

***Government Information (Public Access) Act 2009* policy and procedures**

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1. Abbreviations

AIG	Agency Information Guide
Electoral Act	<i>Electoral Act 2017 (NSW)</i>
EF Act	<i>Electoral Funding Act 2018 (NSW)</i>
GIPA Act	<i>Government Information (Public Access) Act 2009 (NSW)</i>
GIPA Regulation	<i>Government Information (Public Access) Regulation 2009</i>
IPC	Information and Privacy Commission
LG Act	<i>Local Government Act 1993 (NSW)</i>
LOGO Act	<i>Lobbying of Government Officials Act 2011 (NSW)</i>
NCAT	NSW Civil and Administrative Tribunal
NSWEC	New South Wales Electoral Commission
PIIP Act	<i>Privacy and Personal Information Protection Act 1998 (NSW)</i>
RIO	Right to Information Officer

- 2.1. On 1 July 2010 the *Government Information (Public Access) Act 2009* (GIPA Act) replaced the *Freedom of Information Act 1989*. The GIPA Act establishes a public right to access government information.
- 2.2. *Government information* is defined under the GIPA Act to mean information contained in a record held by an agency. *Record* is defined to mean any document or other source of information compiled, recorded or stored in written form or by electronic process, or in any other manner or by any other means. The knowledge of a person is not a record (see s. 4 and clause 10 of schedule 4 of the GIPA Act).
- 2.3. Records held by the NSWEC, whether created or maintained by staff as a result of performing their official duties, or received from elsewhere, are records of the agency and are subject to the access provisions of the GIPA Act.
- 2.4. The fundamental principle of the GIPA Act is that access to information should be provided unless, on balance, it would be contrary to the public interest to do so.
- 2.5. The NSWEC is already required under existing elections, lobbying and campaign finance legislation to make certain information publicly available (see paragraph 5.3 of this policy)
- 2.6. The GIPA Act establishes four ways by which government information, not made publicly available under other legislative schemes, may be accessed:
 - **Mandatory proactive release** – “open access information” as defined under the GIPA Act is required to be made publicly available on the agency’s website (see paragraph 5.6 of this policy).
 - **Authorised proactive release** – other information identified by an agency in the course of its program of release of information that should, in the public interest, be made publicly available (see paragraph 5.7 of this policy).
 - **Informal release** – other information not released proactively that may be released in response to an informal request (see paragraph 6.2 of this policy).

- **Formal access applications** – a formal application process for the release of information (see paragraph 6.5 of this policy).
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3.1. The NSWEC is committed to openness and accountability in government and supports the objectives of the GIPA Act to:

- authorise and encourage the proactive public release of government information by agencies;
- give members of the public an enforceable right to access government information; and
- provide that access to government information is restricted only when there is an overriding public interest against disclosure.

3.2. The purpose of this policy is to ensure that:

- the NSWEC meets its obligations under the GIPA Act to provide access to information; and
 - requests for access to information are handled by the appropriate officer and in accordance with the requirements of the relevant legislation.
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4.1. The NSWEC will provide access to information (that is not already publicly available) in response to a *valid* access application unless the public interest against disclosure outweighs the public interest in favour of disclosure. There are limited circumstances where valid applications may be refused without applying this public interest test, for example where dealing with the application would constitute a significant and unreasonable diversion of resources.

4.2. The GIPA Act provides that agencies are not required to release information in response to an access application if the information is made publicly available under other legislation, whether or not availability of the information is by inspection only or availability is subject to a charge. Specific provisions under legislation including the *Electoral Act 2017* (NSW) (Electoral Act), the *Local Government Act 1993* (LG Act), the *Lobbying of Government Officials Act 2011* (LOGO Act) and the *Electoral Funding Act 2018* (EF Act) give rights to access information held by the NSWEC.

4.3. This policy outlines:

- information held by the NSWEC that is required to be made publicly available under the GIPA Act and other legislation;
- how the NSWEC will assess and respond to informal requests for access to information and formal access applications;
- what constitutes a valid access application;
- the public interest test to be applied when deciding to release information either proactively or in response to informal and formal requests; and
- the circumstances where an access application may be refused.

Roles and Responsibilities

- 4.4. The Electoral Commissioner for NSW has prime responsibility for ensuring the implementation of the GIPA Act at the NSWEC and overall management of its GIPA related matters. This policy details the delegations in relation to these responsibilities (see **Part 10** of this policy).

Procedures

- 4.5. See **Part 12** of this policy for general procedures on receipt of an access application and **Appendix E** for the steps in processing and deciding an access application.
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- 5.1. The NSWEC is required under elections, campaign finance and lobbying related legislation to make a range of information publicly available.
- 5.2. The GIPA Act also provides for:
 - the mandatory release of certain open access information held by the NSWEC; and
 - a program for proactive release of information.

Publicly available information under elections, lobbying and campaign finance legislation

- 5.3. **Appendix A** contains specific provisions under elections, lobbying and campaign finance legislation (such as the Electoral Act, the election provisions in the LG Act, the LOGO Act and the EF Act) that may give members of the public access to information held by the NSWEC.
- 5.4. The NSWEC is not required to provide information in response to a formal access application under the GIPA Act if the information requested is already made publicly available under other legislation (see paragraph 7.5 of this policy).
- 5.5. Members of the public are encouraged to use these existing public access provisions in the first instance.

Mandatory proactive release of open access information under the GIPA Act

- 5.6. The NSWEC must make available, free of charge on its website, the following open access information as defined in the GIPA Act (see section 6 and Division 1 of Part 3 of the GIPA Act):

Note: The requirements in Part 3 of the GIPA Act concerning open access information do not apply to the NSWEC's complaint handling, audit, reporting, investigative and prosecuting functions (see s.19 and Schedule 2 of the GIPA Act and see paragraph 7.2 of this policy).

- **the agency's information guide (AIG):** the AIG details the structure and functions of an agency and how members of the public, community organisations, the media and government agencies can interact with the agency (see s. 20 of the GIPA Act). An agency must annually review and update its agency information guide and must notify the Information Commissioner before amending its agency information guide (see: ss. 21 and 22 of the GIPA Act; paragraph 10.3 of this policy). The Information Commissioner has published a guideline concerning an agency's obligations with respect to its AIG.
- **information about the agency contained in documents tabled in Parliament:** for example, an agency's annual report (see s. 18(b) of the GIPA Act).

