



office of the
information
commissioner
new south wales

Guideline 5

Consultation on public interest considerations under section 54 of the *Government Information (Public Access) Act 2009* (NSW).

February 2012

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Appendix A Section 54 of the *Government Information (Public Access) Act 2009* (NSW) (GIPA Act)

The Information Commissioner is empowered under sections 12(3) and 14(3) of the *Government Information (Public Access) Act 2009* (NSW) (the GIPA Act) to issue guidelines to assist agencies regarding the public interests in favour of, or against, disclosure.

This Guideline, made pursuant to those sections of the GIPA Act, is to assist agencies interpret and apply the provisions in section 54 of the GIPA Act. Section 54 sets out the circumstances in which agencies must consult with individuals, businesses or other agencies about public interest considerations when processing formal access applications under Part 4 of the GIPA Act.

This Guideline supplements the provisions of the GIPA Act. Agencies must have regard to it in accordance with section 15(b) of the GIPA Act.

As this issue involves a privacy-related public interest, the Information Commissioner has consulted with the Privacy Commissioner as required by section 14(4) of the GIPA Act.

The operation and effectiveness of the Guideline will be reviewed after twelve months.

Deirdre O'Donnell

Information Commissioner

February 2012

Overview

When a person requests information from a government agency under the *Government Information (Public Access) Act 2009* (NSW) (the GIPA Act), that information can contain details about other individuals, businesses or agencies. Where the request is a formal access application made under Part 4 of the GIPA Act, the agency dealing with that request may need to consult with those third parties¹ in certain circumstances in accordance with section 54 before deciding whether or not to release the information to the access applicant.

Section 54 states that, in dealing with an access application, agencies must take such steps (if any) as are reasonably practicable to consult with a person before providing access to information relating to the person if it appears that:

- (a) the information is of a kind that requires consultation under this section, and
- (b) the person may reasonably be expected to have concerns about the disclosure of the information, and
- (c) those concerns may reasonably be expected to be relevant to the question of whether there is a public interest consideration against disclosure of the information.

The purpose of this Guideline is to set out the Information Commissioner's view on the interpretation of section 54, with the aim of assisting agencies, access applicants and third parties to whom an application under the GIPA Act relates. The aim of the Guideline is to promote greater consistency in the practice among agencies, and to resolve confusion about how, when and with whom to consult under section 54.

This Guideline deals with:

- the types of information that may trigger the requirement to consult (Part 1)
- the purpose of the consultation requirement in section 54 (Part 1)
- how consultation under section 54 relates to the public interest test (Part 2)
- whether section 54 makes consultation mandatory (Part 3)
- the concept of "reasonableness" as it relates to section 54 (Part 3)
- the process of consulting with third parties (Part 4)
- steps agencies need to take following consultation (Part 5), and
- third party review rights (Part 5).

This Guideline is made under sections 12(3) and 14(3) of the GIPA Act, which give the Information Commissioner the power to make guidelines to assist agencies regarding the public interest considerations in favour of, or against, disclosure of information. The Privacy Commissioner has been consulted in accordance with section 14(4) of the GIPA Act. Agencies are required to have regard to this guideline in accordance with section 15(b) of the GIPA Act.

1. Although the section 54 does not use the term "third party", it is used in this Guideline as a shorthand way of referring to the individuals, business or other bodies to whom section 54 applies.

Part 1: The scope and purpose of section 54

1.1 Section 54(1) of the GIPA Act provides that an agency must take any steps that are reasonably practicable to consult with a person before providing access to information relating to that person in response to an access application if it appears to the agency that:

- (a) the information is of a kind that requires consultation under this section; and
- (b) the person may reasonably be expected to have concerns about the disclosure of the information; and
- (c) those concerns may reasonably be expected to be relevant to the question of whether there is a public interest consideration against disclosure of the information.

1.2 Section 54 is located in Part 4 of the GIPA Act, which applies only to formal access applications. Therefore, the consultation requirement in section 54 applies only to formal applications, and not to informal requests or to information disclosed proactively.

1.3 When processing formal access applications, agencies must consider the following:

- Is the information about a person² other than the access applicant?
- Is the information of the type referred to in section 54(2)?
- Is it reasonable to expect that the person would have concerns about whether the information is disclosed?
- If so, is it reasonable to expect that those concerns would be relevant to any of the public interest considerations against disclosure in the Table at section 14?

