



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".



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.



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.



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.



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.



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.¹

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.

¹ Macquarie Dictionary, 6th edition, October 2013



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).