that are defamatory

Clause 3(e) of the table at section 14 states:

*There is a public interest consideration against disclosure if disclosure of the information could reasonably be expected to reveal false or unsubstantiated allegations about a person that are defamatory.*

To demonstrate that this is a relevant consideration, the Agency must show that the information contains:

- a. false and unsubstantiated allegations against a person; and
- b. that those allegations are defamatory.

In order to satisfy the second element of this consideration, the Agency must consider and reach a conclusion about whether the allegations are defamatory according to the general principles of defamation law.

A general statement of the elements of defamation from Halsbury's Laws of Australia (chapter written by Dr David Rolph) states (with notes removed):

*A publication is defamatory of a person if it tends, in the minds of ordinary reasonable people, to injure his or her reputation either by:*

- (1) disparaging him or her;*
- (2) causing others to shun or avoid him or her; or*
- (3) subjecting him or her to hatred, ridicule or contempt.*

*The cause of action in defamation is complete upon the publication of a defamatory imputation and damage may be inferred without proof of actual loss or injury to the plaintiff.*

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## SECTION 14: Public interest consideration against disclosure

### Consideration 3(f) – expose a person to a risk of serious harm or of serious harassment or serious intimidation

Clause 3(f) of the table at section 14 states:

*There is a public interest consideration against disclosure if disclosure of the information could reasonably be expected to expose a person to a risk of harm or of serious harassment or serious intimidation.*

To show that this is a relevant consideration against disclosure, the Agency must establish that each element of the consideration is satisfied. This involves an objective consideration of the severity or level of the consequences that must be reasonably expectable.

The Agency's notice of decision ought to indicate why it considers a risk of harm, serious harassment or serious intimidation would be reasonably expectable if the information were disclosed and the severity of that harm.

Guidance about the requirements of consideration 3(f) can be found in *AEZ v Commissioner of Police (NSW) [2013] NSWADT 90*. In that case the Tribunal examined the definitions of key terms in the consideration and the issue of objective measure of the reasonably expected consequences. The Tribunal held that "harm" means a real and substantial detrimental effect on a person; whether their physical, psychological or emotional wellbeing.

*In the case of the information sought by AEZ, despite AQE's subjective beliefs, I do not think that, when considered objectively, the evidence demonstrates that disclosure of any of the information in issue could reasonably be expected to expose AQE to a risk of harm or of serious harassment or serious intimidation. While AQE may have a subjective fear that release of the information may expose him to such a risk, I am not persuaded on the evidence justifies that conclusion could be reasonably expected to expose him to such a risk. [95]*

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## SECTION 14: Public interest consideration against disclosure

### Consideration 3(g) – best interests of a child

Clause 3(g) of the table to section 14 of the GIPA Act provides:

*There is a public interest consideration against disclosure of information if disclosure of the information could reasonably be expected to in the case of the disclosure of personal information about a child—the disclosure of information that it would not be in the best interests of the child to have disclosed.*

In order to rely on this clause as a consideration against disclosure, an agency must demonstrate that:

- a. the information contains personal information about a child; and
- b. it would not be in the child's best interests to disclose the information.

The definition of the phrase “could reasonably be expected to” means more than a mere possibility, risk or chance and must be based on real and substantial grounds and not be purely speculative, fanciful, imaginary or contrived.

The Agency needs to demonstrate why disclosure would not be in the child's best interests.

This may require the Agency to sufficiently describe the nature of the information in question (for example, what about those children is being portrayed) in order to establish the relevance of, and weight attributed to this consideration against disclosure.

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## SECTION 14: Public interest consideration against disclosure

### Consideration 4(a) – undermine competitive neutrality in connection with any functions of an agency

Clause 4(a) of the table to section 14 of the GIPA Act provides:

*There is a public interest consideration against disclosure of information if disclosure of the information could reasonably be expected to undermine competitive neutrality in connection with any functions of an agency in respect of which it competes with any person or otherwise place an agency at a competitive advantage or disadvantage in any market,*

To show that this is a relevant consideration against disclosure, the Agency must establish that:

- a. it is providing a function in a marketplace where there are other persons also in that marketplace (that is, the Agency is not a monopoly provider of a particular function); and
- b. that the release of the information could have one or more of the following outcomes:
  - to place an agency at an competitive advantage or disadvantage against others; or
  - to undermine the agency's competitive neutrality in relation to the function.