If the answer to all of these questions is “yes”, then the agency must consult with the relevant third party or parties unless it can show that consultation is not “reasonably practicable”.

1.4 When considering how best to comply with section 54, the following questions arise:

- Why is it important for agencies to consult with third parties?
- What type of information triggers the requirement to consult?
- When may a third party reasonably be expected to have concerns about information being disclosed?
- What steps should agencies take to consult and when will it be “reasonably practicable” for agencies to take those steps?
- Can agencies choose not to consult?
- How do agencies determine if the views of third parties are relevant to the public interest test?
- How should agencies deal with third party objections?

These questions are addressed in this Guideline.

Type of information relevant to section 54

1.5 Section 54(2) provides that information relating to a person is of a kind that requires consultation if the information:

- (a) includes personal information about the person, or
- (b) concerns the person’s business, commercial, professional or financial interests, or
- (c) concerns research that has been, is being, or is intended to be, carried out by or on behalf of the person, or
- (d) concerns the affairs of a government of the Commonwealth or another State (and the person is that government).

2. The term “person” extends beyond individuals to mean an agency in NSW or another jurisdiction, or the government of another jurisdiction: GIPA Act sch 4[1]. The term can also refer to a corporation or other body corporate or politic: *Interpretation Act 1987* (NSW) s 21(1).

Personal information

1.6 The most common circumstance where an agency may need to consult with a third party about information requested in an access application is where that application involves personal information about that third party.

1.7 Personal information is defined in Schedule 4[4] to 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”. Personal information includes such things as an individual’s fingerprints, retina prints, body samples or genetic characteristics, but does not include:

- (a) information about an individual who has been dead for more than 30 years
- (b) information about an individual (comprising the individual’s name and non-personal contact details) that reveals nothing more than the fact that the person was engaged in the exercise of public functions, or
- (c) information about an individual that is prescribed by the regulations as not being personal information.

1.8 The type of information that may be classed as “personal” cannot be exhaustively defined and will depend upon the context. However, for the purposes of the GIPA Act and the requirement to consult, it is likely that the following information will be of a personal nature where it relates to an identified individual:

- a person’s name and personal contact details, such as home and email address and telephone numbers
- information about the person’s family members
- employment information, including information about salary, disciplinary proceedings, performance contracts and reviews, and referee reports
- health information
- information about a person’s education
- information about a person’s criminal record or history, and
- opinions held by individuals about other people, such as witness reports in an investigation, or referee reports in a recruitment process.³

1.9 Discretion needs to be used in determining whether information is of a personal nature. Other information can also be classed as “personal information” for the purposes of the GIPA Act depending on the context. If in doubt, it is prudent to regard the information as “personal” and consult with the person to whom it relates.

1.10 If an access application involves an agency deciding whether or not to disclose personal information about a person who is dead, the agency is required to consult with a close relative of the deceased for their views on the release of the information.⁴ However, if the information is historical and the person has been dead for more than 30 years, there is no requirement to consult.

1.11 Applying the public interest test where personal information is concerned can be complex. OIC Guideline 4 addresses this topic.

Information concerning the person’s business, commercial, professional or financial interests

1.12 Government agencies may hold information that relates to the business, commercial, professional or financial interests of individuals, businesses or other organisations, or government agencies. Where a formal access application is made requesting such information, section 54(2)(b) provides that the third party to whom that information relates may need to be consulted.

1.13 Section 54(2)(b) is broad in scope. It covers information in a contract that may be commercial-in-confidence as defined in Schedule 4[1] to the GIPA Act to mean any provisions of the contract that disclose:

- (a) the contractor’s financing arrangements, or

3. The type of information that may be classed as “personal” is discussed in Guideline 4. That Guideline provides guidance on how agencies should approach personal information as a consideration for and against disclosure: see *Guideline 4 – personal information and the public interest test*.

4. GIPA Act s 54(3).

- (b) the contractor's cost structure or profit margins, or
- (c) the contractor's full base case financial model, or
- (d) any intellectual property in which the contractor has an interest, or
- (e) any matter the disclosure of which would place the contractor at a substantial commercial disadvantage in relation to other contractors or potential contractors, whether at present or in the future.

