



office of the
information
commissioner
new south wales

How to apply the public interest test seminar

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Context for applying the public interest test

Division 1

Section 5 Presumption in favour of the disclosure of government information

There is a presumption in favour of the disclosure of government information unless there is an overriding public interest against disclosure.

In all four ways of accessing government information, government information should be made available unless there is an overriding public interest consideration against disclosure.

Section 6(1), 7(1), 8(1), 9(1)

Public interest considerations

Division 2

Section 12 Public interest considerations in favour of disclosure

Provides that “*there is a general public interest in favour of the disclosure of government information*”.

The GIPA Act does not give any limit to the number of public interest considerations agencies can consider in favour of disclosure.

Applying the public interest test

Applying the public interest test involves stepping through a number of considerations:

- a) An agency must release government information unless there is an overriding public interest consideration against disclosure.

Applying the public interest test, starts with a presumption in favour of disclosing information held by the agency.

Section 5

Public interest considerations are dealt with in sections 12-15 of the GIPA Act.

- b) Does the information relate to a function specified as excluded information under Section 2 of the GIPA Act?

Under Schedule 1, it is conclusively presumed there is an overriding public interest against disclosure of excluded information (unless the agency consents).

Section 43 prevents a formal access application being made to an agency for excluded information of that agency.

- c) Check if there are any conclusive presumptions that there is an overriding public interest against disclosure.

Information for which there is conclusive presumption of an overriding interest against disclosure is listed in Schedule 1.

Section 14 (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.

- d) If there is no conclusive presumption of an overriding public interest against disclosure, the public interest test must be applied as set out in Section 13:

Section 13 Public interest test

There is an overriding public interest against disclosure 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.

In summary, the public interest test requires decision makers to:

- a) Commence with the presumption in favour of disclosure of the information
- b) Identify relevant public interest considerations in favour of disclosure
- c) Identify relevant public interest considerations against disclosure (limited to those listed at Section 14 of the GIPA act)
- d) Attribute weight to each consideration for and against disclosure
- e) Determine whether the balance of the public interest lies in favour of, or against, disclosure of the government information (i.e. where the balance between those interests lies).

The public interest test must be applied in accordance with the principles set out in Section 15.

Principles that apply to the public interest test determination**Section 15**

When determining if there is an overriding public interest against disclosure of government information, agencies must apply the following principles:

- To promote the object of the Government Information (Public Access) Act

(1) In order 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, and*
- b) Giving members of the public an enforceable right to access government information, and*
- c) Providing that access to government information is restricted only when there is an overriding public interest against disclosure.*

(2) It is the intention of Parliament:

- a) That this Act be interpreted and applied so as to further the object of this Act, and*
- b) That the discretions conferred by this Act be exercised, as far as possible, so as to facilitate and encourage, promptly and at the lowest reasonable cost, access to government information.*

Section 3

(N.B. Section 3 (2) b) is the main one for decision makers.)

- Have regard to any relevant guidelines issued by the Information Commissioner

Guideline 1 for Local Government (July 2010)

Guideline 2: Discounting charges – special benefit to the public generally (March 2011)

Guideline 3: Local Councils - personal information contained in development applications: what should not be put on council websites (May 2011)

- The fact that disclosure of information might cause embarrassment to, or a loss of confidence in, the Government is irrelevant and must not be taken into account.
- The fact that disclosure of information might be misinterpreted or misunderstood by any person is irrelevant and must not be taken into account.
- For disclosure in response to a formal access application, it is relevant to consider that disclosure cannot be made subject to any conditions on the use or disclosure of information.

Section 73(1)

An agency can release government information in response to an informal request subject to any reasonable conditions that the agency thinks fit to impose

Section 8 (2)

Public interest considerations for disclosure

Section 12 (1) of the GIPA Act provides that there is a general public interest in favour of the disclosure of government information. This consideration must always be taken into account in the application of the public interest test.

