

DISCLOSURES BY COUNCILLORS AND DESIGNATED PERSONS' RETURN PROCEDURE

| QUALITY CONTROL | | | |
|----------------------|--|-----------------|---|
| TRIM REFERENCES | 11/21 – D22/56581 | | |
| RESPONSIBLE POSITION | General Manager | | |
| SUPPORT POSITION/S | Executive Officer / Executive Assistants | | |
| APPROVED BY | General Manager | | |
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1. INTRODUCTION

This procedure has been established to ensure compliance with Council's adopted Code of Conduct Policy and Access to Information Policy, in relation to the mandatory collection, review and publishing of Disclosures by Councillors and Designated Persons' Returns (Disclosure Returns) as per the Office of Local Government's Model Code of Conduct. The Model Code of Conduct is made under Section 440 of the *Local Government Act 1993*.

Section 440 of the *Local Government Act 1993* and Section 4 of the Code of Conduct Policy requires the mandatory completion and lodgment of annual Disclosures by Councillors and Designated Persons Returns with the General Manager by 30 September each year. The Disclosure Returns are required to be completed by all Councillors and Council Officers who have been identified by the General Manager as being a "Designated Person" due to their roles and responsibilities.

Completed Disclosure Returns must be tabled no later than at the next Ordinary Council Meeting following 30 September each year and following this, public copies of the Disclosure Returns are published on Council's website as Open Access Information in accordance with the requirements of the *Government Information (Public Access) Act 2009*, the *Government Information (Public Access) Regulation 2009* and any guidelines issued by the Information and Privacy Commissioner.

2. PROCEDURE OBJECTIVE

This procedure has been established to ensure that Council meets its legislated obligations under the Section 440 of the *Local Government Act 1993*; the *Local Government (General) Regulation 2021*; Section 6 of the *Government Information (Public Access) Act 2009* and Council's adopted Model Code of Conduct Policy in relation to the collection, review and publishing of Disclosures by Councillors and Designated Persons' Returns.

3. PROCEDURE SCOPE

Section 4 of the Model Code of Conduct for NSW Councils relates to Pecuniary Interest and requires annual Disclosures by Councillors and Designated Persons Returns to be completed and lodged with Council no later than 30 September each year.

A Councillor or designated person must make and lodge with the General Manager a return in the form set out in schedule 2 of Council's Model Code of Conduct Policy, disclosing the Councillor's or designated person's interests as specified in schedule 1 of Council's Model Code of Conduct Policy within 3 months after the following occurring:

- a) Becoming a Councillor or designated person, and
- b) 30 June of each year, and
- c) The Councillor or designated person becoming aware of an interest they are required to disclose under schedule 1 that has not been previously disclosed in a return lodged as per a) or b) above.

A person need not make and lodge a return under paragraphs a) and b) above if:

- a. They made and lodged a return under that clause in the preceding 3 months, or
- b. They have ceased to be a Councillor or designated person in the preceding 3 months.

A person need not make and lodge a return that the person knows or ought reasonably to know is false or misleading in a material particular.

The General Manager must keep a register of Disclosure Returns to be made and lodged with the General Manager.

Completed Disclosure Returns lodged with the General Manager under clause a) and b) above must be tabled at an Ordinary Council Meeting no later than at the first meeting of the Council after the last day the returns are due.

The information contained in all Disclosures by Councillors and Designated Persons Returns required to be lodged with the General Manager are to be made publicly available in accordance with the requirements of the *Government Information (Public Access) Act 2009*, the *Government Information (Public Access) Regulation 2009* and any guidelines issued by the Information Commissioner.

4. PROCEDURE STATEMENT

Issuing of Disclosure Returns and associated information

During August each year Councillors and staff identified by the General Manager as "Designated Persons" will be issued with the following documents in relation to the collection of information regarding the mandatory disclosure of pecuniary interests and other matters prescribed by Schedule 1 of Council's adopted Model Code of Conduct Policy (based on the OLG Model Code of Conduct for NSW Councils):

- Disclosures by Councillors and Designated Persons' Return (as prescribed by Schedule 1 of the Model Code of Conduct for Local Councils in NSW) (see Annexure 1).

- Covering Memo advising of process for the collection, review and publishing of Disclosure Returns (see Annexure 2).
- BHCC Application for redaction of information from the published copy of Pecuniary Interest Disclosures Returns – Information Sheet and Application Form (see Annexure 3).

The completed Disclosure Returns and Applications for Redaction of Information from published copies forms are to be submitted to the General Manager by no later than 30 September each year.

A current list of positions that have been identified as “Designated Persons” at Broken Hill City Council is provided below:

- General Manager
- Chief Financial Officer
- Chief Assets and Project Officer
- Chief Corporate and Community Officer
- Executive Manager Growth and Investment
- Executive Manager People and Culture
- Manager Planning and Community Safety
- Manager Communications and Marketing
- Town Planner
- Strategic Land Use Planner
- Building Surveyor
- Contract Building Surveyor
- Cadet Building Surveyor
- Public Health Officer
- Development and Compliance Officer
- Community Safety Officer – Ranger

Review of Completed Disclosure Returns and associated information to ensure compliance

The submitted completed Disclosure Returns will be reviewed to ensure compliance.

Completed Applications for redaction of information from the published copy of Pecuniary Interest Disclosure Returns will also be reviewed to ensure that they have been completed correctly and contain sufficient information in order for the General Manager to conduct the Public Interest Test to make a determination regarding the publishing of the subject information in Disclosure Returns as per Section 6 of the *Government Information (Public Access) Act 2009*.

Tabling at an Ordinary Meeting of Council

Upon receipt of all completed Disclosure Returns and Applications for Redactions of Information from published copies forms, and review for compliance, the register of Disclosure Returns are presented to the General Manager with a report to be prepared for an Ordinary Council Meeting for the tabling of the Disclosure Returns (completed Disclosure Returns are not to be published in the Council Meeting Business Paper).

The report is to be considered at the first Ordinary Council Meeting following 30 September each year, or at the September Ordinary Council Meeting if all Disclosure Returns have been received prior to mid-September.

Open Access Requirements of the Government Information (Public Access) Act 2009 and Guidelines of the Information and Privacy Commission

Requests for redaction of information from the public copy of Disclosure of Information by Councillors and Designated Persons Returns will be evaluated by the General Manager.

When considering whether certain information should be redacted from the published copy of a Disclosure Return by Councillors and Designated Persons, the General Manager is required to apply the public interest test. Section 6 of the *Government Information (Public Access) Act 2009* (GIPA Act) provides that there is a presumption in favour of disclosure of government information unless there is an overriding public interest against disclosure.

It should also be noted that Section 5 of the *Privacy and Personal Information Protection Act 1998* (PIIP Act) states that nothing in the PIIP Act affects the operation of the GIPA Act and in particular the PIIP Act does not lessen any obligations under the GIPA Act in respect of a public sector agency, and so therefore, does not lessen the presumption in favour of disclosure.

The fact that a Disclosure Return by Councillors and Designated Persons is open access information (as prescribed by the GIPA Act) is an important factor in favour of disclosure.

The General Manager has determined that a standard redaction of all signatures from the public copies of Disclosure Returns will occur (in accordance with Section 6(4) and Section 13 of the *Government Information (Public Access) Act 2009*) as a matter of procedure. This will occur as a standardised redaction and does not require the Councillor or Designated Person to make application. The redaction of signatures will be the only standardised redaction that will occur automatically.

If a Councillor or Designated Person believes there is an overriding public interest against the public release of details in their Disclosure Return (other than their signature) they must complete the Application for Redaction of Information from the Published Copy of Pecuniary Interest Disclosures Returns Form and clearly identify each element that they are requesting to be redacted, whether it relates to an Act and subsequent qualification contained in Schedule 1 of the GIPA Act of which there is a conclusive presumption of overriding public interest against disclosure, and the grounds for the request. The request must also refer to the relevant clause of the *Government Information (Public Access) Act 2009* for which their request relates.

Schedule 1 of the *Government Information (Public Access) Act 2009* provides for the Acts and sections of these Acts, where there is a conclusive presumption of overriding public interest against disclosure of information, and whether the prohibition is subject to specified qualifications or exceptions, and also whether or not a breach of the prohibition constitutes an offence.

EXTRACT:

***The Government Information (Public Access) Act 2009 (GIPA Act)-
Schedule 1 provides information for which there is conclusive presumption of overriding public interest against disclosure as state below***

1 Overriding secrecy laws

- (1) It is to be conclusively presumed that there is an overriding public interest against disclosure of information the disclosure of which is prohibited by any of the following laws (which are referred to in this Act as **overriding secrecy laws**), whether or not the prohibition is subject to specified qualifications or exceptions and whether or not a breach of the prohibition constitutes an offence—

Assisted Reproductive Technology Act 2007—Part 3 (Central register)
Bail Act 2013—section 89 (Restrictions on publication of association conditions)
Biofuels Act 2007—section 25 (Secrecy)
Child Protection (Offenders Registration) Act 2000—section 21E (Prohibited disclosure of information concerning registrable persons)
Crimes (Administration of Sentences) Act 1999—section 194 (Security of certain information) and regulations under section 283 (Regulations)
Crimes (Forensic Procedures) Act 2000—section 109 (Disclosure of information)
Crimes (Sentencing Procedure) Act 1999—sections 51B (Certain information not to be published or broadcast) and 100H (Certain information not to be published or broadcast)
Criminal Procedure Act 1986—regulations under section 351 (Regulations with respect to the provision or disclosure of information in connection with intervention programs)
Criminal Records Act 1991—section 13 (Unlawful disclosure of information concerning spent convictions)
Dust Diseases Tribunal Act 1989—section 32I (Information about claims)
Education Act 1990—provision made by or under section 18A (Publication of school results) or Division 2 (Obtaining information about students) of Part 5A
Electoral Act 2017—sections 43 (Electoral Information Register not available for public inspection), 55 (Privacy—non-disclosure of information), 159 (Secrecy relating to technology assisted voting), 175 (Security of election materials and electronic resources) and 268 (Disclosure of information)
Gaming and Liquor Administration Act 2007—section 17 (Secrecy)
Health Administration Act 1982—Division 6B (Quality assurance committees) of Part 2, Part 2A (Response to incidents) and section 23 (Specially privileged information)
Health Care Complaints Act 1993
Independent Commission Against Corruption Act 1988
Jury Act 1977
Law Enforcement Conduct Commission Act 2016
Parliamentary Budget Officer Act 2010—section 17 (Confidentiality of information or documents relating to election policy costings)
Police Act 1990—section 169A (Identity of complainant not to be disclosed)
Police Regulation 2015—clause 54 (Secrecy as to complaints about conduct)
Public Interest Disclosures Act 1994—section 22 (Confidentiality guideline)
Public Lotteries Act 1996—section 80 (Secrecy)
State Records Act 1998—section 73 (Authority's duty of confidentiality) but only in respect of information to which a person gains access in the exercise of functions under that Act as a result of the information having been acquired in the course of the administration of another Act mentioned in this Schedule
Totalizator Act 1997—section 105 (Secrecy)
Witness Protection Act 1995

- (2) Subclause (1) does not apply in relation to the disclosure of a spent conviction (within the meaning of the *Criminal Records Act 1991*) to the person who was convicted.