- **the agency's policy documents:** an agency's policy documents include those containing interpretations, guidelines, statements of policy, practices, particulars of an administrative scheme, and procedures for investigating contraventions of the law or of an administrative scheme (see s. 23 of the GIPA Act).
- **the agency's disclosure log:** The disclosure log is a record of (non-personal) information released in response to formal access applications that the agency considers is of interest to other members of the public (see Division 4, Part 3 of the GIPA Act).
- **the agency's register of government contracts:** All contracts an agency enters into with the private sector valued over \$150,000 are required to be recorded in the agency's register of government contracts (see Division 5, Part 3 of the GIPA Act and **Appendix B** for further information on recording requirements with respect to classes of government contracts).
- **the agency's record of open access information not disclosed:** an agency is required to keep a record of open access information (if any) that it does not make publicly available on the basis of an overriding public interest against disclosure. The record is to indicate only the general nature of the information (see s. 6(5) of the GIPA Act).
- **other information prescribed by the Government Information (Public Access) Regulation 2009** (see s. 18(g) of the GIPA Act): Other information prescribed as open access information by the GIPA Regulation at time of writing includes the total number and total value of properties disposed of by the statutory body during the previous financial year, and the statutory body's guarantee of service (if any).

Authorised proactive release of information under the GIPA Act

- 5.7. The GIPA Act authorises agencies to make publicly available (either free of charge or at the lowest reasonable cost to the agency) any other government information not required to be released by the agency as open access information, unless there is an overriding public interest against disclosure.
- 5.8. The NSWEC must establish and review, at least annually, a program for the authorised proactive release of information to identify the kinds of government information held by the agency that should, in the public interest, be made publicly available and that can be made publicly available without imposing unreasonable additional costs on the agency (see s. 7(3) of the GIPA Act).
- 5.9. See **Part 10** of this policy for roles and responsibilities in relation to proactive release of information and **Appendix C** for details of the NSWEC's proactive release of information program.

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- 6.1. A person may access information held by the NSWEC (that is not open access information under the GIPA Act or publicly available under other legislation) either by informal request or by lodging a formal access application.

Informal requests

- 6.2. Release of information in response to an informal request may be appropriate in certain circumstances and where the request is manageable. However, there is no obligation under the GIPA Act to provide access in this way. Nor is there any right of review to a decision made in response to an informal request.

- 6.3. The following types of information will generally be provided in response to an informal request unless there is an overriding public interest against disclosure:
- copies of correspondence, where the person requesting the correspondence was the person who sent it to the agency;
 - documents that contain only personal information about the person requesting the information;
 - documents that have already been made public in some other way;
 - other reasonable requests for information the release of which would not raise concerns in relation to public interest considerations against disclosure.
- 6.4. The GIPA Act provides that conditions may be imposed by an agency in relation to the use or disclosure of information that is released informally. See **Part 10** of this policy for roles and responsibilities in relation to informal release of information and **Appendix D** for details of the process.

Access Applications

- 6.5. Access applications are subject to application fees and processing charges in accordance with the GIPA Act (see **Part 9** of this policy for fee and charges; and **Appendix E** for details of the access application process).

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- 7.1. Information will not be provided in response to an access application when the information applied for falls into one of the following four categories:
- excluded information;
 - information that the NSWEC decides is already publicly available;
 - information requested under an access application that the NSWEC refuses to deal with for a reason set out under s. 60 of the GIPA Act;
 - information for which there is an overriding public interest against disclosure.

Excluded information

- 7.2. The GIPA Act provides that information relating to the functions of certain agencies specified in Schedule 2 of the Act is excluded information. An application seeking excluded information is invalid. Excluded information of the NSWEC is set out in Table 1.

Agency	Functions
NSWEC	Complaint handling, audit, reporting, investigative and prosecuting functions

Table 1

- 7.3. Information relating to the NSWEC's functions in Table 1 is excluded because it falls under clause 4 of Schedule 2 of the GIPA Act. As the regulator of elections, campaign finance and third party lobbyists in NSW, the NSWEC is conferred with investigative powers to monitor compliance with and institute proceedings for offences under the EF Act, the Electoral Act, the LOGO Act and the LG Act (in connection with the conduct of local government elections).

- 7.4. Where the NSWEC receives an application for information, which it may hold but would constitute excluded information of another agency (for example, information in relation to the investigative function of the NSW Independent Commission Against Corruption), the application will be transferred to the appropriate agency under Division 2, Part 4 of the GIPA Act (see heading 2 under “Applications” in **Appendix E**).

Decision that information is already available to the applicant

- 7.5. The NSWEC may make a decision in response to an access application that the information applied for is already made publicly available by the NSWEC, or some other agency, either under the GIPA Act or other legislation, and whether or not availability is by inspection only or subject to a charge.
- 7.6. For example, an access application under the GIPA Act for enrolment information will not be granted for a number of reasons, one being that there are already processes under the Electoral Act and LG Act by which individuals must apply to access that information.
- 7.7. See **Part 5** of this policy for open access and proactively released information made publicly available under the GIPA Act and **Appendix A** for information made publicly available under elections, campaign finance and lobbying related legislation.

Decision to refuse to deal with application

- 7.8. The NSWEC may refuse to deal with an access application (in whole or in part) if:
- dealing with the application would require an unreasonable and substantial diversion of resources;
 - the NSWEC has already decided a previous application for the information concerned;
 - the applicant has failed to pay an advance deposit;
 - the information was available to the applicant as documents produced in compliance with a subpoena or other order of a court.
- 7.9. See heading 2.2 under “Deciding access applications” in **Appendix E** for more details. See also **Appendix G**.

Overriding public interest against disclosure

- 7.10. The NSWEC may refuse access to information if there is an overriding public interest against disclosure (see s. 14 and Schedule 1 of the GIPA Act). The NSWEC is required to apply this public interest test having regard to the obligation to promote the objectives of the GIPA Act and to any relevant guidelines issued by the Information Commissioner.
- 7.11. An overriding public interest against disclosure arises in one of 2 ways:
- the information is of a category listed in the GIPA Act as information for which there is a *conclusive* presumption of a public interest against disclosure (see paragraph 7.12); or
 - the NSWEC decides, after applying the prescribed public interest test, that there is an overriding public interest against disclosure of the information requested (see paragraph 7.18).