The Act does not limit additional public interest considerations in favour of disclosure. The notes to section 12(2) set out some examples of public interest considerations in favour of disclosure. These considerations were previously recognised as public interest factors in favour of disclosure in cases decided under FOI Legislation. These notes should not be treated as exhaustive or interpreted narrowly. There is also a range of other considerations. Examples include: to promote public debate; protection of children; administration of justice; procedural fairness; and where the reasons for the original decision for non-disclosure have diminished with the passage of time.

The public interest test requires decision makers to actively identify public interest considerations in favour of disclosure.



Tip: Identify relevant public interest considerations in favour of disclosure first. This is in keeping with the pro-disclosure approach of the GIPA Act.

Public interest considerations against disclosure

The only public interest considerations against disclosure which may be considered when applying the public interest test are set out in the **Table to Section 14** of the GIPA Act.

To raise any of these as relevant considerations, an agency must establish that the disclosure of the information “...could reasonably be expected to have...the...effect” outlined in the table.

What does “could reasonably be expected to have the effect” mean?

The words “could reasonably be expected to have the effect” have been determined to have their ordinary meaning: “whether it is reasonable’ as opposed to irrational, absurd or ridiculous to expect” that the effect could result from disclosure.

See *Attorney-General’s Department v Cockcroft (1986) 10 FRC 180 at 190 per Bowen and Beaumont JJ*.

The agency is required to:

- a) Identify the information
- b) Characterise it as information
 - to which a public interest consideration against disclosure (as set out in the Table to section 14) applies
 - that meets all the elements of the consideration



E.g.: 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:

(c) Prejudice any court proceedings by revealing matter prepared for the purposes of or in relation to current or future proceedings

All elements (as underlined above) need to be considered. The fact that there are or were court proceedings is not sufficient. Will disclosure reveal information prepared for the purposes of the court proceedings? Are the court proceedings current or future?

- c) Prove on the relevant evidence that the disclosure of the information could be reasonably expected to have the effect deemed not to be in the public interest. The onus of proof is on the agency not the applicant. This applies to all of the circumstances of the case. You will need to detail your assertion, evidence and explanation for each public interest consideration against disclosure.

For each consideration an agency raises against disclosure of the information, it needs to demonstrate:

- That there is relevant evidence proving the relevance of each element for each consideration against disclosure, and
- What evidence was relied upon.

Just because one or more public interest considerations against disclosure apply **does not** mean that there is an overriding public interest against disclosure. To determine this, you need to apply the balancing test.

Balancing the public interest

Once you have identified relevant considerations in favour of disclosure and considerations against disclosure, you have to decide if considerations against outweigh considerations in favour of disclosure.

The GIPA Act does not provide a methodology, formula or calculus for weighing individual public interest considerations or assessing their comparative weight.

However, the public interest test must be applied objectively and in the light of all of the circumstances of the application. All the circumstances includes the evidence you have relied upon to raise a consideration against disclosure or consideration in favour of disclosure. It also includes the personal characteristics of the applicant. You have to be careful only to consider what is relevant and not to consider what is irrelevant to the test.

It is often quite easy to demonstrate that a consideration against disclosure is a relevant consideration because the test is quite low ("could reasonably be expected"). By contrast, the test to determine if there is an overriding public interest against disclosure ("if and only if") is quite high. That means that you have to look at the same evidence differently depending on whether you are deciding if a consideration is relevant or whether you are weighing these considerations in favour of release against those not in favour of release.

N.B. the threshold of the public interest test is not neutral. The GIPA Act permits refusal of disclosure "if (and only) if" the weight given to the considerations against disclosure (and the evidence supporting them) is greater than the weight of the considerations in favour. If considerations are evenly balanced, access to the information must be allowed.

There are a number of other considerations which can be taken into account when applying the public interest test and may reduce the public interest considerations against disclosure of the information. These may include considering the motives of the applicant (Section 55).

Other considerations after finding an overriding public interest against disclosure

If the finding under the public interest test is that public interest considerations against disclosure “override” the public interest considerations in favour of disclosure of government information, Part 4 of the GIPA Act contains a number of provisions that may apply to:

- a) avoid an overriding public interest consideration against disclosure (Sections 72(1) & 72(2)(d), 73(2), 74, 75, 76 and 78);
- b) mitigate the effect or reduce the weight of public interest considerations against disclosure (Section 4);
- c) provide for informal resolution of the application, eg, by providing access on a confidential basis (Section 8).