1.14 However, the provision also includes a much broader range of information that concerns the commercial, business, professional or financial interests of a third party, but is not necessarily confidential. An example would be where an application is made to NSW Police for information about violent acts committed at licensed premises, or where Treasury receives an application for information that concerns the commercial operation of a State owned corporation. In these cases, the information would concern the commercial, business, professional or financial interests of the third parties.

1.15 Consulting with third parties about this category of information may be relevant to establishing whether or not any of the following public interest considerations against disclosure apply:

- undermining 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 market⁵
- revealing commercial-in-confidence provisions of a government contract⁶
- diminishing the competitive commercial value of any information to any person⁷
- prejudicing any person's legitimate business, commercial, professional or financial interests⁸
- prejudicing the supply to an agency of confidential information that facilitates the effective exercise of that agency's functions,⁹ or
- founding an action against an agency for breach of confidence or otherwise result in the disclosure of information provided to an agency in confidence.¹⁰

Information concerning research

1.16 Agencies may need to consult with third parties when dealing with an access application for information relating to research being, or intended to be, conducted by, or on behalf of, the third party. This provision includes research that has yet to commence, or that has not been completed. The provision also extends to a third party that funds research if the research is conducted "on behalf of" that party.

1.17 Consulting about this category of information may be relevant to establishing whether or not any of the following public interest considerations against disclosure apply:

- prejudicing the conduct, effectiveness or integrity of any research by revealing its purpose, conduct or results (whether or not commenced and whether or not completed)¹¹
- endangering, or prejudicing any system or procedure for protecting, the environment¹²
- prejudicing 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 knowledge¹³
- endangering, or prejudicing 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,¹⁴ or
- exposing 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.¹⁵

5. See GIPA Act s 14, Table 4(a).
 6. See GIPA Act s 14, Table 4(b).
 7. See GIPA Act s 14, Table 4(c).
 8. See GIPA Act s 14, Table 4(d).
 9. See GIPA Act s 14, Table 1(d).
 10. See GIPA Act s 14, Table 1(g).
 11. See GIPA Act s 14, Table 4(e).
 12. See GIPA Act s 14, Table 5(a).
 13. See GIPA Act s 14, Table 5(b).
 14. See GIPA Act s 14, Table 5(c).
 15. See GIPA Act s 14, Table 5(e).

Information concerning government affairs

1.18 Agencies may need to consult with the Commonwealth or other State governments to determine their views if an access application relates to information that concerns those governments. Such consultation may help to establish if the following public interest considerations against disclosure apply:

- prejudice relations with, or the obtaining of confidential information from, another government;¹⁶ or
- prejudice the supply to an agency of confidential information that facilitates the effective exercise of that agency's functions.¹⁷

Purpose of third party consultation

1.19 The purpose of consultation under section 54 is to ascertain whether the third party to whom the information relates objects to the disclosure of some or all of the information, and the reasons for any such objection.¹⁸ The requirement to consult with third parties is important in balancing information access rights, and the right of individuals to protect and control the privacy of their personal information.

1.20 The need to consult with third parties also bolsters the public interest test by better equipping agencies to decide whether or not there is a public interest consideration against disclosure, and if so, how much weight should be afforded to that consideration. This furthers the object of the GIPA Act by ensuring that an access applicant's enforceable right to government-held information is only dislodged where there is an overriding public interest against disclosure.¹⁹

1.21 The purpose of consultation is to find out the views of the third party and the basis for those views, which will inform the agency's ultimate decision about whether or not to release the information to the access applicant. It is not the role of the third party to decide if there is a public interest consideration against disclosure. Third party views are just one of the matters that an agency needs to consider in determining if any public interest considerations against disclosure apply, and if so, how significant they are.

1.22 Only those considerations listed in section 14 are relevant to determining whether there is a public interest against disclosure. Third parties may feel strongly about their information being disclosed, and might make comments such as "It's none of their business", or "Why would anyone be interested in that". While these comments give an agency an indication of the nature and strength of the third party's views, they are not relevant considerations under section 14 and therefore cannot be used to determine whether the information may be released under the GIPA Act. This is discussed further in Part 5.

