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100 Pitt Street

## 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.



## What is the public interest test?

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

Under the *Government Information (Public Access) Act 2009* (GIPA Act), all government agencies must disclose or release information unless there is an overriding public interest against disclosure. When deciding whether to release information, staff must apply the public interest test. This means, they must weigh the factors in favour of disclosure against the public interest factors against disclosure.

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

### Applying the public interest test

The public interest test involves three steps:

- 1 Identify the relevant public interest considerations in favour of disclosure
- 2 Identify the relevant public interest considerations against disclosure
- 3 Determine the weight of the public interest considerations in favour of and against disclosure and where the balance between those interests lies.

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

The GIPA Act (section 12) provides examples of factors that agencies may consider in favour of disclosure. These are:

- promoting open discussion of public affairs, enhancing government accountability or contributing to positive and informed debate on issues of public importance;
- informing the public about the operations of agencies and, in particular, their policies and practices for dealing with members of the public;
- ensuring effective oversight of the expenditure of public funds;

- the information is personal information of the person to whom it is to be disclosed; and
- revealing or substantiating that an agency (or a member of an agency) has engaged in misconduct or negligent, improper or unlawful conduct.

This is not an exhaustive list and agencies may identify other factors in favour of disclosure.

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

### Step 2. Identify the relevant public interest considerations against disclosure

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

Considerations are grouped under the following headings:

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

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

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



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## 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(1) and (b) of the GIPA Act.)