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## SECTION 14: Public interest consideration against disclosure

### Consideration 4(b) – commercial-in-confidence provisions of a government contract

Clause 4(b) of the table to section 14 of the GIPA Act provides:

*There is a public interest consideration against disclosure of information if disclosure of the information could reasonably be expected to reveal commercial-in-confidence provisions of a government contract.*

The test for this consideration is identifiable by the definitions of the words used in the consideration:

- reasonably be expected – that is, more than a mere possibility
- to reveal – “reveal” is defined in schedule 4 to the GIPA Act to mean to disclose information that has not already been lawfully publicly disclosed
- commercial-in-confidence provisions – “commercial-in-confidence provisions” is defined in schedule 4 of the GIPA Act. The provisions must meet the description in this definition in order for this consideration to apply
- of a government contract – “government contract” is defined in schedule 4 of the GIPA Act as one of four contract types between an agency and a private sector agency. The contract must fall within one of the categories included in this definition for the consideration to apply.

## SECTION 14: Public interest consideration against disclosure

### Consideration 4(c) – diminish the competitive commercial value of any information to any person

Clause 4(c) of the table to section 14 of the GIPA Act provides:

*There is a public interest consideration against disclosure of information if disclosure of the information could reasonably be expected to diminish the competitive commercial value of any information to any person*

In order to rely on this clause as a consideration against disclosure, an agency must show that releasing the information could reasonably be expected to have the effect outlined in clause 4(c) and base this on substantial grounds.

In particular, an agency must identify why the information has a competitive commercial value, and how that value would be adversely affected if the information was disclosed.

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## SECTION 14: Public interest consideration against disclosure

### Consideration 4(d) – prejudice business interests

Clause 4(d) of the table to section 14 of the GIPA Act provides:

*There is a public interest consideration against disclosure of information if disclosure of the information could reasonably be expected to prejudice any person's legitimate business, commercial, professional or financial interests*

In order to establish the relevance of this consideration, the agency must:

- a. identify the relevant legitimate interest; and
- b. explain how the interest would be prejudiced if the information was disclosed.

The meaning of the word prejudice is to “cause detriment or disadvantage”.

Our view is that the relevant meaning of “legitimate” for the purposes of this consideration is its ordinary meaning, that is genuine and not spurious.<sup>1</sup>

In particular, an agency must identify the party whose interests would be prejudiced, and the relevant interest/s. In order to justify the application of the consideration, an agency must demonstrate the causal nexus between the disclosure of the information and the prejudice to that interest.

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<sup>1</sup> Macquarie Dictionary, 6<sup>th</sup> edition, October 2013

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## SECTION 14: Public interest consideration against disclosure

### Consideration 4(e) – prejudice research

Clause 4(e) of the table to section 14 of the GIPA Act provides:

*There is a public interest consideration against disclosure of information if disclosure of the information could reasonably be expected to prejudice the conduct, effectiveness or integrity of any research by revealing its purpose, conduct or results (whether or not commenced and whether or not completed).*

In order to establish the relevance of this consideration, an agency must show how all the elements are satisfied, to demonstrate the reasonably expectable effect of the consideration.

In particular, an agency must

- a. identify the relevant research; and
- b. explain how the conduct, effectiveness or integrity of the research would be prejudiced if its purpose, conduct or results were revealed.

An agency must demonstrate the causal nexus between the disclosure of the information and the expected prejudice to the conduct, effectiveness or integrity of the research.

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## SECTION 14: Public interest consideration against disclosure

### Consideration 5(a) – endanger, or prejudice any system for protecting, the environment

Clause 5(a) of the table to section 14 of the GIPA Act provides:

*There is a public interest consideration against disclosure of information if disclosure of the information could reasonably be expected to endanger, or prejudice any system or procedure for protecting, the environment*

To show that this is a relevant consideration against disclosure, the Agency must identify the manner in which disclosure of the information could reasonably be expected to:

- a. endanger the environment; or
- b. prejudice any system or procedure for protecting the environment.

The meaning of the word prejudice is to “cause detriment or disadvantage”.

The Agency needs to explain how disclosure of the information could reasonably be expected to have the anticipated consequence.

It must give reasons, including the findings on any material questions of fact underlying those reasons, together with a reference to the sources of information on which those findings are based (section 61(a) and (b) of the GIPA Act).

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## SECTION 14: Public interest consideration against disclosure

### Consideration 5(b) – prejudice the conservation of any place or object of natural, cultural or heritage value

Clause 5(b) of the table to section 14 of the GIPA Act provides:

*There is a public interest consideration against disclosure of information if disclosure of the information could reasonably be expected to prejudice the conservation of any place or object of natural, cultural or heritage value, or reveal any information relating to Aboriginal or Torres Strait Islander traditional knowledge.*

To show that this is a relevant consideration against disclosure, the Agency must:

- a. identify the nature of the prejudice which could reasonably be expected to occur to the conservation of any place or object of natural, cultural or heritage value by disclosing the information; or
- b. establish that disclosing the information could reasonably be expected to reveal any information relating to Aboriginal or Torres Strait Islander traditional knowledge.