2 Cabinet information

- (1) It is to be conclusively presumed that there is an overriding public interest against disclosure of information (referred to in this Act as **Cabinet information**) contained in any of the following documents—
- (a) a document that contains an official record of Cabinet,
 - (b) a document prepared for the dominant purpose of its being submitted to Cabinet for Cabinet's consideration (whether or not the document is actually submitted to Cabinet),
 - (c) a document prepared for the purpose of its being submitted to Cabinet for Cabinet's approval for the document to be used for the dominant purpose for which it was prepared (whether or not the document is actually submitted to Cabinet and whether or not the approval is actually given),
 - (d) a document prepared after Cabinet's deliberation or decision on a matter that would reveal or tend to reveal information concerning any of those deliberations or decisions,

- (e) a document prepared before or after Cabinet's deliberation or decision on a matter that reveals or tends to reveal the position that a particular Minister has taken, is taking, will take, is considering taking, or has been recommended to take, on the matter in Cabinet,
 - (f) a document that is a preliminary draft of, or a copy of or part of, or contains an extract from, a document referred to in paragraphs (a)–(e).
- (2) Information contained in a document is not Cabinet information if—
 - (a) public disclosure of the document has been approved by the Premier or Cabinet, or
 - (b) 10 years have passed since the end of the calendar year in which the document came into existence.
- (3) Information is not Cabinet information merely because it is contained in a document attached to a document referred to in subclause (1).
- (4) Information is not Cabinet information to the extent that it consists solely of factual material unless the information is contained in a document that, either entirely or in part, would—
 - (a) reveal or tend to reveal information concerning any Cabinet decision or determination, or
 - (b) reveal or tend to reveal the position that a particular Minister has taken, is taking or will take on a matter in Cabinet.
- (5) In this clause, **Cabinet** includes a committee of Cabinet and a subcommittee of a committee of Cabinet.

3 Executive Council information

- (1) It is to be conclusively presumed that there is an overriding public interest against disclosure of information (referred to in this Act as **Executive Council information**) contained in any of the following documents—
 - (a) a document that contains an official record of the Executive Council,
 - (b) a document prepared for the purpose of being submitted to the Executive Council (whether or not that is the only or the dominant purpose for which it was prepared and whether or not the document is actually submitted to the Executive Council),
 - (c) a document prepared after the Executive Council's deliberation or advice on a matter that would reveal or tend to reveal information concerning that deliberation or advice,
 - (d) a document that is a preliminary draft of, or a copy of or part of, or contains an extract from, a document referred to in paragraphs (a)–(c).
- (2) Information contained in a document is not Executive Council information if—
 - (a) public disclosure of the document has been approved by the Governor or the Premier, or
 - (b) 10 years have passed since the end of the calendar year in which the document came into existence.
- (3) Information is not Executive Council information merely because it is contained in a document attached to a document referred to in subclause (1).
- (4) Information is not Executive Council information to the extent that it consists solely of factual material unless the information would reveal or tend to reveal information concerning any deliberation or advice of the Executive Council.

4 Contempt

It is to be conclusively presumed that there is an overriding public interest against disclosure of information the public disclosure of which would, but for any immunity of the Crown—

- (a) constitute contempt of court, or
- (b) contravene any order or direction of a person or body having power to receive evidence on oath, or
- (c) infringe the privilege of Parliament.

5 Legal professional privilege

- (1) It is to be conclusively presumed that there is an overriding public interest against disclosure of information that would be privileged from production in legal proceedings on the ground of client legal privilege (legal professional privilege), unless the person in whose favour the privilege exists has waived the privilege.
- (2) If an access application is made to an agency in whose favour legal professional privilege exists in all or some of the government information to which access is sought, the agency is required to consider whether it would be appropriate for the agency to waive that privilege before the agency refuses to provide access to government information on the basis of this clause.
- (3) A decision that an agency makes under subclause (2) is not a reviewable decision under Part 5.

5A Privilege generally

It is to be conclusively presumed that there is an overriding public interest against disclosure of information contained in a document that, in response to a court order, subpoena or otherwise—

- (a) was a document a person objected to producing in any court proceedings on the grounds that the document was a privileged document, and

(b) was not compelled by a court to be given or produced on the grounds of privilege.

6 Excluded information

- (1) It is to be conclusively presumed that there is an overriding public interest against disclosure of information that is excluded information of an agency, other than information that the agency has consented to the disclosure of.
- (2) Before an agency decides an access application by refusing to provide access to information on the basis that it is excluded information of another agency, the agency is required to ask the other agency whether the other agency consents to disclosure of the information.
- (3) A decision that an agency makes to consent or to refuse to consent to the disclosure of excluded information of the agency is not a reviewable decision under Part 5.

7 Documents affecting law enforcement and public safety

It is to be conclusively presumed that there is an overriding public interest against disclosure of information contained in any of the following documents—

- (a) a document created by the former Information and Intelligence Centre of the Police Service or the former State Intelligence Group,
- (b) a document created by the State Intelligence Command or the Counter Terrorism and Special Tactics Command of the NSW Police Force, the former Counter Terrorist Co-ordination Command of the NSW Police Force, the former Protective Security Group of the Police Service, the former Special Branch of the Police Service or the former Bureau of Criminal Intelligence,
- (c) a document created by the State Crime Command of the NSW Police Force in the exercise of its functions concerning the collection, analysis or dissemination of intelligence,
- (d) a document created by the Corrections Intelligence Group of Corrective Services NSW, Department of Justice, in the exercise of its functions concerning the collection, analysis or dissemination of intelligence,
- (e) a document created by the Security and Intelligence Unit of Juvenile Justice, Department of Justice, in the exercise of its functions concerning the collection, analysis or dissemination of intelligence,
- (f) a document concerning law enforcement and public safety created by another entity established under a law of another jurisdiction, including a jurisdiction outside Australia, whose functions substantially correspond with an entity referred to in paragraphs (a)–(e), including any entity declared by the regulations to be a corresponding entity for the purposes of this clause.

8 Transport safety

- (1) It is to be conclusively presumed that there is an overriding public interest against disclosure of information that would disclose matter relating to an investigation or inquiry into a transport accident or incident under section 46BA or 46BC of the *Passenger Transport Act 1990*.
- (2) (Repealed)
- (3) Despite subclause (1), information about a matter referred to in that subclause ceases to be covered by this clause when the report into the investigation or inquiry is tabled before both Houses of Parliament.

9 Adoption

It is to be conclusively presumed that there is an overriding public interest against disclosure of information that would disclose—

- (a) matter relating to adoption procedures under the *Adoption Act 2000*, or
- (b) matter relating to the receipt of an amended or original birth certificate or of prescribed information under the *Adoption Act 2000*.

10 Care and protection of children

It is to be conclusively presumed that there is an overriding public interest against disclosure of information contained in a report to which section 29 of the *Children and Young Persons (Care and Protection) Act 1998* applies.

11 Ministerial Code of Conduct

It is to be conclusively presumed that there is an overriding public interest against disclosure of information the disclosure of which would disclose information contained in the Register of Interests kept by or on behalf of the Premier pursuant to the Code of Conduct for Ministers of the Crown adopted by Cabinet.

12 Aboriginal and environmental heritage

- (1) It is to be conclusively presumed that there is an overriding public interest against disclosure of information contained in a document that is the subject of a declaration referred to in section 161 of the *National Parks and Wildlife Act 1974*.
- (2) It is to be conclusively presumed that there is an overriding public interest against disclosure of information that has been provided to the Scientific Committee under the *Biodiversity Conservation*

- Act 2016* if the Minister has, under section 4.20 of that Act, authorised the Scientific Committee to restrict access to the information.
- (3) It is to be conclusively presumed that there is an overriding public interest against disclosure of information in a public register required to be kept under the *Biodiversity Conservation Act 2016* if the Environment Agency Head (within the meaning of that Act) has, under section 9.10 of that Act, restricted access to the information.
 - (4) It is to be conclusively presumed that there is an overriding public interest against disclosure of information contained in a plan of management or draft plan of management for an area of community land under Division 2 of Part 2 of Chapter 6 of the *Local Government Act 1993* that is the subject of a resolution of confidentiality referred to in section 36DA (2) of that Act (which relates to the disclosure of the nature and location of a place or an item of Aboriginal significance).
- 13 Information about complaints to Judicial Commission**
It is to be conclusively presumed that there is an overriding public interest against disclosure of information provided by the Judicial Commission to the Minister administering the *Judicial Officers Act 1986* under section 37A of that Act.
- 14 Information about authorised transactions under Electricity Network Assets (Authorised Transactions) Act 2015**
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.
- 15 Information about authorised transaction under Land and Property Information NSW (Authorised Transaction) Act 2016**
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 the authorised transaction under the *Land and Property Information NSW (Authorised Transaction) Act 2016* other than a document the public disclosure of which has been approved by the Treasurer.
- 16 Information provided to High Risk Offenders Assessment Committee**
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 the High Risk Offenders Assessment Committee established by the *Crimes (High Risk Offenders) Act 2006* or any of its subcommittees

Other than the above listed Acts and qualifications, the public interest considerations listed in the Table contained in Section 14 of the *Government Information (Public Access) Act 2009* below are the only other considerations that may be taken into account as public interest considerations against disclosure, and these requests must be determined by the General Manager by conducting the Public Interest Test:

EXTRACT:

The Government Information (Public Access) Act 2009

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).