Conclusive presumption of public interest against disclosure

- 7.12. The GIPA Act provides that there are certain categories of information for which there is a conclusive presumption of an overriding public interest against disclosure. Access applications in relation to such information will generally be refused. There are 12 categories of such information listed under Schedule 1 of the GIPA Act. Some of those relevant to the functions of the NSWEC include:

Overriding secrecy laws (prohibitions on disclosure)

- 7.13. Information that is prohibited from disclosure under any of the legislative provisions specifically set out in item 1 of Schedule 1 of the GIPA Act.
- 7.14. Those provisions in Schedule 1 relevant to the NSWEC are set out below in Table 2.

Prohibitions on disclosure of information held by the NSWEC

As specified under Schedule 1 to the GIPA Act.

Provision	Type of information
Electoral Act 2017	
s. 43 (Electoral Information Register not available for public inspection)	Information found in the Electoral Information Register includes the surname, given name or names, date of birth and sex of each enrolled person, the residence of the person (except in relation to an eligible overseas elector or an itinerant elector), the electoral district for which the person is enrolled, whether the person is a silent elector, whether the person is a registered early voter.
s. 55 (Privacy- non disclosure of information)	Information collected for the purposes of the preparation, maintenance and revision of the Electoral Information Register.
s. 159 (Secrecy relating to technology assisted voting)	Information in relation to how a person voted by way of technology assisted voting. Source codes or other computer software in relation to technology assisted voting.
s. 175 (Security of election materials and electronic resources)	Information contain in sealed packages including marked and unmarked ballot papers, declaration voting envelopes, authorised rolls, nomination forms and other election materials used in the election – this includes electronic resources including files, programs, applications and spreadsheets used in the election
s. 268 (Disclosure of information)	Information obtained in connection with the administration or execution of the Electoral Act. Information in relation to how a person voted at any election.
Local Government Act 1993	
Nil at time of writing	
Electoral Funding Act 2018	
Nil at time of writing	
Lobbying of Government Officials Act 2011	
Nil at time of writing	

Table 2

Legal professional privilege

- 7.15. Information subject to legal professional privilege unless the privilege has been waived and provided the NSWEC has first considered whether it would be appropriate to waive privilege before refusing to provide access (item 5 of Schedule 1 of the GIPA Act).

Parliamentary privilege

- 7.16. Information subject to Parliamentary privilege, such as draft submissions to Parliamentary Committees and draft answers to Committee Questions on Notice (item 4 of Schedule 1 of the GIPA Act).

Cabinet or Executive Council Information

- 7.17. Documents that contain Cabinet or Executive Council information (as defined in items 2 and 3 of Schedule 1 of the GIPA Act).

Decision by the NSWEC against disclosure

- 7.18. The GIPA Act provides that there is a general public interest in favour of disclosure with respect to all information held by an agency (that is, other than information that is already publicly available by some other means or listed in Schedules 1 and 2 of the GIPA Act).
- 7.19. The NSWEC will refuse to disclose information only where, on balance, there is an overriding public interest against disclosure (“the public interest test”). Where considerations are evenly balanced, the presumption in favour of disclosure stands.
- 7.20. See **Appendix F** for details on applying the public interest test.
- 7.21. **Note:** There is a public interest consideration against disclosure of information if disclosure of the information by any person could reasonably be expected to constitute a contravention of a provision of any other Act or statutory rule that prohibits the disclosure of information (see item 6 of s. 14 of the GIPA Act). This is relevant to the NSWEC because after a local government election has been declared, it is a statutory requirement that all marked and unmarked ballot papers together with authorised copies of the roll and other papers and materials used in the election (including nomination forms and candidate information sheets) are sealed in parcels and kept in secure storage for a prescribed period of time prior to destruction. It is also a statutory requirement that all parcels are to be kept secure until destroyed. It is a longstanding principle of elections administration across local government, state and federal jurisdictions, and as upheld by the courts, that access by candidates, parties and electors to material of a nature that would be kept in secure storage is strictly limited and generally only by way of an order to produce documents by a competent court or tribunal.

8. Review Rights

Internal Review by the NSWEC

- 8.1. A person aggrieved by a decision of the NSWEC may apply for internal review of the decision within 20 working days after notice of a decision is given.
- 8.2. An internal review must be determined within 15 working days after the application is received.

Review by Information Commissioner

- 8.3. An access applicant may apply directly to the Information Commissioner to review an original decision of the NSWEC, or the outcome of an internal review, within 40 working days of the notice of the decision to which the review relates.

Review by the NSW Civil and Administrative Tribunal (NCAT)

- 8.4. An aggrieved person may apply directly to the NCAT to review an original decision of the NSWEC, or the outcome of an internal review, or a review by the Information Commissioner:
- within 40 working days of notice of the original decision is given to the applicant; or
 - if the Information Commissioner has reviewed the original decision – up to 20 working days after the applicant is notified of the Information Commissioner’s review.
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9. Fees and charges

- 9.1. The access application fee is \$30.
- 9.2. Applicants may be entitled to a 50 per cent reduction of processing charges on financial hardship grounds, or may be entitled to a waiver of the fee if the information requested is of special benefit to the public generally.
- 9.3. Applicants may be asked to pay a processing charge. Processing costs \$30 per hour and covers time needed to deal efficiently with the application.
- 9.4. Applicants may be asked to pay up to 50 per cent of the expected processing charge in advance. This request must be in writing and the applicant must be given at least four weeks to pay.
- 9.5. If an applicant seeks access to his or her own personal information, the first 20 hours of processing time are free of charge.
- 9.6. The internal review application fee is \$40.
- 9.7. See “Processing charges and advance deposits” under **Appendix E** for more details on Fees and charges.
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10. Roles and responsibilities

- 10.1. The Electoral Commissioner for NSW is the principal officer at the NSWEC for the purposes of the GIPA Act. As such, the Electoral Commissioner has prime responsibility for the NSWEC's compliance with its obligations under the GIPA Act and for ensuring the implementation of and compliance with this policy (see schedule 4 of the GIPA Act).