The meaning of the word prejudice is to “cause detriment or disadvantage”.

The term ‘reveal’ is defined in schedule 4, clause 1 of the GIPA Act to mean:

*To disclose information that has not already been publicly disclosed (otherwise than by lawful means).*

The Agency needs to explain how disclosure of the information could reasonably be expected to have the anticipated consequence.

It must give reasons, including the findings on any material questions of fact underlying those reasons, together with a reference to the sources of information on which those findings are based (section 61(a) and (b) of the GIPA Act).

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## SECTION 14: Public interest consideration against disclosure

### Consideration 5(c) – endanger, or prejudice any system or procedure for protecting, the life, health or safety of any animal or other living thing

Clause 5(c) of the table to section 14 of the GIPA Act provides:

*There is a public interest consideration against disclosure of information if disclosure of the information could reasonably be expected to endanger, or prejudice any system or procedure for protecting, the life, health or safety of any animal or other living thing, or threaten the existence of any species.*

To show that this is a relevant consideration against disclosure, the Agency must identify the manner in which disclosure of the information could reasonably be expected to:

- a. endanger the life, health or safety of any animal or other living thing; or
- b. prejudice any system or procedure for protecting the life, health or safety of any animal or other living thing; or
- c. threaten the existence of any species.

The meaning of the word prejudice is to “cause detriment or disadvantage”.

The Agency needs to explain how disclosure of the information could reasonably be expected to have the anticipated consequence.

It must give reasons, including the findings on any material questions of fact underlying those reasons, together with a reference to the sources of information on which those findings are based (section 61(a) and (b) of the GIPA Act).

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## SECTION 14: Public interest consideration against disclosure

### Consideration 5(d) – damage or prejudice the ability of the Government or agency to manage the economy

Clause 5(d) of the table to section 14 of the GIPA Act provides:

*There is a public interest consideration against disclosure of information if disclosure of the information could reasonably be expected to damage, or prejudice the ability of the Government or an agency to manage, the economy.*

To show that this is a relevant consideration against disclosure, the Agency must:

- a. identify the reasonably expected damage to the economy; or
- b. identify the reasonably expected prejudice to the ability of the Government or an agency to manage the economy;
- c. explain how the expected damage or prejudice would result if the information was disclosed.

The meaning of the word prejudice is to “cause detriment or disadvantage”.

The Agency needs to explain how disclosure of the information could reasonably be expected to have the anticipated consequence.

It must give reasons, including the findings on any material questions of fact underlying those reasons, together with a reference to the sources of information on which those findings are based (section 61(a) and (b) of the GIPA Act).

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## SECTION 14: Public interest consideration against disclosure

### Consideration 5(e) – expose any person to an unfair advantage or disadvantage as a result of premature disclosure of information

Clause 5(e) of the table to section 14 of the GIPA Act provides:

*There is a public interest consideration against disclosure of information if disclosure of the information could reasonably be expected to expose any person to an unfair advantage or disadvantage as a result of the premature disclosure of information concerning any proposed action or inaction of the Government or an agency*

To demonstrate this consideration against disclosure is relevant, the Agency needs to establish a causal nexus between premature disclosure of the information and the reasonably expected effect.

In particular the Agency needs to:

- a. identify the nature of the unfair advantage or disadvantage to which any person may be exposed; and
- b. establish that the information concerns any proposed action or inaction of the Government or an agency; and
- c. explain how the advantage or disadvantage results from premature disclosure of the information.

The Agency needs to explain how disclosure of the information could reasonably be expected to have the anticipated consequence.

It must give reasons, including the findings on any material questions of fact underlying those reasons, together with a reference to the sources of information on which those findings are based (section 61(a) and (b) of the GIPA Act).

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## SECTION 14: Public interest consideration against disclosure

### Consideration 6 – contravene another Act or statutory rule

Clause 6(1) of the table to section 14 of the GIPA Act provides:

*There is a public interest consideration against disclosure of information if disclosure of the information by any person could (disregarding the operation of this Act) reasonably be expected to constitute a contravention of a provision of any other Act or statutory rule (of this or another State or of the Commonwealth) that prohibits the disclosure of information, whether or not the prohibition is subject to specified qualifications or exceptions.*

**[Note: The application of this consideration refers to contravention of another Act or statutory rule. Therefore the relevant Act or statutory rule will need to be inserted relevant to the particular matter.]**

Section XX of the insert relevant Act provides:

insert relevant provision

In essence the respective provisions of insert relevant Act take on the character of a secrecy provision once if conditional, identify condition [e.g. a direction (written order) is given by the person presiding at an inquiry].