Table

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,
- (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).

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.

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,
- (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.

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).

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.

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 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.

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.

NOTE:

Should a person select **3(a) or 3(b) in the section 14 Table of the GIPA Act above**, it should be noted that Section 5 of the Privacy and Personal Information Protection Act 1998 (PPIP Act) states that nothing in the PPIP Act affects the operation of the GIPA Act and in particular the PPIP Act does not lessen any obligations under the GIPA Act in respect of a public sector agency, and so therefore, does not lessen the presumption in favour of disclosure.

Also the fact that Disclosure Returns by a Councillor a Designated Person is prescribed by the GIPA Act as Open Access Information is another important factor in favour of disclosure.

Where **3(a) or 3(b) of the Section 14 Table** is selected, the General Manager must conduct the Public Interest Test to make a determination whether the reason for the request for redaction of information is of a nature significant enough to override the requirements of the GIPA Act.

Attached to this procedure are Guidelines issued by the Information and Privacy Commission to assist government agencies in conducting the public interest test.

Standardised Redaction of information from published copies of Disclosure Returns

The General Manager has determined that there is an overriding public interest against disclosure of signatures contained in the public copies of Disclosure and that the redaction of signatures from public copies will occur as a matter of procedure (in accordance with

Sections 6, 13 and 14 of the *Government Information (Public Access) Act 2009*). This standardised redaction does not require the Councillor or Designated Person to make application. The redaction of signatures will be the only standardised redaction that will occur automatically.

Conducting the Public Interest Test to determine applications for the redaction of specific information from the published copies of Disclosure Returns

Where Councillors or Designated Persons have submitted an application for the redaction of specific information from the published copies of Disclosure Returns, the General Manager will conduct the Public Interest Test in accordance with Section 6 of the *Government Information (Public Access) Act 2009*.

Key factors to consider when conducting the Public Interest Test are:

1. The fact that information in Disclosure Returns is open access information is an important factor in favour of disclosure which must be balanced against any applicable considerations against disclosure (Section 12 of the GIPA Act).
2. Section 5 of the *Privacy and Personal Information Protection Act 1998* (PIPP Act) states that nothing in the PPIP Act affects the operation of the GIPA Act and in particular the PPIP Act does not lessen any obligations under the GIPA Act in respect of a public sector agency, and so therefore, does not lessen the presumption in favour of disclosure.
3. Schedule 1 of the *Government Information (Public Access) Act 2009* lists the Acts and sections of these Acts, where there is a conclusive presumption of overriding public interest against disclosure of information, and whether the prohibition is subject to specified qualifications or exceptions, and also whether or not a breach of the prohibition constitutes an offence. (see above)
4. The conduct of the public interest test may balance considerations of privacy protection principles and while a return may reveal personal information, which is a public interest consideration against disclosure (Clause 3 of the Table in Section 14 of the GIPA Act) this is not a conclusive presumption against disclosure. It is just one of the relevant factors that need to be weighted against other factors for and against disclosure. In this regard the considerations must be weighed in conducting the public interest test and this balancing should be informed by Section 5 and Section 20(5) of the PIPP Act which provides that the GIPA Act is not limited by the PIPP Act.
5. Clause 3 of the Table in Section 14 of the *Government Information (Public Access) Act 2009* lists as a consideration is where information may expose a person to a risk of harm or of serious harassment or serious intimidation, It is foreseeable that disclosing the type and combination of information contained in the returns on a Council's website could expose a person to harassment and intimidation, and potentially serious harm or identity theft. The Information and Privacy Commissioner has issued Guideline 1: For local councils on the disclosure of information contained in the returns disclosing the interests of councillors and designated persons, and page 10 of Guideline 1 refers to a NSW Civil and Administrative Tribunal case which indicated that the intimidation or harassment needs to be heavy, weighty or grave and not trifling or transient. The risk needs to be considered objectively. Any evidence of the risk should be as it currently stands, rather than evidence of past actions.

6. For guidance on conducting the Public Interest Test, the following information is attached:
- Information and Privacy Commission Factsheet: What is the public interest test.
 - Information and Privacy Commission Guideline 1: For local councils on the disclosure of information contained in the returns disclosing the interests of councillors and designated persons developed under the Government Information (Public Access) Act 2009 (NSW);
 - Information and Privacy Commission Guideline 4 : Personal information as a public interest consideration under the GIPA Act

Publishing on Council's Website

Following the tabling of Disclosure Returns at an Ordinary Council Meeting , Council must make the Disclosure Returns publicly available on Council's website free of charge unless there is an overriding public interest against disclosure or to do so would impose unreasonable costs on Council.

The General Manager has determined that all signatures will be redacted from the published copies as a standardised redaction.

The General Manager will conduct the Public Interest Test on any applications received for the redaction of specific information from a return and following the General Manager's determination any additional redactions will be made to the public copies of Disclosure Returns prior to publishing.

Public copies of Disclosure Returns will be prepared for publishing in the "Open Access" section on Council's website with the standard redaction and any additional redactions as determined by the General Manager.

A Register detailing the Disclosure Returns and indicating the nature of the information that has been redacted from each Disclosure Return, along with this Procedure will also be published on Council's website.

IMPLEMENTATION

4.1. Roles and Responsibilities

The following Council officers are responsible for the implementation of and the adherence to this procedure:

- General Manager
- Executive Officer

4.2. Support and Advice

The following Council Officers can provide support and advice on this procedure:

- Executive Officer
- Executive Assistants

4.3. Communication

This Procedure will be communicated to employees in accordance with Council's Policy, Procedure and Process Framework. The procedure will be available via Council's electronic management information system (Content Manager) and Council's Intranet.

4.4. Associated Documents

The following documentation is to be read in conjunction with this procedure.

- Section 440 of the Local Government Act 1993
- Government Information (Public Access) Act 2009
- Government Public Access Regulation 2009
- Information and Privacy Commission Guideline 1: For councils on the disclosure of information contained in the returns disclosing the interests of councillors and designated persons developed under the *Government Information (Public Access) Act 2009 (NSW)* September 2019
- Information and Privacy Commission Information Access Guideline 4: Personal Information as a public interest consideration under the GIPA Act May 2022
- Office of Local Government's Model Code of Conduct for Local Councils in NSW
- Information and Privacy Commission Fact Sheet: What is the Public Interest Test? August 2022
- Council's adopted Model Code of Conduct Policy
- Council's adopted Access to Information Policy

5. REVIEW

Review of this procedure will incorporate relevant legislation, documentation released from relevant state agencies and best practice guidelines.

The standard review period will be every four (4) years from the effective date. The responsible Council officer will be notified of the review requirements three (3) months prior to the expiry of this procedure.

The Executive Officer is responsible for the review of this procedure.

6. LEGISLATIVE AND LEGAL FRAMEWORK

This procedure is to be read in conjunction with the following:

Local Government Act 1993, Section 440

Government Information (Public Access) Act 2009 Part 1 and Schedule 1

Privacy and Personal information Protection Act 1998 Section 5

Council employees shall refrain from personal activities that would conflict with proper execution and management of Council's Disclosures by Councillors and Designated Persons' Return Procedure. Council's Code of Conduct provides guidance for recognising and disclosing any conflicts of interest.

7. DEFINITIONS

"Disclosure Return" shall mean the Disclosure by Councillors and Designated Persons Return found at Schedule 2 of Council's adopted Model Code of Conduct Policy.

“Redacted” shall mean the removal of information from a completed Disclosure by Councillors and Designated Persons Return

“Open Access Information” shall mean agency information as prescribed by Part 3-Open access information section of the GIPA Act

“GIPA Act” shall mean the Government Information (Public Access) Act 2009

“GIPA Regulation” shall mean the Government Information (Public Access) Regulation 2009

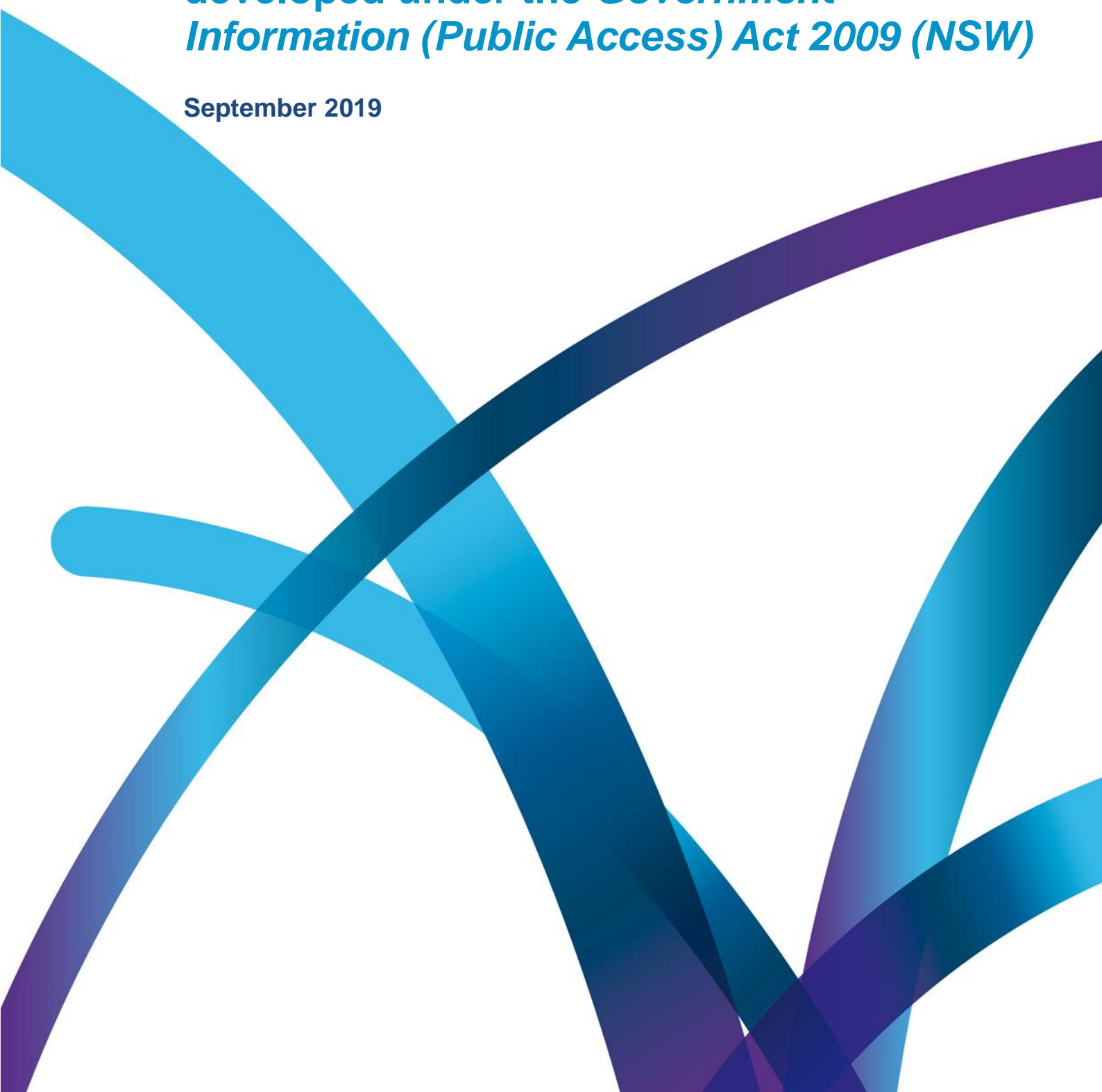
“PIPA Act” shall mean the Privacy and Personal Information Protection Act 1998