Right to Information Officer

- 10.2. The Electoral Commissioner, as principal officer, has delegated to the Right to Information Officer (RIO) the following responsibilities:

Mandatory proactive release of open access information

- 10.3. The RIO will coordinate:

- maintenance of GIPA related information on the NSWEC's website, including clear links to mandatory open access information as required under Part 3 of the GIPA Act;
- maintenance of the agency information guide including review and updating at least once every 12 months;

Note: The RIO will, in accordance with s. 22 of the GIPA Act, notify the Information Commissioner before the NSWEC adopts or amends the agency information guide.

- maintenance of the disclosure log;
- maintenance of the record of open access information not made public as required under s. 6(5) of the GIPA Act;
- publication on the website of the register of government contracts;

Note: The Chief Procurement Officer, is responsible for maintenance of the register of government contracts (see **Appendix B** of this policy)

- publication on the NSWEC's website of information referred to the RIO by the Executive Directors and Directors under the authorised proactive release of information program (see paragraphs 5.7 and 10.7 and **Appendix C** of this policy).

Processing and deciding informal requests and formal access applications

- 10.4. Refer to:

- **Part 12** of this policy for general procedures on receiving access applications;
- **Appendix D** for dealing with an informal request; and
- **Appendix E** for steps in dealing with an access application.

GIPA Annual Report

- 10.5. The RIO will prepare and submit to the IPC a GIPA Annual Report pursuant to s. 125 of the GIPA Act.

Executive Directors and Directors

10.6. The Electoral Commissioner as principal officer under the GIPA Act has delegated to Executive Directors and Directors at the NSWEC the following responsibilities:

Authorised proactive release of information

10.7. Executive Directors and Directors are required to:

- bring proposals in relation to authorised proactive release of information to the Senior Executive Committee for endorsement (either as they arise or by 31 May each year); and
- refer information endorsed by the Senior Executive Committee for authorised proactive release to the RIO to arrange public access (e.g. by publication on the NSWEC website or made available for inspection).

10.8. The Senior Executive Committee will conduct an annual review in June each year of information held by the NSWEC suitable for authorised proactive release (see **Appendix C**).

Informal release of information

10.9. **Appendix D** outlines the process in deciding whether information should be released pursuant to an informal request (see also paragraph 6.2 of this policy).

Chief Procurement Officer

10.10. The Chief Procurement Officer will maintain the register of government contracts, pursuant to Division 5, Part 3 of the GIPA Act (see **Appendix B**).

Private-sector contractors “providing services to the public on behalf of the agency”

10.11. When an agency enters into a contract with a private-sector entity to provide services to the public on its behalf, the agency must have a contractual right to immediately access the information in the contractor’s records as listed in column 1 below, but is not entitled to access the information of the contractor listed in column 2 (see “Template contractual clauses” in paragraphs 10.13 – 10.16 of this policy).

Contractor providing services to the public on behalf of agency

Accessible information	Non-accessible Information
Information relating directly to the performance of services by the contractor.	Information that would reveal the contractor’s financing arrangements, financial modelling, cost structure or profit margins.
Information collected by the contractor from members of the public who are provided or offered the services.	Information the contractor is prohibited from disclosing to the agency under any Australian law.
Information received by the contractor from the agency to enable it to provide the services.	Information that, if revealed to an agency, could place the contractor at a substantial commercial disadvantage in present or future dealings with the agency.

Table 3

- 10.12. Contractors “providing services to the public on behalf of an agency” are generally those providing external services to the public and not outsourced internal services to an agency such as an agency’s office supplies, internal personnel, information technology or corporate support.

Template contractual clauses

- 10.13. The IPC has developed two template clauses for agencies to insert into their private sector contracts. Further information and templates for contract clauses can be found on the IPC’s website.

Access to information clause template (for contracts “providing services to the public on behalf of an agency”)

- 10.14. The template is drafted to comply with the minimum requirements of subsections 121(1) and (2) of the GIPA Act. This also requires the contractor to provide the requested information within seven days of a request.
- 10.15. The remainder of the clause goes beyond the statutory requirements. It requires the contractor to provide the requested information at its own expense and gives the agency a right to terminate the contract if it does not do so. The access to information clause is accessible from IPC’s website.

Consultation clause (s. 54) template

- 10.16. The template consultation clause reflects an agency’s obligations under s. 54 of the GIPA Act to consult before providing access to information. Although agencies are not required to include this clause in their private sector contracts, it may be useful in alerting contractors to their consultation and objection rights. The consultation clause is accessible from the IPC’s website.

11. Templates

- 11.1. The IPC has produced templates for forms and correspondence relating to the processing of access applications, such as:
- making an application;
 - advising an applicant;
 - consultation;
 - notification of decisions;
 - review of decision.
- 11.2. The information access application template has been adapted for use by the NSWEC and is accessible from the NSWEC website.

12. Procedures

- 12.1. The following general procedures are to be followed on receipt of a formal access application. The steps in processing an access application are set out in **Appendix E**.
1. Executive Directors, Directors and supervisors are responsible for ensuring that all enquiries regarding access applications are directed to the RIO.
 2. Executive Directors, Directors and supervisors are responsible for ensuring any access application made under the GIPA Act received in any division or business unit of the NSWEC will be promptly forwarded to the RIO for action.
 3. The RIO will open a file and maintain a running sheet for each access application.
 4. The RIO is required to send an acknowledgement letter or email to the applicant advising whether their application is valid or not within **5 working days** of receipt.
 5. The RIO will coordinate the conduct of reasonable searches to find any of the information applied for and will document all searches carried out to assist in the preparation for any internal or external reviews of compliance with the GIPA Act. **Appendix G** details the process for reasonable searches.
 6. Executive Directors, Directors, and supervisors are responsible for promptly providing all information requested by the RIO when responding to an access application.
 7. The RIO is required to send the applicant a notice of the decision within **20 working days** of receipt of the application, unless the decision period has been extended or put on hold.
 8. The RIO will require and must receive the cooperation of all officers to ensure that statutory deadlines are met. See **Appendix E** for details.
 9. Should an access applicant request an internal review of an access decision, that review will not be conducted by the original decision maker and the Electoral Commissioner will, if necessary, make a delegation for that purpose. An internal review is to be conducted as if the original decision had not been made and by a person who is no less senior than the original decision maker.
 10. The RIO or other delegate of the Electoral Commissioner will decide an access application or review on the basis of his or her judgement after consideration of all the NSWEC's statutory obligations under the GIPA Act and the objects of the GIPA Act being to extend as far as possible the rights of the public to obtain access to information held by the NSWEC.
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13. Review

- 13.1. The Director Legal & Governance is responsible for reviewing and updating this policy and arranging training and education of NSWEC staff about their access to information obligations where required.
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14. Associated documents

- 14.1. NSWEC Disclosure of Enrolment, Electoral and Election Information Policy.