Accordingly an agency must show that the relevant provisions of insert relevant Act have been invoked in order to establish that clause 6(1) of the table at section 14(2) applies as a result of that provision. [If relevant] This may be achieved by explaining:

- list relevant criteria for the secrecy provision to come into effect

Clause 6(2) of the table at section 14(2) of the GIPA Act provides:

*The public interest consideration under this clause extends to consideration of the policy that underlies the prohibition against disclosure.*

Taking into account such policy considerations serves to inform the decision maker as to whether disclosure of information obtained as part of the administration of a particular Act should take place in a controlled and balanced manner or whether the secrecy provision was designed to limit disclosure of particular information altogether.

Given that this is a consideration against disclosure and not a conclusive presumption of an overriding public interest against disclosure, identifying the policy implications behind a secrecy provision will assist the decision maker to attribute weight to this consideration.

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## SECTION 14: Public interest consideration against disclosure

### Consideration 7 – exempt documents under interstate Freedom of Information legislation

The Agency identified clause 7(1) of the table at section 14(2) as a public interest consideration against disclosure of some of the requested information. This clause provides:

*There is a public interest consideration against disclosure of information communicated to the Government of New South Wales by the Government of the Commonwealth or of another State if notice has been received from that Government that the information is exempt matter within the meaning of a corresponding law of the Commonwealth or that other State.*

This clause has the effect that, if another Government notifies an agency that the information is exempt under the FOI law of another State or the Commonwealth, then that is a public interest against disclosing the information pursuant to an application for access made in NSW.

In *Smolenski v Commissioner of Police (NSW) [2015] NSWCATAD 21* at [48], clause 7 was found to apply to information that is:

- a. communicated to the Government of New South Wales;
- b. by the Government of the Commonwealth or of another State; and
- c. a notice has been received from the Government of the Commonwealth or State that the information is 'exempt matter' within the meaning of a corresponding law of the Commonwealth or that other State.

To satisfy the first element of this consideration against disclosure, the notice of decision needs to show that the information in question was communicated to the Government of New South Wales by the Government of the Commonwealth or of another State.

The second element of this consideration is satisfied by the Agency's confirmation that notice has been received from the Government of the Commonwealth or of another State that the information in question is an exempt matter under FOI legislation of the Commonwealth or of another State.

Clause 7(2) of the table at section 14(2) of the GIPA Act provides:

The public interest consideration under this clause extends to consideration of the policy that underlies the exemption.

Taking into account such policy considerations serves to inform the decision maker as to whether disclosure of information obtained as part of the administration of a particular Act should take place in a controlled and balanced manner or whether the secrecy provision was designed to limit disclosure of particular information altogether.

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Given that this is a consideration against disclosure and not a conclusive presumption of an overriding public interest against disclosure, identifying the policy implications behind a secrecy provision will assist the decision maker to attribute weight to this consideration.

Clause 7(3) of the table at section 14(2) of the GIPA Act provides:

*In this clause, a reference to a corresponding law is a reference to:*

- (a) the Freedom of Information Act 1982 of the Commonwealth, or*
- (b) a law of any other State that is prescribed by the regulations as a corresponding law for the purposes of this clause.*

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# Schedule 1: Conclusive presumptions against disclosure

## SCHEDULE 1: Conclusive presumption against disclosure

### Cabinet information

The Agency has decided that information in issue is/are cabinet information and there is an overriding public interest against disclosure.

The Agency relies on Schedule 1 clause 2 of the GIPA Act.

Clause 2 of schedule 1 to the GIPA Act says:

- (1) *It is to be conclusively presumed that there is an overriding public interest against disclosure of information (referred to in this Act as **Cabinet Information**) contained in any of the following documents:*
  - (a) *a document that contains an official record of Cabinet,*
  - (b) *a document prepared for the dominant purpose of its being submitted to Cabinet for Cabinet's consideration (whether or not the document is actually submitted to Cabinet),*
  - (c) *a document prepared for the purpose of its being submitted to Cabinet for Cabinet's approval for the document to be used for the dominant purpose for which it was prepared (whether or not the document is actually submitted to Cabinet and whether or not the approval is actually given),*
  - (d) *a document prepared after Cabinet's deliberation or decision on a matter that would reveal or tend to reveal information concerning any of those deliberations or decisions,*
  - (e) *a document prepared before or after Cabinet's deliberation or decision on a matter that reveals or tends to reveal the position that a particular Minister has taken, is taking, will take, is considering taking, or has been recommended to take, on a matter in Cabinet,*
  - (f) *a document that is a preliminary draft of, or a copy of or a part of, or contains an extract from, a document referred to in paragraphs (a)-(e).*
- (2) *Information contained in a document is not Cabinet information if:*
  - (a) *public disclosure of the document has been approved by the Premier or Cabinet,*  
*or*

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- (b) 10 years have passed since the end of the calendar year in which the document came into existence.
- (3) Information is not Cabinet information merely because it is contained in a document attached to a document referred to in subclause (1).
- (4) Information is not Cabinet information to the extent that it consists solely of factual material unless the information is contained in a document that, either entirely or in part, would:
  - (a) reveal or tend to reveal information concerning any Cabinet decision or determination, or
  - (b) reveal or tend to reveal the position that a particular Minister has taken, is taking or will take on a matter in Cabinet.
- (5) In this clause, **Cabinet** includes a committee of Cabinet and a subcommittee of a committee of Cabinet.