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Guideline 1: For local councils on the disclosure of information contained in the returns disclosing the interests of councillors and designated persons developed under the *Government Information (Public Access) Act 2009 (NSW)*

September 2019



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Guideline 1: For local councils on the disclosure of information contained in the returns disclosing the interests of councillors and designated persons developed under the *Government Information (Public Access) Act 2009 (NSW)*

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

These Guidelines, made pursuant to those sections of the GIPA Act, are made to assist local councils to determine the public interest considerations for and against disclosure of information contained in the returns disclosing the interests of councillors and designated persons as required by clause 1(2)(a) of Schedule 1 of the *Government Information (Public Access) Regulation 2018 (NSW)* ('the GIPA Regulation').

These Guidelines supplement the provisions of the GIPA Act. Agencies must have regard to them in accordance with section 15(b) of the GIPA Act.

The Guidelines have been developed in consultation with the Office of Local Government, and the Privacy Commissioner.

The operation and effectiveness of the Guidelines will be reviewed after two years or as required by any intervening developments relevant to the Guideline.

Elizabeth Tydd

**IPC CEO, Information Commissioner
NSW Open Data Advocate**

September 2019

Overview

Part 4 of the [*Model Code of conduct for Local Councils in NSW \(2018\)*](#) (Model Code) requires a councillor or a designated person to complete and lodge with the general manager a return disclosing his or her pecuniary interests. That return may contain personal information about each councillor and designated person, including his or her name, address and signature, as well as information about property and share holdings, gifts received, debts owed, other sources of income, and positions held in a trade union or business or professional organisation. The form of the return is set out in Schedule 2 of the Model Code.

Mandatory proactive release, also known as open access information, is one of the four information access pathways under the GIPA Act. Proactive release advances the object of the GIPA Act to “maintain and advance a system of responsible and representative democratic Government that is open, accountable, fair and effective ...” The GIPA Act contributes to the building of an integrity culture through the establishment of a framework based around the principles of pro-active disclosure and a presumption in favour of public interest disclosure.

The mandatory proactive release provisions of the GIPA Act and the GIPA Regulation apply to the disclosure of information contained in returns disclosing the interests of councillors and designated persons. The combined effect of the GIPA Act and the GIPA Regulation is that the information in the returns needs to be disclosed on the website of each local council, unless to do so would impose unreasonable costs on the council, or if the council determined there was an overriding public interest against disclosing the information.

In order to decide whether there is an overriding public interest against disclosure, councils need to apply the public interest test, and weigh the public interest considerations in favour of and public interest considerations against disclosure.

This Guideline recognises that disclosing the information in the returns furthers openness, transparency and accountability in local government. It also facilitates the identification and management of potential conflicts of interest that might arise where councillors and other staff participate in decisions from which they may derive, or be perceived to derive, personal or financial benefit.

However, the returns may contain personal information about the person concerned, and, potentially, about third parties such as family members. This is information which individuals may have concerns about disclosing publicly on a website and may object to publication following consultation under the GIPA Act.

[Section 6\(4\)](#) of the GIPA Act requires agencies to “facilitate public access to open access information contained in a record by deleting matter from a copy of the record to be made publicly available, if inclusion of the matter would otherwise result in there being an overriding public interest against disclosure of the record, and it is practicable to delete the matter”.

The fact that information is open access information is an important factor in favour of disclosure which must be balanced against any applicable considerations against disclosure, as was noted by the NSW Civil and Administrative Tribunal Appeal Panel in two recent cases¹. In *Webb v Port Stephens Council (No. 3)* [2018] NSWCATAP 286, the Appeal Panel stated at paragraph 77:

Where the information in issue is in fact open access information, as noted by the Appeal Panel in McEwan, this is an “important factor in favour of disclosure” (in addition to other relevant factors in favour of disclosure, including the general public interest in favour of disclosure provided for in s12(1) of the GIPA Act) when it comes to determining whether the balance lies between a public interest consideration against disclosure and the public interest in favour of disclosure.

Open access information should be available free of charge on a website maintained by the relevant agency. Open access information can also be made publicly available in other ways, however at least one of the ways in which the information is accessible must be free of charge.²

Consequently, this Guideline provides that the requirement in Clause 1(2)(a) of [Schedule 1](#) of the GIPA Regulation, that returns of councillors and designated persons be released as part of local councils' open access information, should be interpreted as follows:

- The returns should be made publicly available on the council's website free of charge unless there is an overriding public interest against disclosure or to do so would impose unreasonable additional costs on the council
- The fact that a return of interests is open access information is a factor in favour of disclosure in balancing the public interest
- In the circumstances where council decides that there is an overriding public interest against disclosure of the return, consideration should then be given to whether it is practicable to release an edited copy of the return (for example redacting the individual's signature or residential address) in accordance with [section 6\(4\)](#) of the GIPA Act
- If it is practicable to do so, then the information should be deleted from a copy of the return and the remainder of the return made available on the council's website
- Where information is deleted from a return, council should keep a record indicating, in general terms, the nature of the information redacted in accordance with section 6(5) of the GIPA Act
- Copies of publicly available information about returns may be made in accordance with [clause 5\(1\)\(b\)](#) of the GIPA Regulation.

Releasing the information contained in the returns of councillors and designated persons in this manner facilitates the legitimate public interest in having access to the information, while protecting the individual's right to privacy and safety.

¹ *McEwan v Port Stephens Council* [2018] NSWCATAP 211, *Webb v Port Stephens Council (No. 3)* [2018] NSWCATAP 286

² GIPA Act sections 6(2);6(3)

Part 1: Returns disclosing the interests of councillors and designated persons

What is a return?

- 1.1 Part 4 of the [Model Code](#) establishes the requirements for the disclosure of pecuniary interests by councillors and designated persons. This includes disclosures of interests in written returns (returns of interests) and disclosures of pecuniary interests at meetings. This Guideline deals only with requirements in relation to written returns of interests and does not affect the obligations of councillors or committee members to disclose pecuniary interests at meetings.
- 1.2 The Model Code is made under section 440 of the *Local Government Act 1993* (NSW) (LGA) and Part 8 the *Local Government Regulation 2005*. Part 4 of the Model Code replicates and replaces the requirements previously set out in sections 441- 449 of the LGA.
- 1.3 Clause 4.21 of the Model Code requires that councillors and designated persons prepare and submit written returns of interest within three months after:
 - becoming a councillor or designated person, and
 - 30 June of each year, and
 - becoming aware of an interest they are required to disclose.
- 1.4 A 'designated person' is defined in clause 4.8 of the Model Code as:
 - *the general manager*
 - *other senior staff of the council*
 - *a person (other than a member of the senior staff of the council) who is a member of staff of the council or a delegate of the council and who holds a position identified by the council as the position of a designated person because it involves the exercise of functions under the LGA or any other Act (such as regulatory functions or contractual functions) that, in their exercise, could give rise to a conflict between the person's duty as a member of staff or delegate and the person's private interest*
 - *a person who is a member of a committee of the council identified by the council as a committee whose members are designated persons because the functions of the committee involve the exercise of the council's functions (such as regulatory functions or contractual functions) that, in their exercise, could give rise to a conflict between the member's duty as a member of the committee and the member's private interest.*
- 1.5 Clause 4.1 of the Model Code defines a 'pecuniary interest' as one involving a "reasonable likelihood or expectation of appreciable financial gain or loss to the person". Clause 4.2 provides that a person "will not have a pecuniary interest in a matter if the interest is so remote or insignificant that it could not reasonably be regarded as likely to influence any decision you might make in relation to the matter, or if the interest is of a kind specified in clause 4.6" (which are interests that do not have to be disclosed).

- 1.6 For the purposes of the Model Code, a pecuniary interest is one held by the councillor and designated person, or his or her spouse, de facto partner, relative, partner or employer, or a company or other body of which the person, or a nominee, partner or employer of the person, is a shareholder or member.³ However, a person is not taken to have a pecuniary interest in a matter:
- a) *if the person is unaware of the relevant pecuniary interest of the spouse, de facto partner, relative, partner, employer or company or other body; or*
 - b) *just because the person is a member of, or is employed by, a council or a statutory body or is employed by the Crown; or*
 - c) *just because the person is a member of, or a delegate of a council to, a company or other body that has a pecuniary interest in the matter, so long as the person has no beneficial interest in any shares of the company or body.*⁴
- 1.7 The returns are designed to promote openness and transparency in local government, and to avoid a conflict of interest on the part of councillors and senior council staff who exercise decision-making functions.