15. Relevant legislation

15.1. Relevant legislation includes:

Electoral Funding Act 2018 (NSW).

Electoral Act 2017 (NSW).

Government Information (Public Access) Act 2009 (NSW).

Government Information (Public Access) Regulation 2009 (NSW).

Lobbying of Government Officials Act 2011 (NSW).

Local Government Act 1993 (NSW).

Local Government (General Regulation) 2005 (NSW).

Privacy and Personal Information Protection Act 1998 (NSW).

16. References

Creating New Records Under the GIPA Act, Fact Sheet, IPC, April 2015.

[Guideline 2: Discounting charges](#), IPC, December 2016.

[Guideline 4: Personal information as a public interest consideration under the GIPA Act](#), IPC, December 2011.

[Guideline 5: Consultation on public interest considerations under section 54 of the GIPA Act](#), IPC, April 2017.

Guideline 6: Agency Information Guides, IPC, December 2016.

Informal Release of Information, Knowledge Update, IPC, November 2010.

17. Document control

Document management

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Publication details

Document type:	<input checked="" type="checkbox"/> Policy <input type="checkbox"/> Standard <input checked="" type="checkbox"/> Procedure <input type="checkbox"/> Guidelines	
Responsible Business Unit: Legal and Governance	Author: Legal and Governance	Publication: <input type="checkbox"/> Not for publication <input type="checkbox"/> Internal catalogue <input type="checkbox"/> Intranet only <input checked="" type="checkbox"/> Intranet and website

Revision record

Date	Version	Revision description
August 2012	V1.1	N/A.
November 2015	V1.2	New template, update references to legislation and government entities.
June 2017	V1.3	New template, update references, amend appendices.
21 August 2018	V2	Update policy – new Electoral Act and Electoral Funding Act.

Next review date

This policy is to be reviewed within three years of approval or earlier if needed.

Appendix A – Publicly Available Information Under Elections, Lobbying and Campaign Finance Legislation

Note: Where public inspection during ordinary office hours is noted in the table below, it is advisable to first contact the NSWEC to determine whether an appointment to attend the office is required.

Electoral Funding Act 2018

Section	What	How
131	Registers for state and local government by-elections: <ul style="list-style-type: none"> • Register of Candidates; • Registers of Third-party Campaigners; • Register of Official Agents. 	Published on the NSWEC website on or before the issue of the writ for a state by-election. Published on the NSWEC website on or before the day for the close of the roll of electors for a local government by-election.
132	Registers for State and Local Government elections: <ul style="list-style-type: none"> • Register of Candidates (s.103); • Register of Third Party Campaigners (s.116); • Register of Party Agents (s.121). 	Published on the NSWEC website.
111	Register of Associated Entities.	Published on the NSWEC website.
125	Register of Official Agents.	Published on the NSWEC website.
82	Claims for public funding for election campaigns.	Published on the NSWEC website. The Electoral Commissioner may on application provide copies of or extracts from any other document relating to the assessment of such a claim by the NSWEC for public inspection.
22	Declarations of disclosures of political donations received and electoral expenditure incurred by candidates, councillors, MPs, groups and parties.	Published on the NSWEC website as soon as practicable after the due date for the making of the disclosures. Copies of declarations are kept by the NSWEC for at least 6 years and are available for public inspection during ordinary office hours. Copies of declarations (or extracts) may be provided on application to the NSWEC and on payment of a reasonable fee (to be determined by the NSWEC from time to time).

Section	What	How
56	Determinations by Electoral Commission that person not a prohibited donor.	Published on the NSWEC website.
95	Declarations by agents of political parties or elected members making claims for administrative and New Party policy development funding.	Published on the NSWEC website. The NSWEC may on application provide copies of or extracts from any other document received in connection with such a claim by the NSWEC for public inspection.
98	The names of senior office holders of political parties and a summary of the roles and responsibilities of those senior office holders.	Published on the NSWEC website.

Local Government Act 1993

Section	What	How
302	Roll of electors (residential roll). Note: the non-residential roll is made available for inspection by the general manager of each council.	Public inspection during ordinary office hours.
308	Candidate information sheets for local government elections administered by the Electoral Commissioner.	Public inspection during ordinary office hours at the office of the returning officer. Displayed at each polling place
319	Local Government Register of Political Parties.	Public inspection during ordinary office hours. Certain documents and information from the register is published on the NSWEC website.

Local Government (General Regulation) 2005

Section	What	How
294	List of Candidates details: full name, suburb, town or other locality of the place of living as enrolled (for local government elections administered by the Electoral Commissioner).	To be displayed on the NSWEC's website between the period when the first name is placed on the list and noon on the nomination day.
290	Candidate Information Sheets (for local government elections administered by the Electoral Commissioner).	Published on the NSWEC website until at least election day.

Section	What	How
332A	Mobile booths for pre-poll voting in remote local government areas (for local government elections administered by the Electoral Commissioner).	The Electoral Commissioner must take such steps as he or she thinks fit to give public notice.
356R	Registration of electoral material – Copy of material and certificate (for local government elections administered by the Electoral Commissioner).	Available for inspection at the request of any person enrolled for the area or of any scrutineer at the office of the returning officer during hours of polling and at such other places as the Electoral Commission determines.

