

## 1.8 *Government Information (Public Access) Act 2009* Policy

This document provides information regarding the Commission's responsibilities under the *Government Information (Public Access) Act 2009* (GIPA Act) and procedures for complying with it.

### Document Control

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## 1. LECC Values

The Commission values of trust, collaboration, integrity, accountability and service are the basis of a values-led workplace culture. The Commission requires your behaviour and conduct to comply with this Policy and the Commission's Code of Ethics and Conduct.

## 2. Purpose

This document provides information regarding the Commission's responsibilities under the *Government Information (Public Access) Act 2009* (GIPA Act) and procedures for complying with it.

This document aims to provide Commission staff with a guide to assessing GIPA requests for Commission information in light of the secrecy provisions that the Commission is bound by in its governing legislation, the *Law Enforcement Conduct Commission Act 2016* (LECC Act). The secrecy provisions are aimed at protecting the sensitive material handled by the Commission and are discussed later.

## 3. Background

### 3.1 *The Government Information (Public Access) Act 2009*

The GIPA Act is intended to promote a 'pro-disclosure' philosophy and creates an explicit presumption in favour of releasing information.

The objectives of the GIPA Act include:<sup>1</sup>

- authorising and encouraging the proactive public release of government information by agencies;
- giving members of the public an enforceable right to access government information; and
- providing that access to government information is restricted only when there is an overriding public interest against disclosure.

The GIPA Act sets a single public interest touchstone for disclosure: a person is legally entitled to access government information unless there is an overriding public interest against disclosure.<sup>2</sup>

### 3.2 Release of Information under the GIPA Act

Under the GIPA Act, the release of information by the Commission is contemplated, and authorised, in the following ways:

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<sup>1</sup> *Government Information (Public Access) Act 2009* s3.

<sup>2</sup> GIPA Act s9.

- mandatory disclosure of ‘open access information’; that is certain information that is to be made publicly available by an agency, such as an Agency Information Guide and certain agency policy documents;<sup>3</sup>
- the proactive and informal release of information where the Commission deems there to be no overriding public interest against disclosure; and
- information released in response to formal requests for information(‘access applications’). These applications are assessed in accordance with the provisions of the GIPA Act and provide for members of the public to have a legally enforceable right to be provided with access to the information in accordance with Part 4 of the GIPA Act unless there is an overriding public interest against disclosure of the information.

### 3.3 Exclusions for the Commission under the GIPA Act

As an investigative law enforcement agency, much of the information held by the Commission is excluded by the GIPA Act. The LECC Act also places specific limits on Commission information that can be publicly disclosed.

There are two means by which most Commission information will be prevented from being disclosed under the GIPA Act.

#### 3.3.1 *Secrecy Provision Information*

The GIPA Act creates a conclusive presumption that there is an overriding public interest against disclosure of any information that is prohibited from disclosure by the *Law Enforcement Conduct Commission Act 2016* (hereafter *secrecy provision information*). The effect of this is that *secrecy provision information* is conclusively presumed to have met the statutory test to justify non-disclosure.<sup>4</sup>

As such, any information held by the Commission that can be said to have been acquired ‘by reason of, or in the course of’,<sup>5</sup> the exercise of the person’s functions under the LECC Act and, therefore, prohibited from disclosure by s 180 of the LECC Act, will be secrecy provision information.

The breadth of s 180 of the LECC Act is significant. All information acquired by Commission officers in their capacity as such is subject to the prohibitions on disclosure of this section. As such, all information retained by the Commission will be secrecy provision information.

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<sup>3</sup> GIPA Act s18.

<sup>4</sup> GIPA Act Schedule 1 read in conjunction with s14(1).

<sup>5</sup> *Law Enforcement Conduct Commission Act 2016* 180(2).

### 3.3.2 *Excluded Information of the Commission*

Any information that relates to the Commission's corruption prevention,<sup>6</sup> handling of misconduct matters (within the meaning of LECC Act), investigative and reporting functions is 'excluded information' under the GIPA Act,<sup>7</sup> meaning it does not fall within the proactive public release intention of the GIPA Act. Thus, any information that relates, directly or indirectly, to the above functions will be *excluded information* for the purposes of the Act.

Whether or not a document falls within one of the specified exemptions for the Commission is a question of fact to be determined in relation to each document. Reference can be made to the circumstances in which the document was created and received.<sup>8</sup>

It should be noted that information that does not relate to these functions, for example, information that relates to an administrative function of the Commission will not be classed as excluded information and will need to be considered under the provisions of the GIPA Act.

Administrative functions of the Commission include its education and prevention activities,<sup>9</sup> however, the release of information that falls within its administrative functions should be assessed on a case by case basis so as to ensure that none of the Commission's excluded information is also captured by the request.

The GIPA Act provides that for the Commission's *excluded information*:

- there is a conclusive presumption that there is an overriding public interest against its disclosure;<sup>10</sup>
- an access application requesting *excluded information* is an invalid access application;<sup>11</sup> and
- the Commission does not have to meet any mandatory obligations, including those regarding *Open Access Information*, under the GIPA Act in respect of *excluded information*.<sup>12</sup>

### 3.3.3 *Applying the Exclusions*

Given the scope of s 180 of the LECC Act, all information acquired by the Commission in connection with the Commission's functions is secrecy provision information. Further,

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<sup>6</sup> GIPA Act Schedule 2 read with Schedule 1 cl 6.