What information do the returns contain?

- 1.8 Part 2 of Schedule 1 of the Model Code sets out the matters that must be disclosed in the returns of interests in the following categories:
- interests in real property: clauses 5 - 8
 - gifts: clauses 9-11
 - contributions to travel: clauses 12-14
 - interests and positions in corporations: clauses 15-18
 - interests as a property developer or a close associate of a property developer: clauses 19-20
 - positions in trade union and professional or business associations: clauses 21-22
 - dispositions of real property: clauses 23-25
 - sources of income: clauses 26-30
 - debts: clauses 31 - 33
 - discretionary disclosures: clause 34 (A person may voluntarily disclose in a return any interest, benefit, advantage or liability, whether pecuniary or not, that is not required to be disclosed under another provision of the Schedule).
- 1.9 The form of the return is provided in Schedule 2 of the [Model Code](#).

³ Clause 4.4 of the Model Code

⁴ Clause 4.5 of the Model Code

Disclosure under the LGA now replaced with the GIPA Act and Regulations

- 1.10 The LGA previously required that the current version of the return of interests of councillors and designated persons was to be made available for public inspection free of charge.
- 1.11 In 2009, the GIPA Act replaced section 12 of the LGA with the mandatory proactive release provisions in [sections 6](#) and [18](#) of the GIPA Act, and the GIPA Regulation (see [Part 2](#)).

Part 2: Disclosure requirements under the GIPA Act and the public interest test

Mandatory disclosure requirements

- 2.1 [Section 6](#) of the GIPA Act requires agencies to make certain information publicly available. This information is known as open access information. [Section 18](#) contains a list of the open access information that all agencies must make publicly available. Schedule 1 to the GIPA Regulation lists additional open access information relevant only to local councils. This includes the returns of the interests of councillors and designated persons (see [clause 1\(2\)\(a\)](#) of Schedule 1).
- 2.2 The GIPA Act requires under section 6 that open access material must be made publicly available unless there is an overriding public interest against disclosure. Section 6(2) provides that the information is to be made publicly available free of charge on a website maintained by the agency (unless to do so would impose unreasonable additional costs on the agency) and can be made publicly available in any other way that the agency considers appropriate.
- 2.3 Section 6(4) requires agencies to facilitate public access to open access information by deleting matter (content) if it is practicable to do so. This facilitates the release of open access information by enabling any matter subject to an overriding public interest against disclosure to be deleted so that the remainder of the information can be released. In circumstances where council determines that there is an overriding public interest against disclosure of open access information, section 6(4) may operate to require public release of the remaining open access information which is not subject to the overriding public interest against disclosure. Where information is deleted in accordance with section 6(4), the agency is required to keep a record indicating, in general terms, the nature of the information that has been redacted (see section 6(5)).
- 2.4 [Part 2](#) of the GIPA Regulation also provides that local councils must provide a copy of a record containing the information (or providing the facilities for making a copy of a record containing the information) to any person either free of charge or for a charge not exceeding the reasonable cost of photocopying.
- 2.5 The combined effect of these provisions is that information in the returns of the interests of councillors and designated persons needs to be made available on a council's website, unless there is an overriding public interest against such disclosure, or if placing it on the web would impose unreasonable costs on a council.

The public interest test

- 2.6 The GIPA Act provides that there is a presumption in favour of disclosure of government information unless there is an overriding public interest against disclosure (section 5). In order to determine if there is an overriding public interest against disclosing information in the returns of the interests of councillors and designated persons, councils need to apply the public interest test under [Part 2](#) of the GIPA Act.
- 2.7 The fact that a return of interests is open access information is an important factor in favour of disclosure which must be balanced against any applicable considerations against disclosure. In balancing the public interest decision makers should have regard to the intent of the legislature and apply the Act consistent with the objects of section 3(2) of the GIPA Act.
- 2.8 The public interest test is described in [section 13](#) of the GIPA Act as “[t]here is an overriding public interest against disclosure of government information for the purposes of this Act 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”.
- 2.9 In applying the public interest test factors such as privacy may be considered. While the note to [section 12](#) provides a non-exhaustive list of examples of factors that may be considered in favour of disclosing information, only those considerations listed in the Table in [section 14](#) may be taken into account in deciding that information should not be disclosed. The considerations against disclosure must be such that they outweigh those in favour, overturning the general presumption in the GIPA Act in favour of disclosure (see [section 5](#)).
- 2.10 The Information Commissioner has published the following resources to assist agencies to apply the public interest test:
- [Guideline 4: Personal information as a public interest consideration under the GIPA Act](#)
 - [What is the public interest test?](#)

Part 3: How the information on returns should be disclosed

Public interest considerations in favour of disclosure

- 3.1 The note in [section 12](#) of the GIPA Act contains a number of factors that favour disclosure of information, including the following:
- (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.*

- 3.2 Disclosure of the returns of the interests of councillors and designated persons promotes some of these public interest considerations in favour of disclosure (see (a), (b), (c) and (e)). It furthers openness, transparency and accountability in local government. Disclosing the returns also protects the integrity of councils' decision-making processes by allowing scrutiny of potential conflicts of interests that would arise where councillors or staff participate in decision making from which they or their close associates may derive, or be perceived to derive, personal or financial benefit.
- 3.3 To assist members of the public to have confidence that potential conflicts of interest are avoided, they should have sufficient information about the areas of conflict. In this respect, disclosure of the information contained in the returns is an important element in promoting public accountability.

Public interest considerations against disclosure

- 3.4 Councillors and designated persons may be required to disclose personal information in the returns. In addition to their names and addresses, the returns include details about each of their property and share holdings, debts and family business interests, as well as their signatures.
- 3.5 Clause 3 in the Table in [section 14](#) of the GIPA Act lists as a consideration against disclosure the fact that information may reveal someone's personal information, or would contravene an information privacy principle under the *Privacy and Personal Information Protection Act 1998* (NSW) (PPIP Act). An individual has a right to protect the privacy of their personal information. Given the amount of personal information that may be contained in the returns, special care should be taken to protect this right.
- 3.6 The balancing of public interest considerations may necessitate consideration of privacy protection principles and the interaction between the GIPA Act and the PPIP Act is well established within both statutes. While a return may reveal personal information, which is a public interest consideration against disclosure, this is not a conclusive presumption against disclosure. It is just one of the relevant factors that need to be weighed against other factors for and against disclosure. In this regard the considerations must be weighed in conducting the public interest test and this balancing should be informed by section 5 and section 20(5) of the PPIP Act which provide that the GIPA Act is not limited by the PPIP Act.
- 3.7 A further consideration against disclosure listed in clause 3 of the Table in [section 14](#) is where release of the information may expose a person to a risk of harm or of serious harassment or serious intimidation. It is foreseeable that disclosing the type and combination of information contained in the returns on a council's website could expose a person to harassment and intimidation, and potentially serious harm or identity theft.
- 3.8 In *Pallier v NSW State Emergency Service* [2016] NSWCATAD 293, the NSW Civil and Administrative Tribunal indicated that the intimidation or harassment needs to be heavy, weighty or grave and not trifling or transient.⁵ The risk needs to be considered objectively. Any evidence of the risk should be as it currently stands, rather than evidence of past actions.⁶

⁵ *Pallier v NSW State Emergency Service* [2016] NSWCATAD 293, paragraph 81

⁶ *Ibid*, paragraph 85.

Application of section 6(4) of the GIPA Act

- 3.9 In circumstances where council determines that there is an overriding public interest against disclosure of a return of interest, council may still be required to release an edited copy of the return.
- 3.10 [Section 6\(4\)](#) of the GIPA Act requires agencies 'must facilitate public access to open access information contained in a record by deleting matter from a copy of the record if disclosure of the matter would otherwise be prevented due to an overriding public interest against disclosure, and it is practicable to delete the matter'.
- 3.11 The type of matter which might be deleted from a return in these circumstances will vary depending on the public interest considerations applied. However, examples might include the signatures or residential address of the individual making the return.
- 3.12 Where information is deleted from a return, council should keep a record indicating, in general terms, the nature of the information redacted in accordance with section 6(5) of the GIPA Act

Conclusion

- 3.13 Disclosure of information contained in the returns of the interests of councillors and designated persons is an important public accountability measure. Open access information should be treated as a special class of information when determining information access. Accordingly, the threshold to displace Parliament's intent that it is open access is set at a high level.
- 3.14 The requirement in clause 1(2)(a) of [Schedule 1](#) of the GIPA Regulation that returns of councillors and designated persons be released as part of local councils' open access information should be interpreted as follows:
- The returns should be made publicly available on the council's website unless there is an overriding public interest against release or to do so would impose unreasonable additional costs on council.
 - The fact that a return of interests is open access information is a factor in favour of disclosure in balancing the public interest.
 - In the circumstances where council decides that there is an overriding public interest against disclosure, consideration should then be given to whether it is practicable to release an edited copy of the record (for example redacting the individual's signature or residential address) in accordance with [section 6\(4\)](#) of the GIPA Act.
 - If it is practicable to do so, then the information should be deleted from a copy of the record and the remainder of the return made available on the council's website.
 - Where information is deleted from a return, council should keep a record indicating, in general terms, the nature of the information redacted.
 - Copies of publicly available information about returns may be made in accordance with [clause 5\(1\)\(b\)](#) of the GIPA Regulation.
- 3.15 Releasing the information contained in the returns of councillors and designated persons in this manner facilitates the legitimate public interest in having access to the information, while respecting other considerations against disclosure including privacy.

Document information

| | |
|--------------------------|--|
| Title: | Guidelines for local councils on the disclosure of information contained in the returns disclosing the interests of councillors and designated persons developed under the Government Information (Public Access) Act 2009 (NSW) |
| Business centre: | IPC |
| Author: | Legal Counsel and Regulatory Advice |
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|---------|-----------|----------------------|
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Information Access Guideline 4: Personal Information as a public interest consideration under the GIPA Act

May 2022



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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.