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## SCHEDULE 1: Conclusive presumption against disclosure

### Legal professional privilege – clause 5 of schedule 1

If information falls within the scope of one of the clauses in schedule 1 to the GIPA Act, then it is conclusively presumed that it is not in the public interest to release the information. This means that the agency is not required to balance the public interest considerations for and against disclosure before refusing access to the information.

Clause 5(1) of schedule 1 to the GIPA Act states that it is conclusively presumed that there is an overriding public interest against disclosure of information:

*that would be privileged from production in legal proceedings on the ground of client legal privilege (legal professional privilege), unless the person in whose favour the privilege exists has waived the privilege.*

This means that in order for an agency to rely on clause 5 of schedule 1 to the GIPA Act, the information must be of a kind that would not be required to be disclosed in legal proceedings in NSW because it is information that attracts client legal privilege and the agency has not waived, either expressly or impliedly that privilege.

Under clause 5(2) of schedule 1 to the GIPA Act, an agency must consider whether it is appropriate to waive privilege. An agency's decision about whether it will waive privilege in order to disclose the information requested in an access application is not a reviewable decision under the GIPA Act. However, if privilege has previously been waived, either expressly or impliedly, by an agency, then clause 5 of schedule 1 to the GIPA Act will not apply.

Client legal privilege protects confidential communications between a lawyer and a client made for the dominant purpose of the lawyer providing legal advice or professional legal services to the client or for use in current or anticipated litigation.

The existence and maintenance of privilege must always be considered in light of all the facts and circumstances that apply to the information.

In order for client legal privilege to attach to the information, each element of client legal privilege must be satisfied. The essential elements of client legal privilege are set out below:

- a. the existence of a client and lawyer relationship; and
- b. the confidential nature of the communication or document, and
- c. the communication or document was brought into existence for the dominant purpose of either:
  - enabling the client to obtain, or the lawyer to give legal advice or provide legal services, or
  - for use in existing or anticipated litigation.

Under clause 5(2) of schedule 1 to the GIPA Act, an agency must consider whether it is appropriate to waive privilege before it decides to refuse access under clause 5(1). An agency's decision about whether or not to waive privilege is not a reviewable decision under the GIPA Act.

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## SCHEDULE 1: Conclusive presumption against disclosure

### Excluded information of another agency – clause 6 of schedule 1

If information falls within the scope of one of the clauses in schedule 1 to the GIPA Act, then it is conclusively presumed that it is not in the public interest to release the information. This means that the agency is not required to balance the public interest considerations for and against disclosure before refusing access to the information.

Clause 6 of schedule 1 to the GIPA Act states that it is conclusively presumed that there is an overriding public interest against disclosing another agency's excluded information, unless that agency consents to the information being disclosed.

The categories of excluded information are set out in schedule 2 to the GIPA Act.

Under clause 6(2) of schedule 1 to the GIPA Act, an agency must ask the agency who holds the benefit of the excluded information whether they consent to disclosure before making a decision about whether or not to provide access to the information. The other agency's decision about whether or not to consent to disclosure is not reviewable (clause 6(3) of schedule 2).

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## SCHEDULE 1: Conclusive presumption against disclosure

### Child at risk reports – clause 10 of schedule 1

If information falls within the scope of one of the clauses in schedule 1 to the GIPA Act, then it is conclusively presumed that it is not in the public interest to release the information. This means that the agency is not required to balance the public interest considerations for and against disclosure before refusing access to the information.

Clause 10 of schedule 1 to the GIPA Act provides that it is to be conclusively presumed that there is an overriding public interest against disclosure of information contained in a report to which section 29 of the *Children and Young Persons (Care and Protection) Act 1998* (CYPCP Act) applies.

Section 29 of the CYPCP Act provides protection for people who make reports or provide certain information, in good faith, to the relevant Director-General. Section 29(1)(f) provides that the identity of the person who made a report about children who may be at risk of harm, and any information which could identify them, must not be disclosed, except with the consent of the person who made the report.

If a report is a report to which section 29 applies and is made in good faith, clause 10 will apply to that report. The question of whether a report is made “in good faith” should be determined as a question of fact on the ordinary meaning of “good faith”: whether it was made honestly. If a report is not made in good faith, section 29 will not apply and nor will the conclusive presumption against disclosure.

