

How to apply the public interest test *

The *Government Information (Public Access) Act 2009* creates an enforceable right to information. All government agencies must release information unless there is an overriding public interest against disclosure.

The purpose of the Act is to foster responsible and representative government that is open, accountable, fair and effective.

Effect of the public interest test

Many staff members in many government agencies routinely provide information to the public in their day-to-day work. This will not change in any way, and staff will continue to carry out these essential services.

Agencies are now specifically authorised to release information proactively, or in response to an informal request, unless there is an overriding public interest against disclosure. This allows agencies to provide as much information as possible while avoiding time-consuming procedures.

Unless there is an overriding public interest against disclosure, agencies must disclose information in response to a valid formal access application for information that is held by the agency and not otherwise available to the applicant. Agencies are only relieved of this obligation in limited circumstances, for example where dealing with an application would constitute a significant and unreasonable diversion of resources. Sections 59-60 of the *GIPA Act* set out the reasons that an agency may refuse to deal with a valid formal access application.

Applying the public interest test

In deciding which information to release, agencies must apply the public interest test having regard to their obligation to promote the objectives of the Act and to any relevant guidelines issued by the Information Commissioner.

The public interest test involves three steps:

1. Identifying the relevant public interest considerations for disclosure
2. Identifying any relevant public interests against disclosure
3. Assessing whether the public interest against disclosure outweighs the public interest in favour.

Step 1: Identify relevant public interest considerations for disclosure

The Act allows for consideration of any public interest in favour of disclosure.

Examples of interests listed in the Act:

- 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
- revealing or substantiating that an agency (or a member of an agency) has engaged in misconduct or negligent, improper or unlawful conduct.

It is crucial to remember that agencies are not limited to these examples, but can take into account any public interest factor in favour of disclosure.

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

Step 2: Identify relevant public interest considerations against disclosure

The Act provides an exhaustive list of public interest considerations against disclosure under s.14. These are the **only** considerations against disclosure that agencies may consider in applying the public interest test.

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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 (in legislation other than those listed in Schedule 1)
- exempt documents under interstate Freedom of Information legislation.

Agencies must only take into account relevant considerations as set out in s.14.

Agencies must take into account any submissions made by an applicant in relation to these public interest considerations, as well as any factors personal to the applicant.

Under the Act, certain factors are expressly stated to be irrelevant. In applying the public interest test, agencies must **not** 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.

Step 3: Assess whether the public interest against disclosure outweighs the public interest in favour of disclosure, giving appropriate weight to each consideration

In contrast to decisions under the *FOI Act*, under the *GIPA Act* the fact that one or even several public interest considerations against disclosure have been identified is not, in itself, sufficient justification for a decision to refuse to publish or disclose. Any decision must be made after balancing any relevant considerations for and against disclosure. In each case, agencies need to consider a range of factors, including:

- the nature and context of the information
- in the case of an informal or formal request, any factors special to the applicant
- the relative weight of public interest considerations for and against disclosure.

Agencies should refuse to disclose information only where, on balance, there is an overriding public interest against disclosure. Where considerations on balance favour disclosure, or are evenly balanced, the presumption in favour of disclosure stands, and information should be published or released.

Presumption against disclosure in some cases

The 'balancing' approach to the public interest test applies in most circumstances. However, in relation to 12 categories of information, there is a conclusive presumption of an overriding public interest against disclosure. These are:

1. information subject to an overriding secrecy law (26 specifically named Acts)
2. Cabinet information
3. Executive Council information
4. information subject to the direction or order of a court or other body with the power to receive evidence on oath, or to Parliamentary privilege
5. information subject to legal professional privilege
6. 'excluded information' (judicial and prosecutorial information, information about complaints handling and investigative functions, competitive and market sensitive information, information in relation to specific functions of the Public Trustee, and information about the ranking and assessment of students completing the HSC)
7. documents affecting law enforcement and public safety
8. specific information relating to transport safety
9. specific information relation to adoption procedures and records
10. specific reports concerning the care and protection of children
11. information contained in the Register of Interests kept in relation to the Ministerial Code of Conduct
12. specific information relating to Aboriginal and environmental heritage.

Generally, agencies must not publish and must refuse requests to disclose information in the above categories.

Formal applications for 'excluded information' are invalid under the Act.

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Further information

- Go to www.oic.nsw.gov.au
- Email oinfo@oic.nsw.gov.au
- Mail GPO Box 7011, Sydney NSW 2001
- Call **1800 194 210** between 9am to 5pm, Monday to Friday (excluding public holidays).

If you have a hearing or speech impairment, you can call us through the National Relay Service (NRS) on **133 677** or if you want to talk to us with the assistance of an interpreter, you can call us through the Translating and Interpreting Service (TIS) on **131 450**. NRS and TIS are free services.

* PLEASE NOTE:

The new Right to Information system has not yet commenced. If you are seeking access to government information now, before the Government Information (Public Access) Act 2009 (GIPA Act) commences, please contact the agency holding the information, or visit the Freedom of Information website at www.dpc.nsw.gov.au/about_us/freedom_of_information or contact the Premier's Department FOI Hotline on 02 9228 4441.