These guidelines, made pursuant to those sections of the GIPA Act, are to assist agencies to deal with requests for personal information under the GIPA Act. It deals with formal and informal requests by people for their own information and for the personal information of third parties.

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.

Elizabeth Tydd

IPC CEO, Information Commissioner

NSW Open Data Advocate

10 May 2022

Introduction

Personal information can be both a consideration in favour of disclosure, and a consideration against disclosure. This Guideline serves to assist agencies to understand what personal information means, and how to properly apply those considerations when carrying out the public interest test under the GIPA Act.

Overview

Of all categories of information held by government agencies, the type most often requested is personal information. People may request access to their own personal information, either in its own right or in combination with other government information, or they may seek access to the personal information of other people.

Dealing with requests for personal information can present agencies with a number of specific challenges. For example:

- There are two options for people to apply for access to their own personal information: under the GIPA Act and under the *Privacy and Personal Information Protection Act 1998* (NSW) (PPIP Act). This can cause confusion for agencies and the public;
- personal information is defined differently in the GIPA Act and the PPIP Act; and
- under the GIPA Act, personal information can be a public interest consideration both for and against disclosure, depending on the circumstances.

Under sections 12(3) and 14(3) of the GIPA Act, the Information Commissioner can issue guidelines to assist agencies regarding the public interest considerations in favour of, or against, disclosure of information. This Guideline is made to assist agencies to deal with requests for personal information under the GIPA Act. It covers formal and informal requests by people for their own personal information and for the personal information of third parties, as well as personal information contained in information to be released by an agency proactively or as open access information.

Specifically, this Guideline covers:

- the definition of personal information under the GIPA Act and the type of information that would be covered;
- whether agencies should apply the GIPA Act or PPIP Act definition of personal information when dealing with requests under the GIPA Act;
- factors to consider when looking at personal information as a public interest consideration in favour of disclosure under the GIPA Act; and
- factors to consider when looking at personal information as a public interest consideration against disclosure under 3(a) and 3(b) of the Table at section 14 of the GIPA Act.

This Guideline does not cover how agencies should deal with requests under the PPIP Act. The PPIP Act is only considered insofar as it affects requests for personal information made under the GIPA Act. Agencies can find detailed information about the PPIP Act on the IPC website.

This Guideline is supported by other material on the [IPC website](#).

Agencies must have regard to this guideline pursuant to section 15(b) of the GIPA Act.

Part 1: Personal information for the purposes of the GIPA Act

Definition of personal information in the GIPA Act

1.1 A person may apply under the GIPA Act for personal information about themselves, or about third parties. Personal information is defined in Schedule 4[4] of 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.”

1.2 Information that can be classed as personal cannot be listed exhaustively. Below are common examples of information that generally falls into the category of personal information for the purposes of the GIPA Act:

Common examples of personal information (NB this is not an exhaustive list):

- a person’s name;
- personal address and contact details, such as email and phone numbers;
- information about a person’s family life;
- financial information, including bank accounts and investments;
- employment information, including details of salaries, personnel records, and recruitment information, including job recommendation and referee reports;
- a person’s signature;
- photographs or audio or video recordings, including CCTV footage, which identifies individuals;
- information about a person’s hobbies or interests;
- information about a person’s education, including the degree they obtained and the marks they were awarded;
- membership of voluntary or professional bodies, including trade unions;
- information about a person’s religion;
- information about sexual preference;
- alpha-numeric or biometric information that can identify an individual; and
- medical and health information.

Personal information includes opinions

1.3 The definition of personal information specifically includes opinions about individuals. Opinions would be considered “personal information” under the GIPA Act where that opinion is about an individual whose identity is apparent or can “reasonably be ascertained” from that opinion or from other accompanying information. Examples of where an opinion could amount to personal information include:

- the report of a referee about an applicant for public sector employment;
- comments recorded by a supervisor about an employee during achievement planning;
- notes made by staff of a public hospital about a patient or an employee;

- views expressed about a member of the public during a local council meeting;
- witness statements taken during the course of a disciplinary investigation; or
- a file note made by a public servant expressing views about a colleague or a member of the public (see *Bannister v Department of Finance, Services and Innovation* [2018] NSWCATAD 33).

1.4 The definition refers to opinions being “about” individuals. This suggests that the personal information conveyed by the opinion is that of the subject rather than the person who gives the opinion. For example, an opinion given in a referee report, the personal information is that of the person being refereed, rather than of the referee. However, in offering an opinion about someone else, personal information about the giver of the opinion may also be revealed. To take the example of a witness making a statement during a disciplinary investigation, the following personal information about the witness may be included:

- name, address, and contact details;
- employment information such as where the witness works, how long they have been employed, and any qualifications that may be relevant to the context of the statement; and
- information about the relationship between the witness and the person being investigated.

What does whose identity is apparent or can reasonably be ascertained mean?

1.5 Information will only be considered to be “personal” if it is about an individual whose identity is “apparent or can reasonably be ascertained”. Obviously, the identity of the person will be apparent where the information includes his or her name. It may also be apparent where the person is not named. For example, a person’s identity can be apparent through a photograph or CCTV footage. However, elements of a person’s gait or body shape may not be considered sufficiently distinctive to enable identification.ⁱ

1.6 A person’s identity may be apparent where neither the name nor a photograph is involved, but the information about the person is such that it could not be referring to anyone else. An example would be a reference to “the President of the United States in 2011”, or “the current Secretary of Department X”.ⁱⁱ This is known as “constructive identification”.

1.7 Whether the identity of a person can “reasonably be ascertained” will depend on the type of information and the context in which it is being used. It is not necessary that the identity of the person be widely known: it will be sufficient to satisfy the definition of personal information if the information is communicated to someone who is able to identify the person. For example, a government employee may talk to a group of colleagues about a member of the public who visits them frequently, noting the person’s gender, approximate age and physical appearance. Although the person is not named, the combination of information and the context enable the people hearing the information to identify the subject.

What is not considered to be personal information under the GIPA Act

1.8 In the GIPA Act, personal information does **not** include:

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

1.9 Therefore, information about someone who has been dead for 30 years is not considered to be personal information for the purposes of the GIPA Act, nor is the fact that John Smith is a Senior Investigation Officer in Agency Y. This means that agencies should not apply clause 3(a) or 3(b) of the Table at section 14 of the GIPA Act to this type of information.

Definition of personal information in the PPIP Act

1.10 The core definition of personal information in section 4 of the PPIP Act is the same as that in the GIPA Act.^{iv} However, the PPIP Act definition lists 12 exceptions where information is not considered to be “personal” for the purposes of that Act,^v as opposed to the three exceptions in the GIPA Act definition set out above.

1.11 Section 4A of the PPIP Act specifically excludes health information from the definition of personal information. Health information is regulated by the *Health Records and Information Privacy Act 2002* (NSW).

Practical effect of the exemptions

1.12 The effect of the PPIP Act and GIPA Act exemptions in practice will mean that some information will be considered to be personal for the purposes of the GIPA Act, but not for the PPIP Act. An example is information or an opinion about an individual’s suitability for appointment or employment as a public sector official, which is excluded from the definition of “personal information” by subsection 4(3)(j) of the PPIP Act, but is considered to be personal information under the GIPA Act.

1.13 As a result, information, such as recruitment records, referee reports and performance appraisals, is covered by the GIPA Act, but not by the PPIP Act. This means that a person does not have a right to his or her own public sector recruitment documents under the PPIP Act, but there is a public interest in favour of disclosing that information to the person to whom it relates under the GIPA Act.

1.14 Furthermore, if a request is made under the GIPA Act by someone wanting access to a recruitment panel’s comments about another applicant, this would amount to revealing the personal information of a third party, which would enliven the consideration against disclosure in 3(a) in the Table at section 14 of the GIPA Act:

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

1.15 However, the public interest consideration against disclosure in 3(b) of the Table would not apply:

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:

(b) contravene an information protection principle under the PPIP Act or a Health Privacy Principle under the *Health Records and Information Privacy Act 2002* (HRIP Act).

This is because the information privacy principles (IPPs) in the PPIP Act only apply to personal information as defined in that Act. Since recruitment panel reports about public officials are not “personal information” under the PPIP Act, the IPPs do not apply to that information.

1.16 The public interest considerations against disclosure in 3(a) and (b) are discussed further in Part 3.

Which definition to use when dealing with GIPA requests?

1.17 The following points can assist when dealing with requests:

- where agencies are considering requests for personal information under the PPIP Act, the PPIP Act definition of personal information applies;

- where agencies are considering requests for personal information under the GIPA Act, the GIPA Act definition of personal information applies;
- the only situation where the PPIP Act definition of personal information will be relevant to requests being dealt with under the GIPA Act is where agencies need to know if releasing the information to a third party would breach an IPP under the PPIP Act. In that situation, agencies need to look at whether the information is personal information for the purposes of the PPIP Act, since the IPPs only apply to that information.

Part 2: Personal information as a public interest consideration in favour of disclosure

2.1 Section 12 of the GIPA Act reiterates the general presumption in favour of disclosure of government information, and lists examples of public interest considerations that favour disclosure. Those considerations include situations where the information is personal information of the person to whom it is to be disclosed.

2.2 Wherever possible, government agencies should provide people with access to their own personal information quickly and free of charge, or at the lowest reasonable cost. This supports the objects of the GIPA Act as stated in section 3, and reinforces the right people have under section 14 of the PPIP Act to obtain access to their personal information “without excessive delay or expense”. Section 67 of the GIPA Act states that agencies cannot impose any processing charge for the first 20 hours of processing time for an application for personal information.

2.3 When an applicant applies for a combination of personal and non-personal information the information must be assessed by the agency to identify if the information is characterised as personal information. The fact that the request may seek business and commercial information does not preclude it from being treated as personal information when the dealings may be relevant to a personal matter. Importantly, whether the access application form contains answers to pro-forma questions such as ‘*are you seeking personal information Yes / No*’, is also of limited relevance in making this determination. The inclusion of pro-forma questions does not create a legal consequence for either an applicant or an agency. It is only when the agency assesses the information collated as a result of its searches that the legal consequence crystallises.^{vi} In relation to an application that is characterised as personal information in whole or in part the GIPA Act imposes specific requirements including the permissible charges.