It is consistent with the objects of the GIPA Act that these provisions be considered, where relevant, before a decision is made to not disclose information because there is an overriding public interest consideration against disclosure.

E.g. to avoid there being an overriding public interest against disclosure of the information, a decision may be made on how the information is accessed such as viewing a document in the company of the applicant’s solicitor, allowing repeated access to CCTV footage but not a copy.

Division 6, Sections 72-79 details how access is provided.

Deleting information to facilitate access

An agency may facilitate access to government information contained in a record by deleting matter from a copy of the record, if its inclusion would otherwise result in there being an overriding public interest against disclosure of the record.

Section 6(4), 7(4), 8(5)

An agency can delete information from a record in response to an access application so as to provide access only to other information that record contains if: the deleted information is not relevant to the information applied for; or if the deleted information was applied for, the agency had decided to refuse access to that information.

Section 74

Additional ways to provide access

An agency may make and provide access to a new record in response to an access application (although it is not required to create a new record in response to an access application).

Section 75

An agency can provide access to information not asked for in response to an access application.

Section 76

Agencies are encouraged to liaise directly with the applicant and seek their agreement where access to information may be facilitated in ways other than requested by the applicant.

It may be possible to informally release the information if the applicant consents to withdraw their application, receive a refund of their application fee and not to have recourse to their review rights. An agency can then place whatever reasonable conditions they wish on the release of this information. This avenue could be a useful way to release information to an applicant, subject to certain confidentiality conditions, and limit the exposure of personal and business interests of other parties.

At other times, it may be appropriate to negotiate with someone making an informal request for information to change this to a formal access application, where, for example consultations with third parties will be required. Agencies have the discretion under Section 127 to waive the fee for an access application.

Consultation on public interest considerations

Agencies should be clear on when consultation is required; who to consult; and what weight any objections of third parties to disclosure of information is given in determining if there is an overriding public interest against disclosure.

Section 54 sets out when an agency is required to consult with a third party before deciding whether to provide access to information. The purpose of consultation is to establish if the person has any objections to the disclosure of some or all of the information that is about their personal information, business, commercial professional or financial interests, the reasons for their objections, and whether there is an overriding public interest against disclosure of the information.

Section 54(1) outlines when an agency must consult. This should not be interpreted as a limit to the situations where agencies may consult. An agency must take what steps are reasonably practicable to consult if it appears:

- The person may be reasonably expected to have concerns about the disclosure of the information, and
- These concerns may be reasonably expected to be relevant to the question of whether there is an overriding public interest consideration against the disclosure of that information.

The information requested which relates to a person that requires consultation also needs to be of a kind that:

- (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.

Section 54(2)

Agencies may need to consult with private individuals, businesses, courts, and other agencies for example. Consultation may also be required where research is being conducted.

Section 54(3) requires consultation with a close relative if the information is personal information of a deceased person. However if the applicant is a close relative of the deceased, this consultation would no longer be necessary.

Consultation is not the same as seeking consent. An agency needs to take any objection to disclosure of the information received from consultation into account when determining whether there is an overriding public interest against disclosure of government information. These views become part of the balancing exercise in applying the public interest test.

A third party's objections are usually raised on the basis of a public interest consideration against disclosure. You therefore need to take same approach as if it was a consideration you had identified against disclosure.

If consultation establishes that a person objects to disclosure of the information, but the agency decides to provide access in response to the application, this access cannot be granted until the agency has given the objector notice of the decision and an opportunity to avail themselves of their review rights.

Where an agency is satisfied that there is an overriding public interest against disclosure of personal information about a person, and the agency intends to delete that information, then no consultation would be necessary. However, deletion is only necessary if the personal information raised a public interest consideration against disclosure.

Section 54(6)

Considering personal factors when applying the public interest test

The GIPA Act provides agencies with discretion to consider the personal factors of the applicant when deciding whether there is an overriding public interest against disclosure of information in a formal access application.