<sup>7</sup> GIPA Act Schedule 2 read with Schedule 1 cl 6.

<sup>8</sup> *McGuirk v NSW Ombudsman (No 3)* [2007] NSWADT 269 at para 34; Note that a complaint written to ICAC and documents created in response to that complaint have been held as falling within the "complaint handling" function of that agency. It may also have fallen within the investigative function: *Hall v Independent Commission Against Corruption* [2008] NSWADT 271 at para 41.

<sup>9</sup> LECC Act s27.

<sup>10</sup> GIPA Act Schedule 1 cl 6(1).

<sup>11</sup> GIPA Act s43.

<sup>12</sup> GIPA Act s19.

given the breadth of application to the Commission's operations of the excluded information definition in the GIPA Act, a large proportion of the Commission's information will also fall within this exception.

As all Commission information will be caught by one or both of these categories, and therefore subject to the associated exceptions, it is anticipated that a large portion of applications for information under the GIPA Act will be refused.

Notwithstanding this, it is recognised that the Commission is required to exercise its functions to promote the objectives of the GIPA Act, namely, the proactive release of government information and withholding government information only where there is an overriding public interest against disclosure.<sup>13</sup>

It is also noted that there are means by which the Commission can choose to release information which would have otherwise been the subject of exceptions under the GIPA Act, namely:

- under s 180(5)(d) of the LECC Act, a person can release information where a Commissioner or the Inspector certifies that it is necessary in the public interest to do so. The information would therefore no longer be secrecy provision information; and
- the Commission is able to consent to the release of *excluded information* where it believes it is in the public interest to do so.<sup>14</sup> The effect of consenting to disclose that information means that the information is no longer classed as *excluded information*.

Accordingly, before a decision is made by the Commission not to disclose secrecy provision information or excluded information (whether it be in response to an access application or other requirement of the GIPA Act) it should be determined whether, notwithstanding the exclusion, the Commission should consent to the release of that information. In making such a determination the public interest in the disclosure of government information that Parliament has identified through the enactment of the GIPA Act should be taken into account as should the requirement for the Commission to exercise its functions so as to promote the objects of that Act.

### *3.3.4 The GIPA Act and Section 180(5)(d) of the LECC Act*

As noted above, s 180 of the LECC Act applies to all Commission information. As such, whenever it is determined to release information under the GIPA Act, a separate determination will need to be made by a Commissioner under subsection 180(5)(d) that it is necessary in the public interest for such information to be disclosed. Such determinations are not necessary however where information has already been divulged for a purpose under the LECC Act.<sup>15</sup>

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<sup>13</sup> GIPA Act s3(2)

<sup>14</sup> GIPA Act Schedule 1 cl 6(1)

<sup>15</sup> See LECC Act s180(5)(a)

It should be noted that in enacting the GIPA Act the Parliament has identified a public interest in the disclosure of certain classes of government information. As noted above there is also a statutory obligation incumbent on the Commission to exercise its functions so as to promote the objects of the Act. Both of these are factors to be taken into account in determining whether the public interest necessitates the disclosure of information under s 180(5)(d) of the LECC Act.

### 3.4 Responsibility of Commission Officers under the GIPA Act

There are two main persons who assume responsibility for decisions made under the GIPA Act, the Right to Information Officer and the CEO (Principal Officer).

#### 3.4.1 *Right to Information Officer*<sup>16</sup>

The Right to Information Officer, by powers delegated from the Chief Executive Officer under the GIPA Act, assumes the majority of responsibility for decisions under, and compliance with the GIPA Act. The role of Right to Information Officer is performed by the Manager, Registry and Security. When the Right to Information Officer is unavailable (e.g. on leave), the role will be performed by the Senior Registry Officer.

The Right to Information Officer, in consultation with Legal Services, is responsible for the following:

- ensuring the Commission meets its mandatory obligations of disclosing “open access information”;
- determining whether access applications received by the Commission are valid;
- where a valid access application is received, determining whether the requested information will be released; and
- making decisions where required on other discretions the Commission is required to exercise under the GIPA Act, for example, a discretion on whether or not to consent to the release of *excluded information* which falls within the scope of an access application received by another agency.<sup>17</sup>

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<sup>16</sup> Note: the Office of the Information Commissioner has information sheets outlining the proper role of the Right to Information officer. The Commission must notify the OIC of who its “Right to Information” officer is and their contact details.

<sup>17</sup> In some circumstances it may be necessary to consult with the Chief Executive Officer about the exercise of this discretion.