While section 54 of the GIPA Act requires an agency to consult with third parties under certain circumstances, this does not apply to information that falls within the scope of schedule 1. There is no requirement on an agency to consult before claiming this conclusive presumption against disclosure.

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# Personal factors of the application

## Personal factors of the application

An Agency is entitled to take into account the personal factors of an application under section 55 of the GIPA Act. These factors can be considered as factors in favour of providing the Applicant with access to the information. They can also be considered as factors against providing access if (and only to the extent that) they are relevant to whether disclosure could reasonably be expected to have any of the effects referred to in clauses 2-5 of the table to section 14 of the GIPA Act.

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# Searches for information

## Searches for information

Section 53 of the GIPA Act sets out the requirement to conduct searches:

### **53 Searches for information held by agency**

- (1) *The obligation of an agency to provide access to government information in response to an access application is limited to information held by the agency when the application is received.*
- (2) *An agency must undertake such reasonable searches as may be necessary to find any of the government information applied for that was held by the agency when the application was received. The agency's searches must be conducted using the most efficient means reasonably available to the agency.*
- (3) *The obligation of an agency to undertake reasonable searches extends to searches using any resources reasonably available to the agency including resources that facilitate the retrieval of information stored electronically.*
- (4) *An agency is not required to search for information in records held by the agency in an electronic backup system unless a record containing the information has been lost to the agency as a result of having been destroyed, transferred, or otherwise dealt with, in contravention of the State Records Act 1998 or contrary to the agency's established record management procedures.*
- (5) *An agency is not required to undertake any search for information that would require an unreasonable and substantial diversion of the agency's resources.*

The expression 'government information' is defined in section 4 of the GIPA Act as 'information contained in a record held by an agency.'

Before deciding that it does not hold information, an agency must comply with the requirements of section 53(2) of the Act. The requirements are:

- undertake such reasonable searches as necessary to locate the information requested; and
- use the most efficient means reasonably available to the agency.

In *Smith v Commissioner of Police [2012] NSWADT 85*, Judicial Member Isenberg said at paragraph 27:

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*In making a decision as to the sufficiency of an agency's search for documents which an applicant claims to exist, there are two questions:*

*(a) are there reasonable grounds to believe that the requested documents exist and are the documents of the agency; and if so,*

*(b) have the search efforts made by the agency to locate such documents been reasonable in all the circumstances of a particular case.*

When considering whether there are reasonable grounds to believe that information exists and whether searches to locate information were reasonable, the facts, circumstances and context of the application is relevant. Key factors in making an assessment about reasonable searches include “the clarity of the request, the way the agency’s recordkeeping system is organised and the ability to retrieve any documents that are the subject of the request, by reference to the identifiers supplied by the applicant or those that can be inferred reasonably by the agency from any other information supplied by the applicant” (*Miriani v Commissioner of Police, NSW Police Force [2005] NSWADT 187* at [30]).

The GIPA Act does not require an agency to include details of its searches in a notice of decision. However, it is good practice for written decisions to clearly explain what the search processes were, what was found, an explanation if no records were found, what was released and what was held back. Details of searches should include where and how the agency searched, a list of any records found – and if appropriate a reference to the business centre holding the records, the key words used to search digital records (including alternative spellings used) and a description of the paper records that were searched.

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# Third Party Consultation

## Third Party Consultation

An agency is required to take reasonable steps to consult third parties before making a decision about an access application if the agency is proposing to provide access to information that is of a kind requiring consultation. Section 54 of the GIPA Act sets out what information requires consultation. For example, consultation may be required if:

- the information concerns a person (or entity)'s business, commercial, professional or financial interests, and
- the person (or entity) may reasonably be expected to have concerns about the disclosure of the information, and
- those concerns may reasonably be expected to be relevant to the question of whether there is a public interest consideration against disclosure.

An agency must take any third party objection into account in making its decision, but an objection is not in itself determinative of an overriding public interest consideration against disclosure.

An agency may decide to release information despite receiving an objection from a third party. However under section 54(6) and (7) the agency must notify the third party of its decision, and not release the information until the third party's review rights have expired.

Under section 54A an agency is also able, but not required, to consult with another agency to determine whether an overriding public interest against disclosure of the information exists, or to help identify a person whom the agency is required to consult.

The Information Commissioner has published *Guideline 5: consultation on public interest considerations under section 54 of the GIPA Act*. This Guideline is available on the IPC website. Agencies must have regard to this Guideline pursuant to section 15(b) of the GIPA Act.

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# Unreasonable and substantial diversion of resources

## Unreasonable and substantial diversion of resources

Under section 60(1)(a) of the GIPA Act, an agency may refuse to deal with an access application if it appears that the work involved in processing the application would substantially and unreasonably divert the agency's resources.