Consideration of personal factors of application

- (1) *(a) the applicant's identity and relationship with any other person*
 (b) the applicant's motives for making the access application
 (c) any other factors particular to the applicant.

Section 55

These personal factors of the applicant can be taken into account as factors in favour of providing the applicant with access to the information.

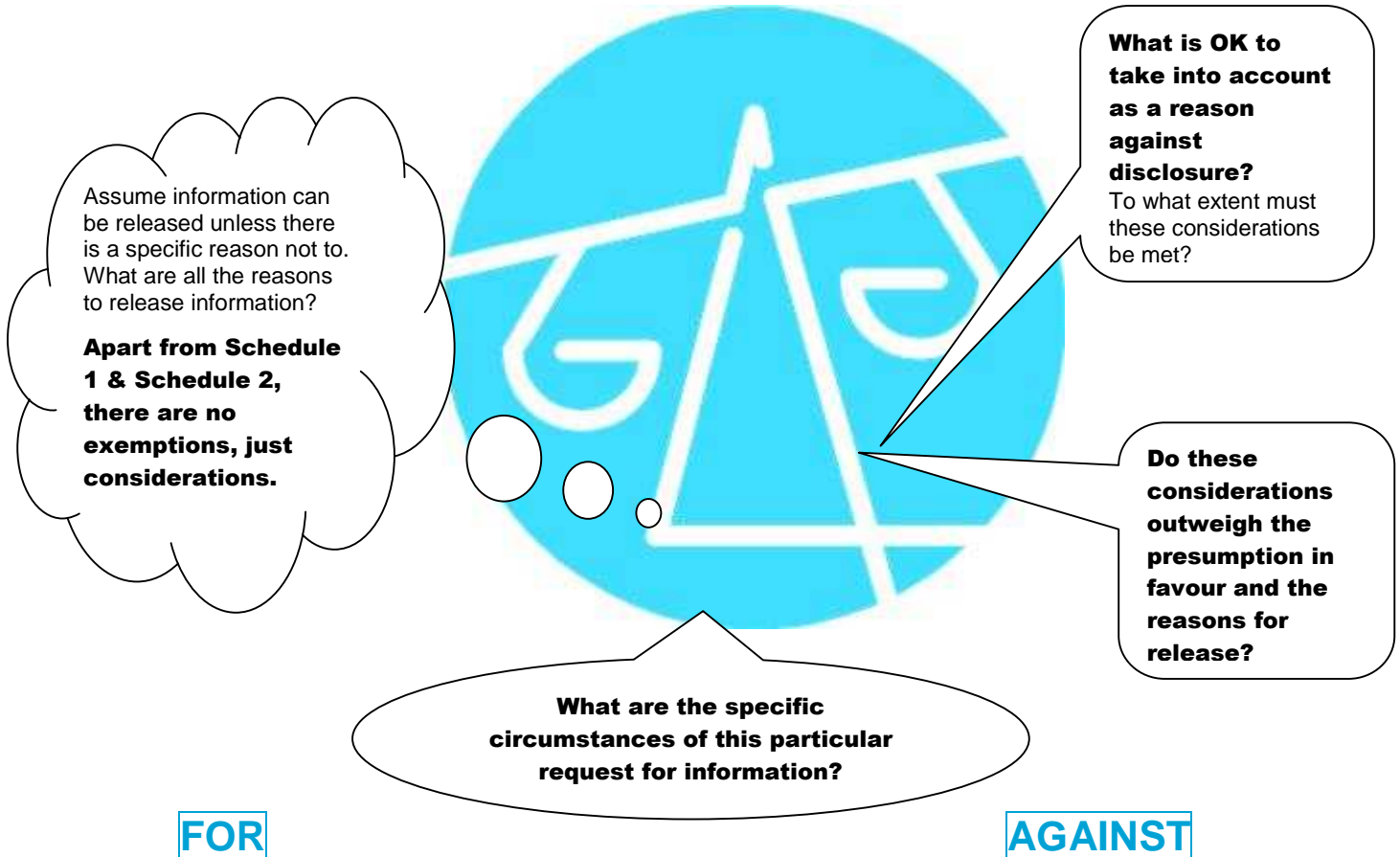
If these personal factors are relevant to the agency's consideration of whether disclosure of the information can reasonably be expected to have any of the effects referred to in clauses 2-5 of the Table to Section 14, they can be taken into account as factors against providing access to the information.