### 3.4.2 Chief Executive Officer (Principal Officer)

As the 'Principal Officer' of the Commission, the Chief Executive Officer is invested with all decision making power under the GIPA Act, however, as noted above, much of this responsibility is delegated to the Right to Information Officer.<sup>18</sup>

The Chief Executive Officer is able to delegate his/her powers under the Act. In the Commission, the majority of the principal officer's powers are delegated to the *Right to Information Officer*.<sup>19</sup>

The Chief Executive Officer performs the following functions under the GIPA Act:

- conducting the internal review of any reviewable decisions made by the Right to Information Officer (i.e. a decision that an application is not a valid application or a decision to refuse to disclose information);
- developing the proactive release program of the Commission and identifying any information proposed to be disclosed under that program and submitting it to the Executive Committee for approval;
- conducting the annual review of the Commission's proactive release program; and
- meeting the annual reporting requirements of the Commission under the GIPA Act.

## 4. Policy

### 4.1 Mandatory Obligations of the Commission under the GIPA Act

The Commission has the following mandatory obligations under the GIPA Act:

- to ensure the Commission's "Open Access Information" is publicly available; and
- to proactively release information for which there is no overriding public interest against disclosure largely through the establishment of a "proactive release program."

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<sup>18</sup> The 'Principal Officer' is defined by Schedule 4 of the GIPA Act as "the head or Chief Executive Officer (however designated) of the agency or the person of greatest seniority in the agency".

<sup>19</sup> The responsibilities given to the principal officer, or their delegate, under the Act are as follows:

- Authorising the proactive release of information held by the Commission but where there is no overriding public interest against disclosure: s7(5)
- Releasing information held by the Commission where appropriate in response to informal requests: s8(6)
- The making of a reviewable decision in connection with an access application: s9(3)

### 4.1.1 Disclosure of ‘Open Access Information’

Under the GIPA Act, the Commission must ensure that information classed as ‘Open Access Information’ is publicly available unless there is an overriding public interest against its disclosure. This information must be free of charge and on the Commission’s website.<sup>20</sup> This obligation to disclose ‘Open Access Information’ does not apply to the *excluded information* of the Commission.<sup>21</sup>

#### What is ‘Open Access Information’?

What is classed as ‘Open Access Information’ by the GIPA Act is set out below.<sup>22</sup>

Category	Description
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The Agency Information Guide must:

- describe the structure and functions of the Commission;
- describe the ways in which the functions (including, in particular, the decision-making functions) of the Commission affect members of the public;
- specify arrangements that exist to enable members of the public to participate in the formulation of the Commission’s policies and the exercise of its functions;
- identify the various kinds of government information held by the Commission;
- identify the kinds of government information held by the Commission that it does or will make publicly available;
- specify the manner in which the Commission makes (or will make) government information publicly available; and
- identify the kinds of information that are (or will be) made publicly available free of charge and those kinds for which a charge is (or will be) imposed.<sup>23</sup>

#### *Agency Information Guide*

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<sup>20</sup> GIPA Act s6; Note the Commission is required to ‘facilitate public access’ by deleting matters from records which would otherwise prevent it being disclosed due to an overriding public interest: GIPA Act s6(4).

<sup>21</sup> GIPA Act s19.

<sup>22</sup> GIPA Act s18.

<sup>23</sup> GIPA Act s20.

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*Information about the Commission contained in any document tabled in Parliament by or on behalf of the Commission other than a document tabled by order of either House of Parliament*

The Commission will table investigation, research and other reports in Parliament. A link to these on the Commission's website should be provided as part of the Commission's 'Open Access Information'.

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*Policy documents*

The Commission's policy documents required to be disclosed are those policies that relate to the exercise of functions by the agency that affect or are likely to affect the rights, privileges or other benefits, or obligations, penalties or other detriments to which members of the public are otherwise entitled.<sup>24</sup>

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*Disclosure log*

The disclosure log records the date of the decision, a description of the information, whether the information is now publicly available and if so how it can be accessed<sup>25</sup> in circumstances where:

- the Commission has decided to provide access to the information applied for; and
  - the Commission considers that information may be of interest to others.<sup>26</sup>
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*Register of Government contracts*

A register of government contracts which have, or are likely to have, a value of \$150 000 or more. This information must be disclosed within 60 days of the contract becoming effective.<sup>27</sup>

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*Record of 'Open Access Information' not made publicly available.*

A record of the open access information which has not been disclosed because there is an overriding public interest against disclosure. This need only indicate the general nature of the information concerned.<sup>28</sup>

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<sup>24</sup> GIPA Act s23.

<sup>25</sup> Note this is not required where requests for information involve personal information: GIPA Act s26(3).

<sup>26</sup> GIPA Act s25.

<sup>27</sup> GIPA Act s27; See also more specific requirements regarding government contracts outlined in ss27-40 of the GIPA Act.

<sup>28</sup> GIPA Act s6(5).

This presently requires:

- a list of the Commission's **major assets**, other than land holdings, appropriately classified and highlighting major acquisitions during the previous financial year;
- the total number and total value of **properties disposed** of by the Commission during the previous financial year;
- the Commission's **guarantee of service** (if any); and
- the Commission's **code of conduct** (if any).<sup>29</sup>

*Further information prescribed by regulations.*

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### Responsibility for Maintaining Commission's 'Open Access Information'

The CEO is responsible for ensuring that the Commission's 'Open Access Information' is available on the website.