2.4 In assessing the characteristics of the information sought, agencies should consider their information management practices in holding personal information. It is arguable that all personal information held by agencies constitutes mixed information (personal and non-personal). For example, information that a person owns a property in a local government area is both personal information and non personal information. It is ‘mixed’ information. Additionally, depending on the context that the information is being viewed, or the purpose (if any) to which the information is applied, it may take on further characteristics. It would include land titling information, local council information, potentially water utility information, land valuation information and clearly personal information.^{vii}

2.5 When dealing with requests by a person for access to their own personal information under the GIPA Act, agencies also need to consider any relevant considerations against disclosure of that information. However, those considerations would have to be very significant to override the general presumption of disclosure in the GIPA Act, and the specific consideration in favour of disclosure of giving people access to their own information.

2.6 If there are strong considerations against disclosing personal information to the person to whom that information relates, agencies should look for ways to mitigate the strength of those considerations.^{viii} For example, if disclosing the information would also involve revealing the personal information of another person, the agency should consult with that person to obtain his or her views. It may be that the third party does not object to the information being disclosed, which makes that consideration against disclosure far less significant. Even where the third party objects, the consultation may indicate to the agency that there is a greater public interest in the information being disclosed to the person requesting it than there are considerations against disclosure. The issue of consulting with third parties about releasing information that affects them is discussed in a separate Guideline.^{ix}

2.7 Other ways agencies may proceed when there are significant public interest considerations against disclosure are to provide the person with access to their own information but redact any other information for which there is an overriding public interest against disclosure, or to create a new document. In particular, the GIPA Act provides that agencies must facilitate public access to government information contained in a record.^x That can be achieved by creating a new record or deleting information from a record that would otherwise result in there being an overriding public interest against disclosure of the record.^{xi}

2.8 However, the public interest in providing people with access to their own information is extremely strong and should only be displaced where the considerations against disclosure are overriding.^{xii}

Part 3: Personal information as a public interest consideration against disclosure

3.1 An exhaustive list of public interest considerations against disclosure is contained in the Table at section 14 of the GIPA Act. The following two considerations are relevant to this Guideline:

3.2 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;^{xiii} or
- (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*.^{xiv}

Revealing personal information as a consideration against disclosure

3.3 This consideration against disclosure will apply once information has been identified as "personal" under the GIPA Act definition of personal information, and the information would be "revealed" by disclosing it under the GIPA Act.

3.4 Although not expressly stated in 3(a), this consideration against disclosure of personal information may be interpreted as referring to third party information: that is, personal information about someone other than the person requesting the information. Any other interpretation would be inconsistent with the public interest consideration in favour of providing people with access to their own personal information under section 12.

3.5 Clause 3(a) therefore should not be used as a reason for denying people access to their own personal information. Rather, it is intended as a balance between the public interest in having access to government information, and the public interest in protecting and controlling the disclosure of personal information to people other than the person to whom the information relates.

3.6 In Schedule 4[1] to the GIPA Act, to “reveal” information is defined as “to disclose information that has not already been publicly disclosed (otherwise than by unlawful disclosure)”. Accordingly, if the personal information has already been publicly disclosed, this consideration against disclosure cannot be relied on.^{xv}

3.7 While the fact that disclosing information to someone would reveal personal information about someone else is a public interest consideration against disclosure, it is not an absolute barrier to the information being disclosed. It is only a relevant factor that needs to be weighed against other factors for and against disclosure.

Consultation with third parties

3.8 Where a request for access to the personal information of a third party is a formal access application, consultation to obtain the views of the third party may be required. Section 54 of the GIPA Act provides that 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 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.

3.9 Section 54(4) states that the purpose of consultation is to find out whether the third party objects to the release of the information, and, if so, the reasons for any objection. The views of third parties about the disclosure of their personal information to an access applicant will be relevant to agencies in determining the weight to give to the consideration against disclosure in 3(a).

3.10 Third party views are only considerations to be taken into account when deciding whether or not the information is released to the applicant. Third party views are considered when deciding applications, however, do not determine the decision whether or not information is released to the applicant. This decision must be made by the agency based on the public interest test. More information can be found in Information Access Guideline 5 – Consultation on public interest considerations under section 54.

Contravening an IPP in the PPIP Act as a consideration against disclosure

3.11 There will be a public interest against disclosure of information if the disclosure would reasonably be expected to contravene an IPP in the PPIP Act. The IPPs in the PPIP Act govern the way that public sector agencies must deal with the personal information they hold. The IPPs cover the collection, storage, use and disclosure of personal information by government agencies.

3.12 The IPPs apply only to personal information as it is defined in the PPIP Act.

3.13 In the context of 3(b) of Table 14, the IPP dealing with disclosure of personal information would be the most likely one to be breached by disclosure of personal information under the GIPA Act. That IPP is contained in section 18 of the PPIP Act and provides that agencies must not disclose personal information unless:

- (a) the disclosure is directly related to the purpose for which the information was collected, and there is no reason to believe that the person would object to the disclosure, or
- (b) the individual concerned is aware, or reasonably likely to be aware, that information of that kind is usually disclosed, or
- (c) the agency believes on reasonable grounds that the disclosure is necessary to prevent or lessen a serious and imminent threat to the life or health of the individual concerned or another person.

3.14 In determining whether disclosure of personal information would reasonably be expected to contravene the PPIP Act, agencies should initially determine if the information is personal information as defined in section 4 of the PPIP Act and then ask the following questions:

- (a) Is the information being disclosed for the same purpose for which it was collected, or a purpose directly related?
- (b) Has the person who is the subject of the information consented to the disclosure?
- (c) Would the subject of the information be likely to be aware that information of that type is usually disclosed?
- (d) Would disclosure of the information be likely to prevent or lessen a serious or imminent threat to someone's life or health?

If the answer to any of these questions is "yes", it is unlikely that disclosure would be a breach of the PPIP Act.

3.15 If the request for the information is in the form of a formal GIPA Act access application, an agency may need to consult with the third party to see if he or she consents to the disclosure. If the third party consents, there will be no contravention of the IPP.

3.16 In establishing whether or not the public interest consideration in 3(b) is relevant, agencies should identify the particular IPP it considers disclosure could reasonably be expected to contravene. Disclosure of the information need only "reasonably be expected" to breach an IPP. Agencies do not need to determine conclusively whether an IPP would in fact be contravened by disclosure of the information.

3.17 If an agency establishes that disclosure of the information could reasonably be expected to contravene an IPP, the question of whether that consideration against disclosure will be an overriding one will depend on the weight given to that consideration. The weight will depend on the type of personal information being requested, the context of the request, and the extent of the breach.

The effect of section 5 of the PPIP Act

3.18 If an agency finds that either 3(a) or 3(b), or both, are public interest considerations against disclosure and that releasing the information would contravene the PPIP Act, it may still release the information after applying the public interest test under the GIPA Act. This is made clear by section 5 of the PPIP Act, which provides that nothing in that Act serves to lessen the obligations agencies must exercise under the GIPA Act. Therefore, if the public interest considerations in favour of disclosure outweigh those against, then the personal information can be released to the applicant. In the context of considering an information access request and applying the 'public interest test' the GIPA Act must be applied and accordingly section 5 of the PPIP Act must be considered together with section 20(5) of the PPIP Act.

NOTE: The information in this Guideline is to be used as a guide only. Legal advice should be sought in relation to individual circumstances.

Appendix A: GIPA Act and definition of personal information

4 Personal information

- (1) In this Act, personal information means 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.
- (2) Personal information includes such things as an individual's fingerprints, retina prints, body samples or genetic characteristics.
- (3) Personal information does not include any of the following:
 - (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 including the individual's position title, public functions and the agency in which the individual works) 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 of a class, or is contained in a document of a class, prescribed by the regulations for the purposes of this subclause.

Appendix B: Privacy and Personal Information Protection Act 1998 (NSW)

4 Definition of personal information

- (1) In this Act, personal information means 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 whose identity is apparent or can reasonably be ascertained from the information or opinion.
- (2) Personal information includes such things as an individual's fingerprints, retina prints, body samples or genetic characteristics.
- (3) Personal information does not include any of the following:
 - (a) information about an individual who has been dead for more than 30 years;
 - (b) information about an individual that is contained in a publicly available publication;
 - (c) information about a witness who is included in a witness protection program under the Witness Protection Act 1995 or who is subject to other witness protection arrangements made under an Act;
 - (d) information about an individual arising out of a warrant issued under the Telecommunications (Interception) Act 1979 of the Commonwealth;
 - (e) information about an individual that is contained in a public interest disclosure within the meaning of the Public Interest Disclosures Act 1994, or that has been collected in the course of an investigation arising out of a public interest disclosure;
 - (f) information about an individual arising out of, or in connection with, an authorised operation within the meaning of the Law Enforcement (Controlled Operations) Act 1997;
 - (g) information about an individual arising out of a Royal Commission or Special Commission of Inquiry;

- (h) information about an individual arising out of a complaint made under Part 8A of the Police Act 1990;
- (i) information about an individual that is contained in Cabinet information or Executive Council information under the Government Information (Public Access) Act 2009;
- (j) information or an opinion about an individual's suitability for appointment or employment as a public sector official;
- (j) information about an individual that is obtained about an individual under Chapter 8 (Adoption information) of the Adoption Act 2000;
- (k) information about an individual that is of a class, or is contained in a document of a class, prescribed by the regulations for the purposes of this subsection.

Privacy and Personal Information Protection Regulation 2014

5 Meaning of personal information

For the purposes of section 4(3)(k) of the Act, the following information is not personal information:

- (a) information about an individual that is contained in a document kept in a library, art gallery or museum for the purposes of reference, study or exhibition
- (b) information about an individual that is contained in a state record under the control of the State Records Authority that is available for public inspection in accordance with the State Records Act 1998
- (c) information about an individual that is contained in archives within the meaning of the Copyright Act 1968 of the Commonwealth.

Footnotes

ⁱ *Seven Network Limited v Southern Eastern Sydney Local Health District* [2017] NSWCATAD 210.

ⁱⁱ *Zonneville v NSW Department of Finance and Services* [2015] NSWCATAD 175.