Electoral Act 2017

Section	What	How
22(3), 25(3), 27(5)	Comments, suggestions, objections lodged with the redistribution panel.	Published on the NSWEC website as soon as is reasonably practicable after the expiry of the suggestion period, submission period, comments period or objection period as the case requires.
25	Panel's reasons for proposed alteration of existing boundaries.	Published on the NSWEC website.
25	A map setting out proposed names and boundaries of electoral districts.	Published on the NSWEC website.
29	Maps indicating the names and boundaries proclaimed by the redistribution panel.	Published on the NSWEC website.
47	Authorised rolls	Public inspection during ordinary office hours is available to approved applicants after the issue of the writ for an election and until 40 days after the return of the writ. Checking your own enrolment status is available on the NSWEC website. Refer to the NSWEC Disclosure of Enrolment, Electoral and Election Information Policy.

Section	What	How
50(1)	The NSWEC may provide a list of enrolled persons and their particulars to applicants if the public interest in doing so outweighs the public interest in protecting privacy. Disclosure is strictly controlled and generally permitted only for the limited purposes of public health and safety, criminal law enforcement, and protection of the public revenue. Approved applicants must enter into an undertaking with the NSWEC.	Available to approved applicants. Fees may be applicable. Refer to the NSWEC Disclosure of Enrolment, Electoral and Election Information Policy.
50(6)-(7)	Findings and reasons concerning the provision of enrolment information under s.50(1).	Any findings in favour of disclosing enrolment information under s. 50(1) are to be published on the NSWEC website and in its annual report.
53	An individual's enrolment details.	The NSWEC website allows an individual to ascertain whether or not he or she is correctly enrolled.
70(1)&(3)	Register of Parties.	Public inspection available during ordinary office hours. Certain documents and information from the Register is published on the NSWEC website.
70(2)	Applications for registration of parties and amendment of particulars in the Register of Parties.	Public inspection available during ordinary office hours.
93(2)	If an election is required, the names of candidates (in relation to a periodic Council election – the names of any candidates who are included in a group) and the suburb, town or other locality of the enrolled address of each candidate	Announced on the NSWEC website.
96	Child protection declarations (State candidates).	Published in such manner as the Commissioner thinks fit.
108	Appointment or abolishment of voting centres.	Published on the NSWEC website.
117	Declared facility approved by the Electoral Commissioner.	Published on the NSWEC website (see s.270 of the Electoral Act)
118	"How to vote" electoral material in declared facilities.	Available for inspection by scrutineers at a declared facility.

Section	What	How
155	Approved procedures for technology assisted voting.	Published on the NSWEC website. (see s.270 of the Electoral Act)
163	Appointment of ballot counting place.	Published on the NSWEC website at a time determined by the Electoral Commissioner.
173	Declaration of election result.	Published on the NSWEC website as soon as practicable after the count has been completed.
222(1)	Election Information (number of first preference votes, distribution of votes).	Published on the NSWEC website.
201(8)	Registered Electoral Material and Certificate of Registration.	Published on the NSWEC website from the Monday preceding the election day until 6 pm on election day.
270	Approvals under the Electoral Act	Published on the NSWEC website.
Schedule 1, Cl 10	Disclosure of pecuniary interests by a member of the Electoral Commission.	Public inspection available during ordinary office hours on payment of the fee determined by the Electoral Commission.

Lobbying of Government Officials Act 2011

Section	What	How
8	Register of Third-Party Lobbyists.	Published on the NSWEC website.
12	Lobbyists Watch List.	Published on the NSWEC website.
19A	Notice of and reasons for the decision of the NSWEC to amongst other things, refuse to register a third-party lobbyist, or cancel or suspend the registration of a third-party lobbyist, or place the name of a third-party or other lobbyist on the Lobbyists Watch List.	Published on the NSWEC website unless there is an overriding public interest against the disclosure of the information within the meaning of the GIPA Act.

Note: this table is not an exhaustive list of publicly available information

Appendix B – Register of Government Contracts

What is a government contract?

A government contract is defined in the GIPA Act to mean any of the following contracts between an agency and a private sector entity:

- a contract under which a party agrees to undertake a specific project (such as a construction, infrastructure or property development project);
- a contract under which a party agrees to provide specific goods or services (such as information technology services), other than a contract of employment;
- a contract under which a party agrees to transfer real property to another party to the contract;
- a lease of real property.

Class One Contracts

All contracts an agency enters into with the private sector valued at \$150,000 or more are required to be recorded in a register of government contracts.

The details of each contract are required to be entered into the register within 45 days of the contract coming into effect and must remain on the register for 20 days or until the project to which the contract relates is complete, whichever is longer.

A contract comes into effect when the contract is entered into or if a contract stipulates that a condition or conditions must be met before the contract comes into force, then the day the condition or conditions have been met.

The following information about a class one contract must be entered on the register:

- the name and business address of the contractor;
- particulars of any related body corporate or private sector entity that will be involved in carrying out any of the contractor's obligations under the contract;
- the date the contract becomes effective;
- the duration of the contract;
- particulars of the project to be undertaken, goods and services to be provided or the real property to be leased or transferred under the contract;
- the estimated amount payable to the contractor under the contract;
- a description of any provisions that allow the payable amount to be varied;
- a description of any provisions concerning the renegotiation of the contract;
- if applicable, the method of tendering and a summary of the criteria used;
- a description of any provisions that allow for payment of operational or maintenance services.

The inclusion of confidential information is discussed below.

The value of a contract is discussed below.

Class Two Contracts

A class two contract exists when any of the following apply:

- there has not been a tender process, the contract has not been made publicly available and the terms and conditions of the contract have been negotiated directly with the contractor;
- the contract (publicly available or not) has been subject to a tender process and the terms and condition of the contract have been substantially negotiated with the successful tenderer;
- the obligations of one or more parties under the contract to maintain or operate infrastructure or assets could continue for 10 years or more;
- the contract involves a privately financed project as defined by guidelines published by the Treasury (as in force from time to time);
- the contract involves a transfer of a significant asset of the agency concerned to another party to the contract in exchange for the transfer of an asset to the agency.