The following categories of 'Open Access Information' require regular updating:

- policy documents;
- disclosure log;
- register of government contracts. Details regarding government contracts must be entered within 60 days of the contract becoming effective;<sup>30</sup>
- Record of 'Open Access Information' not made publicly available; and
- Reports tabled in parliament.

The following require regular review or updating:

- the Agency Information Guide must be reviewed every 12 months,<sup>31</sup> and
- the lists of major assets and properties disposed of require updating every new financial year.

It is the responsibility of the CEO to ensure that information is updated and the appropriate reviews are conducted. Teams within the Commission should ensure that the CEO is supplied with the appropriate information so the required updates can be effected.

Note: a table specifying which types of information require updating and the interval in which they require updating can be found in Appendix B.

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<sup>29</sup> Government Information (Public Access) Regulation 2009 cl 5(2); Note by Schedule 4 of the GIPA Act the LECC is a "Government Department" for the purposes of the GIPA Act.

<sup>30</sup> GIPA Act s27(2); See GIPA Act s27(3) for when a contract becomes effective.

<sup>31</sup> GIPA Act s21.

#### 4.1.2 Proactive Release of Information

The Commission is authorised by the GIPA Act to make any information it holds publicly available where there is no overriding public interest against disclosure.<sup>32</sup> This is implemented through the adoption of the 'proactive release program'.

##### Proactive Release Program

The 'Proactive Release Program' is developed by the CEO, in consultation with the Directors and Managers from other teams within the Commission.

The program should identify:

- information which should in the public interest be made available;<sup>33</sup>
- information which can be made publicly available without imposing unreasonable costs on the agency;<sup>34</sup>
- information for which there is no overriding public interest against disclosure;<sup>35</sup>
- information which is not categorised as 'Open Access Information';
- information which is not *excluded information*; and
- information or documents that are able to be reasonably redacted or modified to meet the above criteria.<sup>36</sup>

Where possible, the program should identify certain documents or information that could be released under the program.

When conducting the review, the CEO should contact relevant Directors within the Commission and ask them to consider whether they have any classes of information that their team holds that could be released under the proactive release program in line with the above criteria. Responses from all teams should be compiled into the final program for approval.

When considering the above regard should be had to the Commission's obligations to exercise its functions to promote the objectives of the GIPA Act discussed above. It should also be noted that any specific information considered for release under the program will be secrecy provision information. As such, should it be proposed to release this information, a determination under section 180(5)(d) as discussed above. Once approved, information should be released on the Commission's website as per the program.

The Commission is required to review its program once every 12 months hence the above process should be conducted at the end of each reporting year, at the same time the Commission is compiling statistics for its Annual Report.

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<sup>32</sup> GIPA Act s7(1).

<sup>33</sup> GIPA Act s7(3).

<sup>34</sup> GIPA Act s7(3).

<sup>35</sup> GIPA Act s7(1); Noting the presumption for information prohibited from disclosure by the LECC Act.

<sup>36</sup> GIPA Act s7(4).

### Informal Release of Information

The Commission is authorised to release information in response to informal requests where there is no overriding public interest against disclosure.<sup>37</sup>

Given the sensitive nature of the majority of Commission information it is appropriate that all requests for specific information be written and formally requested.

#### *4.1.3 Access Applications*

Members of the public are able to apply for access to information held by the Commission by writing to the Commission.

In its response to an access application the Commission should, where possible:

- seek to ensure the application process is simple and easily comprehensible to the applicant; and
- provide advice and assistance to the applicant to access the information they are requesting.

### Acknowledging Receipt of Access Application

Once the Right to Information Officer receives an access application he/she must determine whether the application is a valid one within 5 working days.<sup>38</sup>

The Right to Information Officer must determine whether or not the application meets the formal requirements as set out below.

#### **Formal requirements**

To be valid an application must comply with the following:

- it is in writing and sent to, or lodged with, the Commission;
- it clearly indicates it is an access application made under the GIPA Act;
- it is accompanied by a fee of \$30;
- it states a postal address for correspondence in connection with the application; and
- it includes such information that is reasonably necessary to enable the information being applied for to be identified.<sup>39</sup>

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<sup>37</sup> GIPA Act s8.

<sup>38</sup> GIPA Act s51(2); The application is taken to be received by the Commission on the date that it is actually received: s41(3).

<sup>39</sup> GIPA Act s41(1).

If the application meets the above requirements the Right to Information Officer must send a notice to that effect within 5 days. The requirements of the notice are set out below.<sup>40</sup>

Should the application not meet the formal requirements the Right to Information Officer should, so far as is reasonable and where it is possible, provide the applicant with assistance to amend his/her application to make it valid.<sup>41</sup>

#### Notice acknowledging receipt of valid access application

This notice should:

- acknowledge the receipt of the application;
- state the date at which the application is required to be decided (this is 20 working days after the application has been received);
- include a statement to the effect that the application will be deemed to have been refused if not decided by the required date;
- include a statement that the information may be made public in the Commission's disclosure log and that the applicant may object to this (if the Commission considers such a statement is necessary);
- include details of any likely charges and the applicant's ability to apply for a reduction in processing charges (if applicable);
- include the details of rights of review in connection with access applications. This can be achieved by including a 'Rights of Review' pamphlet from the Information Commissioner obtained from their [website](#),<sup>42</sup> and
- include the contact details of the Commission's Right to Information Officer and a statement informing the applicant that the officer can be contacted in connection with the application.<sup>43</sup>