16. See GIPA Act s 14, Table 1(c).

17. See GIPA Act s 14, Table 1(d).

18. GIPA Act s 54(4).

19. GIPA Act s 3.

Part 2: How section 54 relates to the public interest test

2.1 The public interest test is central to making decisions about disclosure of information under the GIPA Act. In formal access applications, an applicant has a legally enforceable right to government information unless there is an overriding public interest against the disclosure of that information.²⁰ In applying the public interest test to the information sought, agencies identify the relevant considerations in favour of disclosure in section 12 of the GIPA Act, and any other pro-disclosure interests that may apply. Those considerations are then compared against the exhaustive list of public interest considerations against disclosure in section 14, with appropriate weight given to each consideration. If the considerations against disclosure do not outweigh those in favour, the information must be released to the applicant.

2.2 In order to apply the public interest test properly, agencies need as much information as possible to identify all of the relevant public interest considerations for and against disclosure, and to know how much weight to give each consideration. In some cases, agencies will be able to make this decision by looking at the documents alone. In other cases, the question of where the public interest lies may be less straightforward. This is especially the case where the information sought involves personal information or the interests of a party or parties other than the applicant.

2.3 Section 54 of the GIPA Act supports the need for agencies to be as fully informed as possible by requiring them to consult with third parties who may reasonably be expected to have concerns about the disclosure of information that affects them. Section 54 (1)(c) states that agencies must consult with third parties where their concerns may “reasonably be expected” to be relevant to the question of whether there is a public interest consideration against disclosure of the information.

2.4 The Information Commissioner considers that the views of third parties may “reasonably be expected” to be relevant to the question of whether there is a public interest consideration against disclosure in two respects:

1. Third parties can help establish if a public interest consideration against disclosure exists; and
2. They can assist an agency decide how much weight to give those considerations.

Identifying the existence of a public interest consideration against disclosure

2.5 With some access applications involving information about third parties, it will be clear that at least one public interest consideration against disclosure exists. That is where an application involves personal information about another person. This would automatically identify the public interest consideration against disclosure in 3(a) in the Table at section 14 of the GIPA Act. In this example, consultation would not be required simply to identify the existence of a relevant consideration against disclosure. However, consultation with that person may indicate the existence of further considerations against disclosure that the agency may not be aware of otherwise, such as prejudicing court proceedings (consideration 3(c)) or exposing the person to a risk of harm (consideration 3(f)).

2.6 In other situations, consultation with third parties will need to occur before any public interest consideration against disclosure can be identified. For example, it would be difficult to determine whether, and how, information about a business would diminish the competitive value of the information (consideration 4(c)), or prejudice legitimate business interests (consideration 4(d)), unless that business is consulted.

Attributing weight to a public interest consideration against disclosure

2.7 For agencies to apply the public interest test, identifying the existence of a public interest against disclosure is not sufficient. Agencies need to know how much weight to give each consideration. Consultation with the party to whom the information relates will generally be relevant to working out an appropriate weighting.

2.8 Taking personal information about a third party as an example, consultation may reveal that the person has no objection to the release of the information concerning them. This would reduce to nothing the weight to be given to that consideration against disclosure.

20. GIPA Act s 9(1).
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Part 3: Is consultation mandatory under section 54?

3.1 Section 54 provides that agencies must take such steps (if any) that are “reasonably practicable” to consult with third parties if

- (a) the information is of a kind that requires consultation; and
- (b) the third party may “reasonably be expected” to have concerns about the information being released; and
- (c) those concerns may “reasonably be expected” to be relevant to whether or not there is a public interest against disclosure.

3.2 The Information Commissioner is of the view that section 54 places an obligation on agencies to consult with third parties where (a), (b) and (c) above are satisfied, unless it is not “reasonably practicable” to consult. This raises the question of what steps might or might not be reasonably practicable when undertaking consultation, and when might third parties “reasonably be expected” to have concerns relevant to public interests against disclosure.

“Reasonably practicable to consult”

3.3 What constitutes “reasonably practicable” will differ depending on the nature and scope of the request, and the resources of the agency. Generally, however, agencies should make every effort to consult with third parties. Theoretically, there may be practical obstacles to consulting in situations such as the following:

- there are a large number of third parties
- the agency is unable to locate the third party’s contact details
- the third party has been dead for some time and the agency is unable to locate a relative, or
- there are particular cultural sensitivities surrounding consultation with Aboriginal communities.

3.4 Agencies should take whatever steps they can to remove obstacles to consultation. For example, if a particular access application required consultation with a significant number of third parties, the agency could ask the applicant to narrow the scope of the request to make consultation more reasonable, or to agree to an extension of time so that proper consultation could occur.