As a precondition to providing access to information, an agency may require the applicant to provide evidence of the personal factors of their application if this helps determine there is no overriding public interest against disclosure. Agencies are not required to verify any claims made by an applicant.

Further resources for applying the public interest test

Mindset

Questions



Look at how these scales are balanced....

The starting weight is always in favour of release of information!

Examples of public interest considerations in favour of disclosure (Section 12)	Only other considerations as public interest factors against disclosure (Table Section14)
Transparency of process	Responsible and effective government
Enhances government accountability	Law enforcement and security
Contains personal information about the person	Individual rights, judicial processes and natural justice
Ensures effective oversight of expenditure of public money	Business interest of agencies and other persons
Promotes public's "right to know"	Environment, culture, economy and general matters
May be reasonably expected to reveal an agency has engaged in negligent, unlawful or improper conduct	Secrecy provisions
*This list is not exhaustive – the Information Commissioner can issue guidelines with more considerations in favour of the disclosure of government information.	Exempt documents under interstate Freedom of Information legislation

Public Interest considerations (adapted from OIC compliance checklist for agencies)

Public Interest Test	
Requirement	
<ul style="list-style-type: none"> ○ Applies the public interest test when considering whether or not to release government information. <i>Note: This test applies to information released both formally and informally. The public interest test is found in section 13 of the GIPA Act.</i> 	M
<ul style="list-style-type: none"> ○ Under the GIPA Act, there are a limited number of public interest considerations against disclosure. These are the only considerations that may be taken into account under the GIPA Act for the purpose of deciding whether there is an overriding public interest against disclosing government information. 	
<p>Right to information officers and other relevant people in the agency know what these considerations are and where to find them.</p> <p><i>Note: They are listed in schedule 1 and in section 14 of the GIPA Act.</i></p>	M
➤ Applying the public interest test	
<ul style="list-style-type: none"> ○ Knows the objects of the GIPA Act. (<i>Note: See section 3 of the GIPA Act</i>) 	M
<ul style="list-style-type: none"> ○ Exercises its functions so as to promote the objects of the GIPA Act. 	M
<ul style="list-style-type: none"> ○ When applying the public interest test, has regard to all relevant guidelines issued by the Information Commissioner. 	M
<ul style="list-style-type: none"> ○ Disregards as irrelevant the fact that disclosure of information might cause embarrassment to, or a loss of confidence in, the Government when applying the public interest test. 	M
<ul style="list-style-type: none"> ○ Disregards as irrelevant whether disclosure of information might be misinterpreted or misunderstood by any person. 	M
<ul style="list-style-type: none"> ○ Applies its discretion to consider that disclosure cannot be made subject to any conditions on the use or disclosure of information. 	D
Considering personal factors when applying the public interest test	
Requirement	
➤ Personal factors of the applicant	
<ul style="list-style-type: none"> ○ Applies its discretion to consider the personal factors of the applicant when deciding whether there is an overriding public interest against disclosure of information, including: <ul style="list-style-type: none"> • the applicant's identity and relationship with any other person • the applicant's motives for making the access application • any other factors particular to the applicant. 	D
<ul style="list-style-type: none"> ○ Applies its discretion to take into account personal factors of the applicant as factors in deciding whether to provide the applicant with access to the information 	D
<ul style="list-style-type: none"> ○ Applies its discretion to request an applicant to provide evidence about their personal factors (relevant to a decision by the agency) to demonstrate that there is no overriding public interest against disclosure. 	D
<ul style="list-style-type: none"> ○ Applies its discretion to inquire into or verify claims made by an access applicant. 	D

M = mandatory, D= discretionary