#### Notice acknowledging receipt of invalid application

This notice should include:

- a statement why the application is invalid;
- the details of rights of review in connection with access applications. This can be achieved by including a 'Rights of Review' pamphlet from the Information Commissioner obtained from their [website](#),<sup>44</sup>
- Refund of the application fee if applicable;
- A suggestion about the revision of the application where applicable (see below);<sup>45</sup> and
- the contact details of the Commission's Right to Information Officer and a statement informing the applicant that the officer can be contacted in connection with the application.<sup>46</sup>

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<sup>44</sup> GIPA Act s51(3).

<sup>45</sup> GIPA Act s52(1).

<sup>46</sup> GIPA Act s126.



### Determining the Access Application

A decision in relation to the application must be made within 20 working days from when it is received by the Commission.<sup>47</sup>

In dealing with an application the considerations below should be documented in an accompanying memo.

#### *Step 1 - Does the Commission hold the information requested?*

The Right to Information Officer should undertake 'reasonable searches' to determine whether the Commission holds the requested information.<sup>48</sup>

If the information is already publicly available, the applicant should be informed as such.<sup>49</sup>

If the information is held by another agency the applicant should be informed and consideration should be given to transferring the application to that agency.<sup>50</sup>

#### *Step 2 - Determine whether the request is for 'excluded information'*

The Right to Information Officer, in consultation with LSU, should determine whether the application requests *excluded information*.<sup>51</sup>

An application that requests *excluded information* will be invalid to the extent that it requests such information.<sup>52</sup>

The Right to Information Officer should apply the excluded information exception in the manner outlined above. Where it is decided to apply the exception the application should be refused and a notice to that effect sent to the applicant. The notice should meet the formal requirements set out above under 'Notice acknowledging receipt of invalid application.' If, notwithstanding the exception, it is proposed to deal with the application the Right to Information Officer should continue with the steps below.

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<sup>43</sup> GIPA Act s126.

<sup>44</sup> GIPA Act s51(3).

<sup>45</sup> GIPA Act s52(1).

<sup>46</sup> GIPA Act s126.

<sup>47</sup> GIPA Act s57; This can be extended by 10 days where consultation is required with a third person or records are required to be retrieved from a records archive: GIPA Act s57(2).

<sup>48</sup> GIPA Act s53(2).

<sup>49</sup> GIPA Act s59.

<sup>50</sup> For more on the process regarding transfer see GIPA Act ss44-46.

<sup>51</sup> For definitions of these terms see above.

<sup>52</sup> GIPA Act s43(2).



### *Step 3 – Applying the public interest test*

The Right to Information Officer should determine whether there is an overriding public interest against disclosure. Information should only be withheld by the Commission where such an overriding public interest exists.<sup>53</sup>

In conducting this balancing exercise the Right to Information Officer should consider the following:

- there is a general public interest in favour of disclosure;<sup>54</sup>
- there is no limit to what factors can be considered *in favour* of disclosure however the GIPA Act provides some examples<sup>55</sup> (detailed in **Appendix A**);
- the GIPA Act limits the factors that may be weighed *against* disclosure<sup>56</sup> (detailed in **Appendix A**);
- the GIPA Act determines that some factors that must be *disregarded*; (detailed in **Appendix A**); and
- the personal factors of the applicant are able to be taken into account.<sup>57</sup>

The Right to Information Officer should also consider that the Commission can modify or redact a record to enable it to be released.<sup>58</sup>

### *Step 4 – Additional considerations*

The Right to Information Officer should also consider the following:

#### **Third Party Consultation**

Where the information requested contains:

- personal information about a third party; or
- concerns the third party's financial, business, commercial, professional or other interests; or
- concerns research conduct by or on behalf of a third party

and it appears that the third party may reasonably be expected to have concerns about the disclosure of such information the Commission must consult with that person about its disclosure.<sup>59</sup>

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<sup>53</sup> GIPA Act s13.

<sup>54</sup> GIPA Act s12.

<sup>55</sup> GIPA Act s14.

<sup>56</sup> GIPA Act s14.

<sup>57</sup> This includes the applicants identity and relationship with any other person; the applicants motives for making the application; and any other factors particular to the applicant. There's no obligation on the Commission to enquire into the personal factors of an applicant: GIPA Act s55.

<sup>58</sup> GIPA ss74 and 75.

<sup>59</sup> Note: a 'third party' may include another Government agency or another Government: GIPA Act s54 and Schedule 4.