### What factors must an agency consider?

Whether an application is one that would be an unreasonable and substantial diversion of resources depends on the facts of each case.

In making a decision that dealing with an application would require an unreasonable and substantial diversion of resources, an agency can take into account:

- a. the estimated volume of information involved in the request,
- b. its size and resources, and
- c. the period for deciding the application,

and consider whether these factors outweigh the general public interest in favour of disclosing government information and demonstrable importance of the information to the applicant. This will help inform the agency's decision about what constitutes an unreasonable and substantial diversion of resources.

An agency is not limited in the factors it is able to take into account and it can also consider whether the applicant is a repeat applicant to the agency in respect of applications of the same kind, or a repeat applicant to the agency in respect of application of the same kind. If so, the agency may also consider the extent to which the present application may have been adequately met by those previous applications.

For guidance about what other factors may be relevant when making a decision that dealing with an application would require an unreasonable and substantial diversion of resources, an agency should consider in the case of *Colefax v Department of Education and Communities No 2 [2013] NSWADT 130*. In the *Colefax* case, the Administrative Decisions Tribunal considered relevant factors that were outlined in an earlier case: *Cianfrano v Director General, Premier's Department [2006] NSWADT 137*. *Cianfrano* was decided under previous freedom of information legislation, which contained a provision similar to section 60(1)(a) of the GIPA Act. As noted by the Tribunal in

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Colefax, there is an important distinction between the tests under the previous FOI legislation and the GIPA Act. The distinction is that under the GIPA Act an applicant has a statutory right to access government information, and the Act instructs that discretions under it be exercised so as to enhance its objects.

The factors that were outlined in the Cianfrano case and reinforced in Colefax include:

- terms of the request;
- demonstrable importance of the document(s) to the applicant;
- whether the request is a reasonably manageable one, having regard to the size of the agency and the extent of its resources usually available for dealing with information access applications;
- agency's estimate as to the number of documents affected by the request, and the number of pages and the amount of officer time, and salary cost;
- reasonableness of the agency's initial assessment and whether the applicant has taken a co-operative approach in redrawing the boundaries of the application;
- the time lines binding on the agency, that is, the time in which it has to process the application;
- the degree of certainty that can be attached to the estimate that is made as to documents affected and hours to be consumed; and whether there is a real possibility that processing time may exceed to some degree the estimate first made.

This is not an exhaustive list of factors, and there may be other circumstances that are relevant in deciding whether an application would require an unreasonable and substantial diversion of an agency's resources.

In Colefax, the Tribunal discussed a factor identified in Cianfrano of whether dealing with the application would require more than 40 hours' processing time. The Tribunal cautioned against reading into this a "40-hour rule":

With respect to the 40 hour consideration referred to by the President In Cianfrano, the Tribunal in that case accepted evidence that a request taking more than 40 hours to process would be a cause for concern to those responsible for processing it. Considerable caution needs to be exercised with respect to that finding. It was made in the context of the facts and evidence in that case, and should not be taken as establishing something in the nature of a 40-hour rule (paragraph [40] of the Colefax decision).

Having assessed the access application using the above factors, if an agency refuses to deal with the application then it must provide an applicant with a notice of decision that outlines in some detail why it considers the application to be both unreasonable and substantial diversion of resources (under section 60(5) of the GIPA Act).

### **Reasonable opportunity to amend an application**

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Under section 60(4) an agency must not refuse to deal with an access application without first providing the applicant with a reasonable opportunity to amend the application.

In light of the objectives of the GIPA Act, and other provisions contained within the GIPA Act requiring agencies to provide an applicant with advice and assistance (such as sections 16(1) and 52(3)), section 60(4) requires a positive approach by the agency to assist the applicant in reducing the scope of the application. It is insufficient for an agency to tell an applicant that the application is 'too broad.' In order to assist an applicant in reducing the scope and reframing an application into an acceptable form, it may be helpful for the agency to provide information about the relevant types or classes of information that it holds and how the agency's records are kept.

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# Notices of decisions

## Notices of decisions

The GIPA Act does not provide a set formula for weighing individual public interest considerations or assessing their comparative weight. Whatever approach is taken, these questions may be characterised as questions of fact and degree to which different answers may be given without being wrong, provided that the decision-maker acts in good faith and makes a decision available under the GIPA Act.

Agencies should:

- set out the considerations in favour of disclosure, identify the evidence that affects the weight to be given to each consideration, and give weight to each consideration;
- set out the considerations against disclosure, identify the evidence that affects the weight to be given to each consideration, and give weight to each consideration;
- make a decision about which way the balance lies, in light of the weight in favour and against.