3.5 Agencies are not bound by particular methods of consultation, but may develop their own approaches. The more flexible the consultation methods, the more likely they are to be reasonable. For example, if the contact details of third parties are known, agencies could facilitate consultation with a large number at once by sending a group email.

3.6 If an agency decides that consultation is not reasonably practicable, it bears the onus of showing why, and to document its reasons.

“Reasonably be expected to have concerns”

3.7 Taking the term “reasonably be expected” to have its ordinary meaning, it would be reasonable for any person to have concerns, or at least to expect to be informed, about the disclosure of their personal or other information to another person, unless it has already been made publicly available. In relation to personal or health information about an individual, this is consistent with the *Privacy and Personal Information Protection Act 1998* (NSW) (“PIIP Act”) and the *Health Records and Information Privacy Act 2002* (NSW) (“HRIP Act”), which allow people certain rights to control access to such information.

“Reasonably be expected to be relevant” to public interest considerations against disclosure

3.8 The Information Commissioner is of the view that the concerns of third parties are relevant to both the existence of the public interest considerations against disclosure, and to the appropriate weight to be given to those considerations. Consultation with third parties plays a significant role in agencies properly being able to apply the public interest test, and therefore the Information Commissioner considers that consultation would be relevant in most cases.

3.9 Since consultation informs the public interest test, agencies should consult *before* weighing up the public interest considerations for and against disclosure. Agencies should not decide the public interest test and then work out if there is a need to consult.

3.10 For an agency to decide that third party views are not expected to be reasonably relevant to whether there is a public interest consideration against disclosure, the agency must be certain that the consideration does or does not apply, and be able to attribute appropriate weight to that consideration, without needing the views of the third party.

3.11 This could be the case where a number of considerations against disclosure apply in relation to the information requested by an access applicant, all of which carry such significant weight that the agency decides that it would be contrary to the public interest to release the information, even if the third party were agreeable to the information being disclosed. In this example, the views of the third party would be irrelevant to the public interest test.

3.12 If an agency decides that the concerns of third parties are not relevant to the question of the existence of public interest considerations against disclosure, it needs to document the reasons for its decision.

3.13 If there is any uncertainty about the relevance of third party concerns, agencies should consult. The Information Commissioner considers consultation to be an important element in the proper application of the public interest test.

Part 4: The consultation process

4.1 The GIPA Act does not prescribe how agencies should consult with third parties. Agencies can and should adopt flexible consultation procedures.

4.2 Whatever method is adopted, a record of the consultation, endorsed by the third party, should be made so that the agency can support its decision if the matter becomes the subject of a review.

4.3 Consultation methods may differ depending on how many third parties need to be consulted, and on the nature of the consultation. For example, consulting with one person about the release of their personal information will involve different practical considerations from consulting with several hundred business owners.

4.4 Prior to conducting any consultation, it may be appropriate for agencies to clarify the scope of the application with the applicant, since consultation can be time-consuming and add to the processing costs of an access application. This would be especially important where consultation is likely to involve a large number of third parties.

4.5 Regardless of the methods used, any consultation with third parties under section 54 should contain the following steps:

1. Notify the third party or parties that information about them has been requested under a formal GIPA application. Since many third parties will not be familiar with the workings of the GIPA Act, it may be helpful for agencies to provide them with explanatory material. The OIC fact sheets on the public interest test and on third party consultation may assist.
2. Clearly specify the information that is being sought. This may involve showing the third party a copy of the information concerning them that has been requested by the applicant.
3. Explain to the third party that:
 - a. there is a presumption under the GIPA Act that information held by government agencies should be disclosed unless there is an overriding public interest against disclosure
 - b. the fact that providing the applicant with the information requested in an access application would mean disclosing personal or business information of a third party is a relevant consideration against disclosure, but not necessarily an overriding one
 - c. the purpose of the consultation is so that the agency can know if the third party objects to the information being released to the applicant, and if so, why
 - d. their views will help the agency make a decision about whether or not the information should be released
 - e. the agency can only make a decision not to release information based on the considerations in section 14 of the GIPA Act – therefore, some views held by the third party cannot be considered by the agency in making its decision, and
 - f. the information may be released even if the third party objects, if the agency considers that the public interest in disclosing the information outweighs any relevant considerations against disclosure.
4. Give third parties an opportunity to consider and confirm their views.
5. Inform the third party about their right to seek review if the agency decides to release the information to the applicant despite their objection. Agencies should also note that no information about the third party will be released to the applicant until after their review rights have expired or been exhausted (see Part 5 for further information).

