

Policy Statement and Objective

The objectives of this TIPP are to ensure:

- NSW Treasury complies with its obligations the *Government Information (Public Access) Act 2009*
- effective and efficient processes and procedures are in place
- a consistent approach across NSW Treasury for managing access applications
- accountability and ethical practice

Scope

This procedure applies to all NSW Treasury staff, officers, consultants, contractors or temporary workers undertaking work for NSW Treasury

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1. Introduction

1.1. Policy objectives

The objectives of this TIPP are to ensure:

- NSW Treasury complies with its obligations the *Government Information (Public Access) Act 2009* (the GIPA Act)
- effective and efficient processes and procedures are in place
- a consistent approach across NSW Treasury for managing access applications
- accountability and ethical practice

1.2. The Government Information (Public Access) Act 2009 (GIPA Act)

The object of the GIPA Act is as follows:

- “(1) To maintain and advance a system of responsible and representative democratic Government that is open, accountable, fair and effective, the object of this Act is to open government information to the public by:
- (a) authorising and encouraging the proactive public release of government information by agencies
 - (b) giving members of the public an enforceable right to access government information
 - (c) providing that access to government information is restricted only when there is an overriding public interest against disclosure.

1.3. Scope

This TIPP applies to all officers, consultants and contractors undertaking work for NSW Treasury.

1.4. Ethical conduct

The public has a right to expect the highest integrity and competence from NSW Treasury staff. All activities, including the release of government information, must be conducted in an ethical manner and must comply with the principles contained in the Code of Ethics and Conduct (TIPP2.05).

NSW Treasury staff must ensure they do not have, or are not perceived to have, a conflict of interest with any government information that is requested or released. Those staff that may have a personal interest that may conflict directly or indirectly with the performance of their duties should discuss the related matter with their Branch Head or member of the Leadership Team, as appropriate.

2. Information access applications

NSW Treasury manages information access applications through a centralised decision-making model. The NSW Treasury delegated decision-maker sits within the Information Access and Transactions Branch of the Office of General Counsel.

NSW Treasury must usually issue a decision on an access application within 20 working days after the application is received and/or becomes valid.

Information Access and Transactions work hand in hand with the relevant NSW Treasury business areas in order to process information access applications.

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The key stages of processing an information access application are:

1. Receipt of a valid application
2. Search of NSW Treasury records
3. Collation of relevant records
4. Review of records
5. Preparation of a Notice of Decision and release of information, if so decided

Under this centralised model, all officers, consultants and contractors undertaking work for NSW Treasury must comply with the obligations set out in the GIPA Act and specified in this TIPP.

3. Internal review

3.1. Reviewable decisions

Section 80 in Part 5 of the GIPA Act, details the decisions for which an applicant can seek review.

A decision cannot be internally reviewed if the:

- original decision is made by the Secretary;
- decision is or has been the subject of review by the Information Commissioner, except where internal review is recommended by the Information Commissioner; or
- decision is or has been the subject of review by the NSW Civil and Administrative Tribunal (NCAT).

An applicant or a person aggrieved by a reviewable decision may seek an internal review within 20 working days, from the date of the Decision. An internal review request must be accompanied by a fee of \$40.00.

NSW Treasury must make its decision on an internal review and notify the applicant within 15 working days after the application for internal review is received.

4. Review by the Information Commissioner

4.1. Applying for external review by the Information Commissioner

An applicant or a person aggrieved by a reviewable decision may seek review by the Information Commissioner, within 40 working days, from the date of the decision.

The applicant may apply directly to the Information Commissioner to have the decision reviewed, without having to seek an internal review. A person aggrieved by a reviewable decision, however, such as a third party, must first seek an internal review before going to the Information Commissioner.

4.2. Recommendation for reconsideration of decision

If the Information Commissioner makes a recommendation, NSW Treasury may reconsider its decision by conducting an internal review, by another officer, but if the decision has already been internally reviewed, NSW Treasury is to reconsider the decision and make a new decision. The new decision, after an IPC recommendation, may be made by the original decisionmaker, or another delegated officer.

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4.3. Information Commissioner may refuse to review decision

The Information Commissioner may refuse to review or to deal further with a review of a decision, if the:

- access application for review is frivolous, vexatious, misconceived or lacking in substance;
- review would require an unreasonable and substantial diversion of the resources of the Information Commissioner;
- applicant for review has failed without reasonable excuse to co-operate with the Information Commissioner in connection with the review; or
- applicant for review cannot by reasonable efforts be contacted by the Information Commissioner.