ⁱⁱⁱ The GIPA Regulation does not prescribe any category of information as not being personal information.

^{iv} Schedule 4 clauses 4(1) and 4(2).

^v See Appendix B of this Guideline for the PPIP Act definition of personal information.

^{vi} *Walton v Eurobodalla Shire Council* [2022] NSWCATAD 46.

^{vii} *Ibid* at [109].

^{viii} See the GIPA Act sections 54; 72-75.

^{ix} See Guideline 5: consultation on public interest considerations under section 54 of the GIPA Act.

^x See the GIPA Act section 3(2)(b)

^{xi} See the GIPA Act sections 6-8.

^{xii} *Bryant v Secretary, Department of Communities and Justice* [2021] NSWCATAD 73 at [30]; *Cameron v Commissioner of Police, New South Wales Police Force* [2014] NSWCATAD 13 at [77].

^{xiii} *Davis v Secretary, Department of Education* [2022] NSWCATAD 55; *Newton v Newcastle City Council* [2022] NSWCATAD 18; *Norkin v University of New England (No. 2)* [2021] NSWCATAD 371; *Dennis v Department of Planning, Industry and Environment* [2021] NSWCATAD 377.

^{xiv} *Morgan v Commissioner of Police* [2021] NSWCATAD 173; *Seven Network Limited v South Eastern Sydney Local Health District* [2017] NSWCATAD 210; *Burke v Health Education and Training Institute* [2016] NSWCATAD 194; *Khoo v South Western Sydney Local Health District* [2015] NSWCATAD 183; *Field v Commissioner of Police (NSW)* [2015] NSWCATAD 153.

^{xv} For a ruling of the Administrative Decisions Tribunal on this point, see *Richard v Commissioner, Department of Corrective Services* [2011] NSWADT 98. (the ADT is now the NSW Civil and Administrative Tribunal).



What is the public interest test?

The right to information system in NSW fosters responsible and representative government that is open, accountable, fair and effective.¹

Under the *Government Information (Public Access) Act 2009* (GIPA Act), all government agencies must disclose or release information unless there is an overriding public interest against disclosure.

Fundamental to the obligation to release information is the overarching presumption in favour of disclosure of information.² This is the starting point for all decisions regarding information access by: mandatory proactive disclosure; authorised proactive release, informal release and in response to access applications.³

Accordingly, when deciding whether to release information, decision makers must commence the public interest test from the position of acknowledging the presumption in favour of disclosure of information.⁴

Therefore, unless there is an overriding public interest against disclosure, agencies must provide the information. There are some limited exceptions to this general rule, for example where dealing with an application would constitute a significant and unreasonable diversion of an agency's resources.

Applying the public interest test

The public interest test requires balancing factors for and against disclosure of each piece of government information.⁵ That balancing must be undertaken within the context of the GIPA Act.

Accordingly the:

- object of the GIPA Act;
- four legislative pathways through which information can be released;
- the presumption in favour of disclosure of information;
- limited factors which operate against disclosure of information;
- identification of irrelevant considerations;⁶ and
- principles that apply to the public interest test

all form part of the legislative context in which the public interest test be undertaken.

Following recognition of the legislative context the public interest test requires the decision maker to:

1. Identify the relevant public interest considerations in favour of disclosure
2. Identify the relevant public interest considerations against disclosure
3. Determine the weight of the public interest considerations in favour of and against disclosure and come to a conclusion about whether the factors in favour of disclosure outweigh the factors against disclosure (taking into account the presumption in favour of disclosure).⁷

The public interest test provides that there is an overriding public interest against disclosure if, on balance, the public interest considerations against disclosure outweigh the presumption in favour of disclosure and the public interest considerations in favour of disclosure.⁸

Step 1: Identify the relevant public interest considerations in favour of disclosure

The GIPA Act provides examples of factors that agencies may consider in favour of disclosure.

These are:

- 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; and

¹ GIPA Act section 3

² GIPA Act section 5

³ GIPA Act Part 2 Division 1

⁴ GIPA Act section 9

⁵ GIPA Act section 13

⁶ GIPA Act section 15

⁷ *Amos v Central Coast Council* [2019] NSWCATAD 226 at [20]

⁸ GIPA Act section 13

- revealing or substantiating that an agency (or a member of an agency) has engaged in misconduct or negligent, improper or unlawful conduct.⁹

This is not an exhaustive list. Agencies may consider other factors in favour of disclosure which are not listed above. For example, an agency may identify that disclosure of the information could be reasonably expected to contribute to the protection or care of the environment and consider this as a factor in favour of disclosure. Accordingly, the public interest considerations in favour of disclosure should not be narrowed.

Additionally, in undertaking the public interest test, decision makers are required to consider personal factors in favour of disclosure of information.¹⁰ These factors operate positively in conjunction with other factors in favour of disclosure to foster the release of information.¹¹

The GIPA Act is to be interpreted and applied so as to further the object of the Act and facilitate and encourage, promptly and at the lowest reasonable cost access to government information.¹² Therefore, it is important that decision makers consider additional factors and, where relevant, articulate and apply those additional factors in favour of disclosure. It is also important that decision makers consider contemporary events and materials in identifying public interest factors in favour of disclosure.

The Information Commissioner may also issue guidelines on additional considerations in favour of disclosure.

Step 2: Identify the relevant public interest considerations against disclosure

Section 14 of the GIPA Act provides an exhaustive list of public interest considerations against disclosure. These are the **only** considerations against disclosure that decision makers can consider in applying the public interest test.¹³

Considerations are grouped under the following headings:

- Responsible and effective government (clause 1)
- Law enforcement and security (clause 2)
- Individual rights, judicial processes and natural justice (clause 3)
- Business interests of agencies and other persons (clause 4)
- Environment, culture, economy and general matters (clause 5)
- Secrecy provisions specifically provided in legislation (clause 6)
- Exempt documents under interstate Freedom of Information legislation (clause 7).

The considerations against disclosure set out in clause 1 to 6 of the Table to section 14 require an objective assessment of whether the effects claimed to operate could reasonably be expected to arise. For the public interest consideration against disclosure in clause 7 of the Table to section 14 to arise, it must be established that information was communicated to the New South Wales Government by the Government of the Commonwealth, or another State and that Government provided notice to the New South Wales Government that the information is exempt from disclosure within the meaning of a corresponding law of the Commonwealth or that other State. Decision makers must be satisfied that the effect is proven as a fact established to the relevant standard of proof, on the balance of probabilities.¹⁴

The GIPA Act requires that in applying the public interest test agencies are not to take into account the fact that disclosure of information:

- might cause embarrassment to, or loss of confidence in, the government or an agency;
- might be misinterpreted or misunderstood by any person.¹⁵

Decision makers must apply the following principles when determining if there is an overriding public interest against disclosure of government information:

- exercise functions to promote the object of the GIPA Act;
- have regard to any guidelines issued by the Information Commissioner;
- observe that disclosure might cause embarrassment to, or loss of confidence in, the government or an agency cannot be taken into account;
- observe that any information disclosed might be misinterpreted or misunderstood by any person cannot be taken into account; and
- in the case of disclosure in response to an access application, disclosure cannot be made subject to any conditions on the use or disclosure of information.

In determining an application, decision makers should consider any submissions made by an applicant.

Decision makers may also be required to consult with third parties in relation to an access application.¹⁶

⁹ GIPA Act section 12

¹⁰ GIPA Act section 55

¹¹ *Leydon v Commissioner of Police* [2019] NSWCATAD 267 at [3]

¹² GIPA Act section 3(2)

¹³ *Ryan v NSW Minister for Planning and Open Spaces* [2021] NSWCATAD 22 at [15]

¹⁴ *Bryant v Secretary, Department of Communities and Justice* [2021] NSWCATAD 73 at [17]

¹⁵ GIPA Act section 15 (c)-(d)

¹⁶ GIPA Act section 54

Step 3: Weigh the public interest considerations in favour of and against disclosure (taking into account the presumption in favour of disclosing the information)

The identification of one or even several public interest considerations against disclosure is not sufficient justification to refuse to provide information. In each case, decision makers will consider a range of factors, including:

- the nature and context of the information
- any personal factors of the application (under section 55 of the GIPA Act)
- the relative weight of public interest considerations for and against disclosure.

Agencies should refuse to disclose information **if and only if** there is an overriding public interest against disclosure.¹⁷ Where considerations on balance favour disclosure, or are evenly balanced, the presumption in favour of disclosure stands, and information should be published or released.

This approach reflects the purpose of the GIPA Act; the principles that apply and the requirements under the Act governing the way in which agencies must undertake their responsibilities under the Act.¹⁸

Other considerations for disclosing information

The GIPA Act contains a number of provisions that may operate to facilitate access to information. These mechanisms may be applied even in circumstances where the decision maker considers that public interest considerations against disclosure **override** the public interest considerations in favour of disclosure.

The provisions are found in sections 72 to 78 of the GIPA Act. They may be applied to mitigate the effect of, or reduce the weight of, public interest considerations against disclosure or even avoid an overriding public interest consideration against disclosure arising, through for example redaction of some information.¹⁹

It is consistent with the objects of the GIPA Act that these provisions are considered, where relevant, before a decision is made to not disclose information.

Making and communicating a decision

Decision makers are required to provide written reasons for their decision. If access to some or all of the information is refused, a decision maker must:

- provide reasons for the decision;
- set out findings of fact on any material question of fact reference sources of information that informed the findings of fact; and

- set out the general nature and format of the records held by the agency that contain the information concerned.²⁰

For more information

For more information on consultation see [IPC Guideline 5: Consultation on public interest considerations under section 54 of the GIPA Act](#) and [IPC Fact Sheet: Why consult third parties](#).

Contact the Information and Privacy Commission NSW (IPC):

Freecall: 1800 472 679
Email: ipcinfo@ipc.nsw.gov.au
Website: www.ipc.nsw.gov.au

NOTE: The information in this Fact Sheet is to be used as a guide only. Legal advice should be sought in relation to individual circumstances.

¹⁷ GIPA Act section 13

¹⁸ GIPA Act section 16

¹⁹ GIPA Act section 74

²⁰ GIPA Act section 61