If the third party objects to disclosure this is a factor that the Right to Information Officer must take into account.<sup>60</sup> If it's decided to release information despite the objection the third party must be given notice of the decision and notice of their rights to have the decision reviewed.<sup>61</sup>

### **Impact of Responding to Access Application on the Commission's Resources**

If the Right to Information Officer is of the view that dealing with the application would require an 'unreasonable and substantial diversion' of the Commission's resources the Commission may refuse to deal with that application.<sup>62</sup>

An opportunity should be given to the applicant to amend the application. The Right to Information Officer should, where possible, make such suggestions to modify the application so the Commission can deal with it.<sup>63</sup>

### ***Step 5 - Applying section 180(5)(d) of the LECC Act***

Given that all Commission information is secrecy provision information it is a requirement that before any information is released in response to an access application a determination under s 180(5)(d), as discussed above be undertaken.

Given that most requests for investigative, complaint handling, reporting and corruption prevention material are likely to have been declared invalid in Step 1 of these procedures it is anticipated that most applications which fall for consideration under this step will be for government information that relates to the Commission's other functions, such as its corporate and administrative functions. As the Parliament, in enacting the GIPA Act has identified a public interest in the disclosure of information of this type it is considered that, absent overwhelming factors militating against disclosure, it will generally be necessary in the public interest for such information to be disclosed under s 180(5)(d) (assuming that steps 1-4 above have been satisfied).

### **Responding to the Access Application**

#### ***Decision that the application is invalid***

Where a decision is made that the application is invalid because it requests excluded information, notice to this effect should be sent. The notice must meet the formal requirements as set out above under 'Notice acknowledging receipt of invalid application'.

#### ***Decision not to disclose requested information***

Where a decision has been made by the Right to Information Officer not to disclose and there are no reasonable means by which the request or information can be modified to provide access a notice must be sent to the applicant. The requirements of the notice are set out below.

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<sup>60</sup> GIPA Act s54

<sup>61</sup> GIPA Act s54(6)

<sup>62</sup> GIPA Act s60(1)

<sup>63</sup> GIPA Act s60(4); Note any amendments should be in writing: GIPA Act s49

### Notice of decision not to disclose

This notice must:

- state the Commission's reasons for the decision;
- state any findings on material questions of fact underlying those reasons, and where external sources are used to base those findings, a reference to such sources;
- state the general nature and format of records containing the information<sup>64</sup>
- Inform the applicant about their rights of review; and
- Include the contact details of the Right to Information Officer who can be contacted in connection with the application.<sup>65</sup>

### *Decision to disclose requested information*

Where a decision is made to provide access a notice to this effect should be sent to the applicant and the information requested enclosed.<sup>66</sup> A notice regarding the disclosure log (see below) should also be included.

### Disclosure Log

Where:

- the Commission provides access; and
- the information released is information which may be of interest to other members of the public the information should be recorded on its disclosure log.<sup>67</sup>

An applicant should be informed of his/her right to object to such an inclusion.<sup>68</sup> If such an objection is made then the Right to Information Officer must determine whether the applicant can so object. A decision about whether the information should be posted on the Commission's disclosure log should then be made.<sup>69</sup>

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<sup>64</sup> GIPA Act s61.

<sup>65</sup> GIPA Act s126.

<sup>66</sup> The Commission must provide access in the manner requested unless to do so would be unreasonable: GIPA Act s 72(2); Note that the Commission is unable to attach any conditions to the use of the information i.e. confidentiality etc. If it is considered appropriate for conditions to be attached, s180(5)(d) of the LECC Act, if possible, should be used which enables the imposition of such conditions.

<sup>67</sup> For details regarding what should be recorded see earlier in the document.

<sup>68</sup> An applicant's right to object to the inclusion of information in the disclosure log is provided for in GIPA Act s56. An applicant can only object if the information concerns:

- personal information;
- business, commercial, professional or financial interests;
- research conducted by the applicant; or

affairs of a government of the Commonwealth or another State.

<sup>69</sup> GIPA Act s56(4) outlines the procedure in this regard.

### Recording of statistics

The Commission has annual reporting obligations regarding the applications it receives. Statistics regarding the applications are recorded by the Right to Information Officer and are stored in SharePoint. The recording of these statistics will facilitate the annual reporting obligations of the Commission.

### Fees to be charged

The Right to Information Officer should calculate the appropriate level of fees to be charged in accordance with the process set out above and will be impacted by the time it takes Commission staff to source the information requested.

## *4.1.4 Internal Review*

### Receiving an application for an internal review

A person not satisfied with the Commission's decision is able, within 20 working days, to apply for an internal review.<sup>70</sup>

Upon receipt the Commission must acknowledge the application for an internal review within 5 working days.<sup>71</sup> In order to be valid an application for an internal review must be accompanied by a fee of \$40<sup>72</sup> although the Commission is able to waive this fee.<sup>73</sup>

### Conducting an internal review

The internal review is conducted by the Chief Executive Officer, on advice provided by the LSU.<sup>74</sup>

The review is to be conducted as if the original decision had not been made, that is, as if the access application to which the review relates had been originally received by the Commission.<sup>75</sup> The determination should proceed using the same steps outlined above for Access Applications.

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<sup>70</sup> Note: the Commission can accept an internal review received out of time: GIPA Act s83; Note the following restrictions on application's for internal review:

- an internal review is not available where the original decision maker was the Chief Executive Officer: GIPA Act s82(2)
- A decision of the Commission to consent or to refuse to consent to disclose its excluded information is not reviewable: GIPA Act Schedule 1 cl6(3)
- An internal review is not available where a review has already been conducted by the Information Commissioner or the NCAT.