A class two contract requires the following information to be entered on the register, in addition to the information required for class one contracts:

- particulars of future transfers of significant assets to the State at zero, or nominal, cost to the State, including the date of their proposed transfer;
- particulars of future transfers of significant assets to the contractor, including the date of their proposed transfer;
- the results of any cost-benefit analysis of the contract conducted by the agency;
- the components and quantum of the public sector comparator if used;
- if relevant, a summary of information used in the contractor's full base case financial model (for example, the pricing formula for tolls or usage charges);
- if relevant, particulars of how risk, during the construction and operational phases of a contract to undertake a specific project (such as construction, infrastructure or property development), is to be apportioned between the parties, quantified (where practicable) in net present-value terms and specifying the major assumptions involved;
- particulars as to any significant guarantees or undertakings between the parties, including any guarantees or undertakings with respect to loan agreements entered into or proposed to be entered into;
- particulars of any other key elements of the contract.

The inclusion of confidential information is discussed below.

Class Three contracts

If a class two contract has (or is likely to have) a value of \$5 million or more (a class 3 contract), the register must include a copy of the class 3 contract.

Confidential information not required to be included in register

Information required to be placed on the register (including a copy of the contract) does not require the following:

- commercial-in-confidence provisions of a contract;
- details of any unsuccessful tender;
- any matter that could reasonably be expected to affect public safety or security;
- a copy of the contract, a provision of a contract or any information in relation to a contract that is of such a nature that its inclusion in a record would result in there being an overriding public interest against disclosure.

If a copy of the contract or provisions of the contract are not included on the register the NSWEC will need to include on the register:

- reasons for not including the information;
- a statement as to whether the information will appear at a later date; and
- a general description of the excluded information.

Commercial-in-confidence

Commercial-in-confidence provisions of a contract are defined in the GIPA Act to mean any provisions of the contract that disclose:

- the contractor's financing arrangements, or
- the contractor's cost structure or profit margins, or
- the contractor's full base case financial model, or
- any intellectual property in which the contractor has an interest, or
- any matter the disclosure of which would substantially disadvantage the contractor commercially in relation to other contractors or potential contractors, whether at present or in the future.

Value of contract

The value of the contract is any of the following, depending on the type of contract:

- the total estimated value of the project;
- the total estimated value of the goods or services over the term of the contract;
- the value of the real property transferred;
- the rent for the term of the lease.

Refer to Division 5 of Part 3 of GIPA Act for further information. Note also, paragraphs 10.10 and 10.11 of this policy.

Appendix C – Authorised Proactive Release of Government Information

Authorised Proactive Release of Government Information

Authorising and encouraging the proactive public release of government information is one way of meeting the objectives of the GIPA Act.

The NSWEC is authorised to make any government information held by the agency publicly available unless there is an overriding public interest against disclosure of the information.

The GIPA Act requires agencies to establish a program for the authorised proactive release of information.

Program for proactive release

- The Executive Directors and Directors are responsible for identifying information generated in their areas of responsibility that should, in the public interest, be made publicly available.
- In deciding whether information should be released it is necessary to apply the public interest test (see **Appendix F**).
- If there is an overriding interest against disclosure a decision will need to be made whether information can be omitted, deleted or redacted.
- Proposals for authorised proactive release (including how the information is proposed to be endorsed and whether a fee should be incurred for access) are to be submitted by the Directors to the Management Committee for endorsement.
- The Management Committee will conduct an annual review concerning the proactive release of information – to take place in June each year.

What information is not subject to the proactive release program?

The proactive release program is not intended to apply to:

- information concerning the NSWEC's core business such as election handbooks, guides and forms;
- information where there is a statutory requirement for publication such as approved procedures, child protection declarations and candidate information sheets.

This is on the basis that the proactive release program is intended to encourage identification and release of information in addition to information concerning the NSWEC's core business and information where there is a statutory requirement for publication.

Appendix D – Informal release

Informal release occurs when an agency provides information in response to a request, without requiring the person to lodge a formal application under Part 4 of the GIPA Act.

Informal release is subject to any reasonable conditions the NSWEC considers appropriate. It should be noted that such discretion should be exercised in accordance with the object of the GIPA Act.

If a person requests information that is not publicly available or not routinely/proactively provided as part of the NSWEC's regular work, informal release may in certain circumstances be a suitable alternative to a formal access application under the GIPA Act.

When a request for information is received, the decision-maker should consider if the information requested can be released informally.

The NSWEC can decide how information is released, for example by email or post.

Can any NSWEC officer provide access by informal release?

No. Only a person authorised by the principal officer may release information informally. The functions conferred on the Electoral Commissioner pursuant to s. 8 of the GIPA Act (informal release of information) are delegated to all Executive Directors, Directors and the RIO within the NSWEC.

Is there an obligation to provide information under informal release if requested?

No. The NSWEC is not obliged to provide access in this way (see s. 8(3) of the GIPA Act). Also, there is no right of review to a decision made in response to an informal request.

The NSWEC will consider releasing information informally when:

- it is in the public interest;
- the information is easily accessible;
- the information has previously been made publicly available;
- an individual is requesting information that is his or her personal information;

If informal access is not provided, the applicant may be invited to make an access application, unless the information is for excluded information or there is a conclusive overriding public interest against disclosure.

It is appropriate to require an access application when:

- there will be a significant diversion of resources (see “Fees and Charges” and “Workload and unreasonable diversion of resources” below and **Appendix G** for details on reasonable searches);
- the information contains information about a third party that cannot be deleted easily or without rendering the information useless, and consultation would need to occur;
- the information is sensitive in nature and requires careful balancing of public interests (see **Appendix F** for details about the public interest test).

What kind of information can be provided under informal release?

This will vary depending on who is making the request.

Informal access may be suitable for records such as correspondence between the applicant and the NSWEC or statistical information that is not already on the website and which is not sensitive or controversial.

Informal release can include omitting, deleting or redacting information, which would otherwise prevent informal release. Care should be taken to ensure that redacted information cannot be read.

The following types of records are generally not appropriate to release informally:

- Documents in draft form or not yet approved;
- Documents containing confidential information (including commercial information);
- Documents dealing with internal staff disciplinary or grievance matters;
- Documents that are prohibited from disclosure by legislation;
- Documents relating to legal proceedings;
- Documents that are copyrighted by a third party other than the State of NSW;
- Documents containing sensitive personal information.