The Information Commissioner cannot review a decision if it is or has been the subject of review by NCAT.

5. Review by the NCAT

5.1 Applying for external review by NCAT

An applicant or a person, such as a third party, aggrieved by a reviewable decision may seek review by the NSW Civil and Administrative Tribunal (NCAT), within 40 working days of the date of the Decision.

If the Decision is first reviewed by the Information Commissioner, then an application for NCAT review must be made within 20 working days after the applicant is notified of the Information Commissioner's recommendation.

A reviewable decision does not have to be internally reviewed or viewed by the Information Commissioner before it can be the subject of an NCAT review.

5.2. Receiving a NCAT notice

Upon receipt of an NCAT notice, NSW Treasury will consider appropriate legal representation and, as required under the GIPA Act, engage with relevant government agencies.

5.3. NCAT may refuse to review a decision

NCAT may refuse to review or to deal further with a review of a Decision, if it is satisfied that the application for review is frivolous, vexatious, misconceived or lacking in substance.

5.5. Extension of time to apply for a NCAT review

NCAT may extend the time for making an NCAT application (even if time has expired) if it is satisfied that the person has provided a reasonable excuse for the delay in making the application, and the application to extend the time is in writing.

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Appendix 1 – How to apply the public interest test

How to apply the public interest test

In deciding whether to disclose government information under the GIPA Act, NSW Treasury must apply the public interest test having regard to its obligation to promote the objectives of the Act.

The public interest test involves three steps:

- identifying the relevant public interest considerations in favour of disclosure
- identifying any relevant public interests against disclosure
- assessing whether the public interest against disclosure outweighs the public interest in favour.

Step 1: Identify relevant public interest considerations for disclosure

The GIPA Act allows consideration of any public interest consideration in favour of disclosure. Section 12 (set out below) provides some public interest examples to guide decision-makers. It is important to note that the decision-maker is not limited to these examples but can consider any public interest consideration in favour of disclosure.

Section 12 - Public interest considerations in favour of disclosure

1. There is a general public interest in favour of the disclosure of government information.
2. Nothing in this Act limits any other public interest considerations in favour of the disclosure of government information that may be taken into account for the purpose of determining whether there is an overriding public interest against disclosure of government information.

Note: The following are examples of public interest considerations in favour of disclosure of information:

- a. Disclosure of the information could reasonably be expected to promote open discussion of public affairs, enhance Government accountability or contribute to positive and informed debate on issues of public importance.
 - b. Disclosure of the information could reasonably be expected to inform the public about the operations of agencies and, in particular, their policies and practices for dealing with members of the public.
 - c. Disclosure of the information could reasonably be expected to ensure effective oversight of the expenditure of public funds.
 - d. The information is personal information of the person to whom it is to be disclosed.
 - e. Disclosure of the information could reasonably be expected to reveal or substantiate that an agency (or a member of an agency) has engaged in misconduct or negligent, improper or unlawful conduct.
3. The Information Commissioner can issue guidelines about public interest considerations in favour of the disclosure of government information, for the assistance of agencies.

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Step 2: Identify relevant public interest considerations against disclosure

The GIPA Act provides a list of public interest considerations against disclosure under section 14. These, and the provisions set out in Schedule 1 of the GIPA Act, are the only considerations against disclosure that agencies may consider in applying the public interest test against disclosure.

Section 14 - Public interest considerations against disclosure

1. It is to be conclusively presumed that there is an overriding public interest against disclosure of any of the government information described in Schedule 1.
2. The public interest considerations listed in the Table to this section are the only other considerations that may be taken into account under this Act as public interest considerations against disclosure for the purpose of determining whether there is an overriding public interest against disclosure of government information.
3. The Information Commissioner can issue guidelines about public interest considerations against the disclosure of government information, for the assistance of agencies, but cannot add to the list of considerations in the Table to this section.
4. The Information Commissioner must consult with the Privacy Commissioner before issuing any guideline about a privacy-related public interest consideration (being a public interest consideration referred to in clause 3 (a) or (b) of the Table to this section).

Section 14 - 1 Responsible and effective government

There is a public interest consideration against disclosure of information if disclosure of the information could reasonably be expected to have one or more of the following effects (whether in a particular case or generally):

- a. prejudice collective Ministerial responsibility,
- b. prejudice Ministerial responsibility to Parliament,
- c. prejudice relations with, or the obtaining of confidential information from, another government,
- d. prejudice the supply to an agency of confidential information that facilitates the effective exercise of that agency's functions,
- e. 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,
- f. prejudice the effective exercise by an agency of the agency's functions,
- 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,

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- 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).