4.6 Agencies should also be aware of the special considerations that may arise when consulting with people with limited literacy, people whose first language is other than English, and people with a disability or their carers or guardians. Also, agencies need to consider issues of cultural sensitivity when consulting with the Aboriginal community.

4.7 Given the 20 working day time limit agencies have under the GIPA Act to process formal access applications, it is advisable that agencies decide as soon as possible after acknowledging receipt of a valid application if consultation needs to occur. If necessary, section 57(2)(a) enables the 20 working day decision period to be extended for up to 15 working days where consultation is necessary under section 54, or longer if the applicant agrees.

4.8 Third parties may ask the name of the access applicant who is requesting their personal or other information. Third parties may be more willing to agree to the disclosure of information concerning them if they know who is requesting it and the context of that request. Agencies should treat the identity of access applicants like any other personal information they hold. It is advisable for agencies to obtain the consent of the applicant prior to disclosing their identity and other particulars to third parties.

Part 5: Actions following consultation

5.1 Following consultation with third parties, there are a number of steps to be taken.

Keeping a record of the consultations

5.2 First, agencies should document the results of any consultations with third parties, recording:

- how the agency decided who should be consulted
- the names of the people, businesses or organisations with whom they consulted
- how the consultation was conducted, eg, letter, email, telephone call
- when the consultation occurred
- information about any third parties with whom consultation was required but not conducted, and the reasons for this
- the questions asked of the third party
- the third party's responses to those questions and any other views the third party conveyed to the agency, and
- details about any information the agency gave to the third party about the access applicant and the application.

These records will be important should the third party or the applicant seek a review of the agency's decision.

Decision-making following consultation

5.3 Section 54(5) provides that an agency must take into account any objection to the release of information made by a third party during the consultation process when the agency is making its decision about the existence of an overriding public interest against disclosure of the information. As noted in Part 2, the views of third parties will generally be relevant to determining both the existence of a public interest consideration against disclosure, and whether that consideration carries sufficient weight to make it an overriding one.

5.4 The views of third parties do not determine the outcome of the public interest test, but are an important contribution to the agency's decision. An agency will not have discharged its responsibilities regarding the proper application of the public interest test if it makes a decision about release of information based solely on the views of the third parties with whom the agency has consulted.

5.5 An agency may make a number of possible decisions following consultation. For example, an agency may decide:

- to release all or part of the information to the applicant where the third party does not object to the release
- to release all or part of the information to the applicant despite the third party's objections
- to withhold all or part of the information from the applicant where the third party objects to the release, or
- to withhold all or part of the information from the applicant even though the third party has no objection to its release.

5.6 Agencies may decide to release information concerning a third party to an access applicant despite the third party's objection, as provided for in section 54(6). This can occur even where the information sought is personal information of the third party, and disclosure in these circumstances may be contrary to the PPIP Act. This is because section 5 of the PPIP Act states that nothing in that Act affects the operation of, or agencies' obligations under, the GIPA Act. Dealing with personal information as a public interest consideration against disclosure is discussed in Guideline 4.

5.7 The public interest must dictate the outcome of an access application, and the agency's decision must reflect this. Accordingly, in making decisions following consultation, agencies should document:

- the relevant public interest considerations in favour of disclosure of the information
- the relevant public interest considerations against disclosure of the information
- details about any consultations with third parties as discussed in paragraph [5.2] above

- the relevance of the consultations to the existence and weight of public interest considerations against disclosure, and
- the agency's decision about release of the information after applying the public interest test, taking the views of third parties into consideration.

Notifying parties of the decision

5.8 Following the decision about whether or not to release the information, agencies need to notify the applicant and all third parties with whom the agency consulted. If the agency's decision is to refuse to provide access to the information, it must notify the applicant in writing of the reasons for the decision and the basis for those reasons.²¹ This would include details about any third party consultation and the results of that consultation.

5.9 If the agency decides to disclose the information to the applicant despite the objections of a third party, the agency must notify that party of its decision under section 54(6) of the GIPA Act. That notice would need to be in the form prescribed by section 126 of the Act, and:

- be in writing
- include the date of the decision
- provide information about any available review rights and time periods for review²²
- relevant agency contact details, and
- not disclose any information for which there is an overriding public interest against disclosure.