<sup>71</sup> GIPA Act s83(3).

<sup>72</sup> GIPA Act s85(1); Note this is not payable if the review is due to a deemed refusal that has occurred because the Commission had not decided an access application within the specified timeframe.

<sup>73</sup> GIPA Act s127.

<sup>74</sup> Note: the Act requires the review to be conducted by a person who is not less senior than the person who made the original decision: s84(2).

<sup>75</sup> GIPA Act s84(1).

A decision must be made within 15 working days of the application's receipt.<sup>76</sup>

### **Notification of outcome**

A notice of outcome should be sent to the applicant as detailed below.

#### **Notification of outcome of internal review**

This notice must:

- Include the date of the decision;
- Inform the applicant about their rights of review; and
- Include the contact details of the *Right to Information Officer* who can be contacted in connection with the application.<sup>77</sup>

The applicant is not entitled to any further internal review.<sup>78</sup>

### ***4.1.5 Further Review Options Open to Applicant***

An applicant who is unsatisfied with the internal review is entitled to a review by the Information Commissioner or the NSW Civil and Administrative Tribunal (NCAT).<sup>79</sup>

### **Information and Privacy Commission**

If the applicant wishes to seek a review by the Information Commissioner, an application must be made within 40 working days of being advised of the Commission's decision.<sup>80</sup> The Information Commissioner may make such recommendations to the Commission as he/she thinks appropriate.<sup>81</sup>

If the Information Commissioner recommends that the Commission reconsider the decision, it must be by way of internal review, unless the decision has already been internally reviewed, in which case the Commission is to reconsider the decision and make a new decision.<sup>82</sup> Reconsideration of a decision that is not an internal review can be done by the person who made the original decision, and cannot be done by a person who is less senior than the person who made the original decision.<sup>83</sup>

If an application is lodged outside of the 40 working days, the Information Commissioner has no jurisdiction to accept the application.

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<sup>76</sup> GIPA Act s86; Note the deadline is able to be extended by 10 days where consultation with a third party is required: GIPA Act s86(2).

<sup>77</sup> GIPA Act s126.

<sup>78</sup> GIPA Act s88.

<sup>79</sup> GIPA Act s89 & s100.

<sup>80</sup> GIPA Act s90.

<sup>81</sup> GIPA Act s92.

<sup>82</sup> GIPA Act s93(3).

<sup>83</sup> GIPA Act s93(4) and (5).

### NSW Civil and Administrative Tribunal

If the applicant wishes to seek a review by the NCAT, an application must be made within 40 working days of being notified of the Commission's decision, or within 20 days of being notified of the Information Commissioner's review.<sup>84</sup> The NCAT does, however, have the power to extend the period of time for making such an application, even if the relevant period of time has expired.<sup>85</sup>

Once an application has been made, the NCAT will send a copy of the application to the Commission together with an 'Agency Response' form, along with a letter advising the date of the first planning meeting. The Commission must then send the following documents to the NCAT, the applicant, and the Information Commissioner (if applicable):

- Agency Response form;
- copies of the applications and decisions made under the GIPA Act in respect of the matter, including those relating to any internal review; and
- a schedule of documents, identifying in tabular form each document in dispute by number and giving details of its date, nature, and author, and of the basis on which access was refused.

A copy of the documents under review must also be provided to the NCAT on a confidential basis (in sealed envelope) if they are considered to be subject to a conclusive overriding public interest against disclosure or a non-conclusive overriding public interest against disclosure.

At the planning meeting, the NCAT Member may encourage the parties to negotiate with a view to settling the dispute, refer the matter for formal mediation, or refer the matter to hearing.

#### *4.1.6 Fees and Charges*

##### Fees entitled to be charged

The fees the Commission is entitled to charge are detailed below. Hourly rates refer to time spent by Commission officers dealing with the application.

The Commission also has a general ability to waive, reduce or refund any fee paid under the GIPA Act where it thinks appropriate.<sup>86</sup> In order to promote the objects of the GIPA Act it is envisaged that in most cases any processing charge will be waived.

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<sup>84</sup> GIPA Act s101.

<sup>85</sup> *Civil and Administrative Tribunal Act 2013* s41.

<sup>86</sup> GIPA Act s127; Note this is subject to the regulations; More information on the calculation of fees associated with the GIPA Act can be found in fact sheets on the OIC's website [here](#).