Section 14 - 2 Law enforcement and security

There is a public interest consideration against disclosure of information if disclosure of the information could reasonably be expected to have one or more of the following effects (whether in a particular case or generally):

- a. reveal or tend to reveal the identity of an informant or prejudice the future supply of information from an informant,
- b. prejudice the prevention, detection or investigation of a contravention or possible contravention of the law or prejudice the enforcement of the law,
- c. 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),
- d. endanger, or prejudice any system or procedure for protecting, the life, health or safety of any person,
- e. endanger the security of, or prejudice any system or procedure for protecting, any place, property or vehicle,
- f. facilitate the commission of a criminal act (including a terrorist act within the meaning of the *Terrorism (Police Powers) Act 2002*),
- g. prejudice the supervision of, or facilitate the escape of, any person in lawful custody,
- h. prejudice the security, discipline or good order of any correctional facility.

Section 14 - 3 Individual rights, judicial processes and natural justice

There is a public interest consideration against disclosure of information if disclosure of the information could reasonably be expected to have one or more of the following effects:

- a. reveal an individual's personal information,
- b. 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*,
- c. prejudice any court proceedings by revealing matter prepared for the purposes of or in relation to current or future proceedings,
- d. prejudice the fair trial of any person, the impartial adjudication of any case or a person's right to procedural fairness,

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- e. reveal false or unsubstantiated allegations about a person that are defamatory,
- f. expose a person to a risk of harm or of serious harassment or serious intimidation,
- g. 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.

Section 14 - 4 Business interests of agencies and other persons

There is a public interest consideration against disclosure of information if disclosure of the information could reasonably be expected to have one or more of the following effects:

- a. 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,
- b. reveal commercial-in-confidence provisions of a government contract,
- c. diminish the competitive commercial value of any information to any person,
- d. prejudice any person’s legitimate business, commercial, professional or financial interests,
- e. 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).

Section 14 - 5 Environment, culture, economy and general matters

There is a public interest consideration against disclosure of information if disclosure of the information could reasonably be expected to have one or more of the following effects:

- a. endanger, or prejudice any system or procedure for protecting, the environment,
- b. 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,
- c. 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,
- d. damage, or prejudice the ability of the Government or an agency to manage, the economy,
- e. 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.

Section 14 - 6 Secrecy provisions

- 1) 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

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State or of the Commonwealth) that prohibits the disclosure of information, whether or not the prohibition is subject to specified qualifications or exceptions.

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

Section 14 - 7 Exempt documents under interstate Freedom of Information legislation

- 1) 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.
- 2) The public interest consideration under this clause extends to consideration of the policy that underlies the exemption.
- 3) 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.

Step 3: Balance the public interest considerations

NSW Treasury must refuse to disclose information where, on balance, there is an Overriding Public Interest Against Disclosure (OPIAD), or if there is a conclusive presumption of an overriding public interest against disclosure; please see Schedule 1, or the section 14 Table, of the GIPA Act.

There is an OPIAD of government information if (and only if) there are public interest considerations against disclosure and, on balance; those considerations outweigh the public interest considerations in favour of disclosure. Where considerations on balance favour disclosure, or are evenly balanced, the presumption in favour of disclosure stands, and information must be released.

Conclusive presumption against disclosure in some cases

Section 14 also refers to a list of **conclusive** public interest factors against disclosure which are listed in **Schedule 1** to the GIPA Act. If there is a public interest of the kind found in Schedule 1, then no further balancing is required, as Parliament has mandated that the public interest weighs against disclosure. The categories listed in Schedule 1 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

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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
13. Information about complaints to Judicial Commission
14. Information about authorised transactions under the *Electricity Networks Assets (Authorised Transactions) Act 2015*.
15. **Information about authorised transaction under Land and Property Information NSW (Authorised Transaction) Act 2016.**
16. **Information provided to High-Risk Offenders Assessment Committee**

Note: Category 14 above refers to information about the long-term lease by the State of TransGrid, Ausgrid and Endeavour Energy. The GIPA Act provides that “*It is to be conclusively presumed that there is an overriding public interest against disclosure of information contained in any document prepared for the purposes of or in connection with an authorised transaction under the Electricity Network Assets (Authorised Transactions) Act 2015 other than a document the public disclosure of which has been approved by the Treasurer*” (clause 14 of Schedule 1 to the GIPA Act).”

Generally, agencies must refuse requests to disclose information in the above categories.

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