5.10 Although not required, agencies should consider giving third parties reasons for the decision to release information. This would give the third party a better understanding of the basis for the decision.

Timing of disclosure of information about third parties

5.11 Where an agency has decided that it is in the public interest to disclose information despite third party objections, the agency cannot disclose information to the access applicant while the third party's review rights are pending. Those rights will be pending until the time limits for seeking review have expired, or until any and all internal and external reviews sought by the third party have been determined.²³ This could potentially be a considerable length of time if the third party pursues review rights through all available channels.

5.12 Where the information sought involves a number of third parties, and the information is about the same issue, the agency should not disclose any of the information to the applicant until the review rights of all of the third parties have expired or been exhausted. For example, an applicant may seek information about the salary and working conditions of five employees who all receive the same salary and work under the same conditions. Two of those employees may apply for a review of the decision to release the information. To ensure the integrity of those two reviews, the agency should not release the information about any of the five employees until after the reviews have been finalised.

Third party review rights

5.13 The decision of an agency to disclose to an access applicant information concerning a third party is reviewable under section 80(d). The third party may ask the agency who made the decision to conduct an internal review of the decision. This must be applied for within 20 working days of the agency giving notice of its decision, unless the agency agrees to accept a late application.²⁴ The internal review must be completed within 15 working days, and may be extended for up to 10 working days if the agency needs to consult with a person who was not previously consulted while the original application was being considered.²⁵

5.14 Third parties must seek an internal review by the agency before seeking review by the Information Commissioner.²⁶ Third parties who remain unhappy with the agency's decision following the internal review may ask the Information Commissioner to review the agency's internal review decision within 8 weeks of that decision.²⁷

21. GIPA Act s 61 and s 126.

22. This information is also required under s 54(6).

23. GIPA Act s 54(6) and (7).

24. GIPA Act s 83.

25. GIPA Act s 86.

26. GIPA Act s 89(2).

27. GIPA Act s 90.

5.15 Alternatively, a third party may apply to the Administrative Decisions Tribunal for review within eight weeks of the agency's decision (this need not be internally reviewed first), or within four weeks of the completion of the Information Commissioner's review.²⁸

5.16 Where the third party is arguing that the information should not be released, the onus is on the third party to establish that there is an overriding public interest against disclosure.²⁹

28. GIPA Act s 100, s 101.
29. GIPA Act s 97(2), s 105(2).
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Appendix A:

Section 54 of the GIPA Act

54 Consultation on public interest considerations

- (1) An agency must take such steps (if any) as are reasonably practicable to consult with a person before providing access to information relating to the person in response to an access application if it appears that:
 - (a) the information is of a kind that requires consultation under this section, and
 - (b) the person may reasonably be expected to have concerns about the disclosure of the information, and
 - (c) those concerns may reasonably be expected to be relevant to the question of whether there is a public interest consideration against disclosure of the information.
- (2) Information relating to a person is of a kind that requires consultation under this section if the information:
 - (a) includes personal information about the person, or
 - (b) concerns the person's business, commercial, professional or financial interests, or
 - (c) concerns research that has been, is being, or is intended to be, carried out by or on behalf of the person, or
 - (d) concerns the affairs of a government of the Commonwealth or another State (and the person is that government).

Note. The requirement to consult extends to consultation with other agencies and other governments. See the definition of person in Schedule 4.

- (3) If consultation is required concerning the release of personal information about a deceased person, that consultation is to be done by consultation with a close relative of the deceased.
- (4) The purpose of consultation under this section is to ascertain whether the person has an objection to disclosure of some or all of the information and the reasons for any such objection.
- (5) The agency must take any objection to disclosure of information that the agency receives in the course of consultation into account in the course of determining whether there is an overriding public interest against disclosure of government information.
- (6) If consultation establishes that a person objects to the disclosure of information but the agency decides to provide access to the information in response to the application, access is not to be provided until the agency has first given the objector notice of the agency's decision to provide access to the information and notice of the objector's right to have that decision reviewed, and is not to be provided while review rights on the decision are pending.
- (7) Review rights on a decision are pending while the objector is entitled to apply for a review of the decision under Part 5 (ignoring any period that may be available by way of extension of time to apply for review), or any review duly applied for is pending.