If at this stage the agency considers that there is an overriding public interest against disclosing the information, the GIPA Act contains a number of provisions that may apply 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 altogether. These provisions are found in sections 72 to 78 of the GIPA Act.

It is consistent with the objects of the GIPA Act that these provisions be considered, where relevant, before a decision is made to not disclose information because there is an overriding public interest consideration against disclosure.

Once all of the above steps have been finalised, an agency should explain its reasons for the decision to the applicant. If the agency decides that there is an overriding public interest against disclosing the information its notice of decision must meet the notice requirements in section 61 of the GIPA Act. Each notice must meet the requirements prescribed by section 126 of the GIPA Act:

- it must be in writing;
- it must include the date of the decision;
- it must 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;
- it must include the contact details of an officer to whom inquiries about the decision can be directed; and

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- it must not disclose information for which there is an overriding public interest against disclosure.

The agency, having applied the public interest test under section 13 of the GIPA Act, must include detailed reasons if it decides not to release information in response to a formal access application.

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:

- the reasons for its decision to refuse access;
- the findings on any key questions of fact, and the source of the information on which the findings are based; and
- the general nature and format of the records that contain the information sought.

Although not required by the GIPA Act, as good practice a notice of decision for formal applications should include:

- details of the searches conducted by the agency to locate the information asked for;
- the reasons for the agency's decision to withhold the information including:
  - public interest considerations in favour of disclosure and why the agency considers them relevant to the information sought;
  - public interest considerations against disclosure and why the agency considers them relevant to the information sought; and
  - the agency's decision after balancing the public interest considerations for and against disclosure.
- appropriate details of relevant consultations made as required under section 54 of the GIPA Act;
- details of any personal factors of the application under section 55 of the GIPA Act that the agency has taken into account in making its decision;
- details about the access period (under section 77 of the GIPA Act) and forms of access to any information released under the agency's notice of decision;
- details about whether any processing charges will be payable for access to the information and how those charges have been calculated (as required by section 62 of the GIPA Act);
- whether the agency will record details about the access application in its disclosure log (as required by sections 25 and 26 of the GIPA Act); and
- a schedule of documents itemising the documents falling within the scope of the access application, including a description of the record, location of the record within the agency, format of the record, public interest considerations in favour of, or against disclosure, the corresponding GIPA Act sections for any such considerations, and whether the information was released.

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# Processing charges and advance deposits

## Processing charges and advance deposits

Sections 64 to 71 of the GIPA Act set out provisions regarding processing charges and advance deposits.

Under section 64(1) of the GIPA Act, an Agency may impose a charge for dealing with an access application at a maximum of \$30 per hour for each hour of processing time. The application fee of \$30 will count as payment towards any processing charges imposed by the Agency. If a 50% discount on charges is granted by the Agency then the application fee will pay for the first two hours of processing the access application.

The GIPA Act does not specify the way in which an Agency should calculate the hourly rate.

Section 68 of the GIPA Act authorises an agency to require an applicant to pay an advance deposit of a processing charge. Under section 69 of the GIPA Act, the maximum advance deposit that can be required is 50% of the estimated processing charge.

An agency's notice requiring an advance deposit must:

- include a statement of the processing charges for work already undertaken by the agency in dealing with the application, and
- include a statement of the estimated processing charges for work expected to be required to be undertaken by the agency in dealing with the application, and
- specify a date by which the advance deposit must be paid (being a date at least 20 working days after the date the notice is given), and
- include a statement that if the advance deposit is not paid by the due date the agency may refuse to deal further with the application and that this will result in any application fee and advance deposit already paid being forfeited.

Section 62 of the GIPA Act provides that notice of an agency's decision to provide access to information must state whether any processing charges will be payable for access to the information and indicate how those charges have been calculated. This notice is not required until the Agency has dealt with the application and decided whether to provide access to the information requested.

With respect to the tasks that attract a processing charge, paragraph 3.9 of the Information Commissioner's *Guideline 2: Discounting Charges* states:

*The IPC's view is that agencies cannot charge for registering the application, conversations with the applicant to clarify the request or reduce the scope, drafting file notes, drafting letters (including notification of a valid application, or advance deposit letters; however, the determination letter may be charged for), postage, internal conversations, printing and other general administration incidental to or associated with processing the application.*

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# Special public benefit

## Special public benefit

The Applicant sought a 50% discount under section 66 of the GIPA Act (special public benefit). The Agency refused a further 50% discount under section 66 of the GIPA Act. This is because the Agency decided that the information requested does not meet the criteria in section 66, or the Information Commissioner's *Guideline 2: Discounting Charges*.

In accordance with section 97(3) of the GIPA Act, in this review the burden of establishing that there is an entitlement to the reduction lies on the Applicant.

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