<b>Access Application</b>	
<i>Application fee</i>	<ul style="list-style-type: none"> <li>• \$30 application fee.<sup>87</sup></li> <li>• Where determined invalid \$30 must be refunded.<sup>88</sup></li> </ul>
<i>Processing charges</i>	<ul style="list-style-type: none"> <li>• \$30 per hour</li> <li>• Initial fee to count towards first hour of processing<sup>89</sup></li> <li>• Where application for personal information first 20 hours cannot be charged for.<sup>90</sup></li> <li>• Commission can require payment of an advanced deposit.<sup>91</sup></li> </ul>
<b>Internal Review</b>	
<i>Application fee</i>	<ul style="list-style-type: none"> <li>• \$40 application fee<sup>92</sup></li> </ul>
<i>Processing charges</i>	<ul style="list-style-type: none"> <li>• The Commission cannot impose any processing charges for work done in connection with the internal review.<sup>93</sup></li> </ul>

### **Applicant entitled to reduction in charges**

An applicant is entitled to a reduction of 50% of the processing fees charged where:

- the Commission is satisfied that the applicant is suffering financial hardship<sup>94</sup>; or
- the Commission is satisfied that the information is of special benefit to the public at large.<sup>95</sup>

The Commission is required to reduce the processing charge by 50% where the applicant is:

- the holder of a Pensioner Concession Card;
- a full time student; or
- a non-profit organisation.<sup>96</sup>

In responding to the application the Right to Information Officer must make an assessment of the fee to be charged. When such a determination is made the above matters must be considered.

<sup>87</sup> GIPA Act s41.

<sup>88</sup> GIPA Act s52(2).

<sup>89</sup> GIPA Act s64.

<sup>90</sup> GIPA Act s67.

<sup>91</sup> GIPA Act ss68-71.

<sup>92</sup> GIPA Act s85(1); Note this is not payable if the review is due to a deemed refusal that has occurred because the Commission had not decided an access application within the specified timeframe.

<sup>93</sup> GIPA Act s87.

<sup>94</sup> GIPA Act s65.

<sup>95</sup> GIPA Act s66.

<sup>96</sup> *Government Information (Public Access) Regulation 2009* cl 9.

A statement outlining the applicant's ability to apply for a reduction in processing charges is to be included in the initial response to the applicant by the Right to Information Officer.

## 4.2 Reporting to Parliament

The Commission must prepare an annual report on its obligations under the GIPA Act. A copy is also to be provided to the Information Commissioner.<sup>97</sup>

This is to be implemented by including a separate section on compliance with the GIPA Act in the Commission's Annual Report.

The Commission is required to include the following information regarding the GIPA Act in its Annual Report:<sup>98</sup>

- **Proactive Release Program:** details of the review carried out by the Commission under s7 (3) of the GIPA Act (information that may be proactively released) during the reporting year and the details of any information made publicly available by the agency as a result of the review; and
- **Access Applications:** statistical information regarding the Access Applications received by the Commission and the manner in which they were dealt with.

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<sup>97</sup> GIPA Act s125

<sup>98</sup> The requirements for information regarding GIPA included in the Annual Report is prescribed by the *Government Information (Public Access) Regulation 2009*.



## 5. Appendices

### 5.1 Appendix A: Factors to be Considered in Overriding Public Interest Balancing Test

Note the below is taken from the GIPA Act.

#### **Section 12 Public interest considerations in favour of disclosure**

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

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

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

#### **Section 14 Public interest considerations against disclosure**

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

## 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**

- a) 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.
- b) 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**

- a) 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.
- b) The public interest consideration under this clause extends to consideration of the policy that underlies the exemption.
- c) In this clause, a reference to a corresponding law is a reference to:
  - the [Freedom of Information Act 1982](#) of the Commonwealth, or
  - a law of any other State that is prescribed by the regulations as a corresponding law for the purposes of this clause.

## Section 15 Principles that apply to public interest determination

A determination as to whether there is an overriding public interest against disclosure of government information is to be made in accordance with the following principles:

- (1) Agencies must exercise their functions so as to promote the object of this Act.
- (2) Agencies must have regard to any relevant guidelines issued by the Information Commissioner.
- (3) The fact that disclosure of information might cause embarrassment to, or a loss of confidence in, the Government is irrelevant and must not be taken into account.
- (4) The fact that disclosure of information might be misinterpreted or misunderstood by any person is irrelevant and must not be taken into account.
- (5) In the case of disclosure in response to an access application, it is relevant to consider that disclosure cannot be made subject to any conditions on the use or disclosure of information.

## 5.2 Appendix B: table of recurring responsibilities under the GIPA Act

Obligation	Recurring responsibility
Proactive release program under section 7 of the GIPA Act	Required to be reviewed <b>every 12 months, reviewed at the end of the financial year.</b>
List of major assets, other than land holdings, acquired in the last financial year under cl 5 of the GIPA Regulation	Required to be reviewed at the <b>end of the financial year</b>
List of number and value of properties disposed of by the Commission during the last financial year under cl 5 of the GIPA Regulation.	Required to be reviewed at the <b>end of the financial year</b>
Commission's Agency Information Guide under s20 of the GIPA Act	Required to be reviewed at the <b>end of the financial year.</b> The OIC has indicated they would like this completed before 31 July each year.
Disclosure of Government contracts which a value greater than \$150 000 under section 22 of the GIPA Act	<b>Ongoing</b> , information must be updated within 60 days of the contract becoming effective.
Disclosure of Commission's policy documents under section 23 of the GIPA Act	<b>Ongoing</b> , must be updated when new information is available.
Commission's disclosure log	<b>Ongoing</b> , must be updated where it is resolved to release information in response to an access application and the Commission decides it's appropriate to post on its disclosure log