Conditions

The NSWEC can release information in response to an informal request subject to any reasonable conditions that it thinks fit to impose (see s. 8(2) of the GIPA Act). It is expected that a common sense approach is taken in all circumstances.

Factors for consideration in determining conditions include:

- the nature of the information requested;
- the volume of information requested;
- the availability of the information requested; and
- the work involved in processing the request.

Reasonable conditions may be negotiated directly with the applicant, and may include:

- the information may be viewed but not copied (e.g. where copyright is a concern);
- the information may be released to the applicant but not disclosed to third parties or published in any format;
- a copy of the record may be released with all information concerning or identifying third parties deleted (e.g. a list which includes the applicant amongst a list of people);
- the information may be included in a summary of the information contained in the NSWEC's records (e.g. summary of a database);
- the information will be released to the person within a specific period after it is published or released (in the case of research, for example);
- the information may be released in stages, according to workload demands, availability, publication restrictions or other conditions;
- the applicant is to pay for the cost of photocopying where the volume of records is high;
- limiting the scope of an informal request to records that are on hand at the NSWEC's office (i.e. excluding archived records).

Fees and Charges

The GIPA Act does not provide for an application fee or processing charge for providing access under informal release.

In some cases the cost of providing informal access will be negligible and providing free access will be suitable. However, where there is an actual cost, it is reasonable to require the applicant to contribute to those costs.

Often the applicant will consider it reasonable to pay a small amount to obtain the information quickly and directly rather than having to lodge a formal access application.

Reasonable conditions that may be negotiated with the applicant include:

- having the applicant pay the cost of photocopying and printing at a reasonable rate where the volume exceeds 20 pages (e.g. 30 cents per page); and/or
- having the applicant pay the cost of retrieving the records from the Government Records Repository.

If the work to provide access would impact significantly on resources, or if the applicant does not agree to conditions the NSWEC considers reasonable in the circumstances, the applicant may be invited to make a formal access application.

The issue of costs will vary from one request to another.

Is there a time limit?

No. The decision should be made and the applicant advised of the decision as soon as reasonably possible, ideally within 10 to 20 working days of receipt of the request for information. The time may be negotiated with the applicant.

Workload and unreasonable diversion of resources

Informal release is not suitable if the work involved in searching for, retrieving, compiling and deciding on informal release of the information unreasonably diverts the resources of the agency. What is a reasonable workload will depend on the resources available at the time the request is made.

Subpoena and court orders to produce documents

The GIPA Act specifically states that an agency is not required to provide information that has previously been provided to the applicant or their legal representative under a subpoena or other court order (see s. 60(1)(d) of the GIPA Act).

What's the advantage in providing access by informal release?

Informal release is subject to any reasonable conditions the agency sees fit to impose. The agency can negotiate directly with the applicant about what information is provided and when.

The RIO or other delegated officer deciding a formal access application may elect to provide the information under informal release as an alternative to going through the formal processes under the GIPA Act.

Officers who decide to release information informally, and who believe in good faith that the decision is permitted or required by the GIPA Act are not exposed to any personal liability or to any action in breach of confidence or defamation, and are protected from criminal liability that may result from disclosure. The same applies when information is released under a formal access application.

Can the RIO suggest that a formal application be dealt with informally?

Yes. The RIO may contact an applicant to make that suggestion and explain amongst other things that the applicant does not have to pay an application fee and the decision is not subject to review.

See Knowledge Update, *Informal release of information*, IPC, November 2010 for further information.

Appendix E – Access Applications

Applications

1. How to make an access application (s.41)

An access application is invalid unless it complies with the following requirements (the formal requirements):

- it is in writing;
- it clearly indicates it is an access application under the GIPA Act;
- it is accompanied by a fee of \$30;
- it provides a reply postal address for correspondence; and
- it includes such information as is reasonably necessary to enable the information applied for to be identified.

2. Access application cannot be made for excluded information (s.43)

An access application made for excluded information of an agency is invalid.

Information is excluded information if it relates to any function specified in Schedule 2 to the GIPA Act in relation to the agency.

The complaint handling, audit, reporting, investigative and prosecuting functions of the NSWEC are listed in Schedule 2 (see paragraph 7.2 of this policy).

3. Information for which there is conclusive presumption of overriding public interest against disclosure

It is to be conclusively presumed that there is an overriding public interest against disclosure of information listed in Schedule 1 of the GIPA Act. Relevant to the NSWEC are the following provisions under the Electoral Act (see also paragraph 7.12 of this policy):

- s. 43 (Electoral Information Register not available for public inspection);
- s. 55 (Privacy – non disclosure of information);
- s. 159 (Secrecy relating to technology assisted voting);
- s. 175 (Security of election materials and electronic resources));
- s. 268 (Disclosure of information).

4. An Access Application does not require the NSWEC to create a new record

The NSWEC's obligation to provide access to government information in response to an access application does not require the NSWEC to do any of the following:

- make a new record of information,
- update or verify information held by the NSWEC, or
- create or produce a new record of information by deduction, inference or calculation from information held by the NSWEC (see s. 75(2) of the GIPA Act).

The NSWEC is not creating a new record if the record is produced by collating information held electronically from different areas using a standard reporting capability function available to the NSWEC, or if the NSWEC redacts information from a record.

The NSWEC is creating a new record when a record is

- produced by collating information held in different electronic folders or systems,
- edited and the body of information is changed,
- converted following non-standard processes,
- produced by applying additional resources that are not generally available to the agency, or
- produced by applying new software that is not usually available to the NSWEC (see Fact Sheet *Creating new records under the GIPA Act*, IPC, April 2015 for further information).

Process for dealing with access applications

1. Initial decision as to validity of application (s.51)

The applicant must be advised whether their application is valid or not within 5 working days from receipt. This is done by sending the applicant an acknowledgement letter or email.

An application is not a valid access application if it is an application for excluded information or does not comply with the formal requirements for access applications (see “Applications” above).

Acknowledging receipt of a valid access application does not prevent a subsequent decision that the application is not valid.

2. Agency assistance with invalid applications (s.52)

Advice and assistance should be provided to enable the applicant to make a valid access application.

Where an application is invalid because it has not met formal requirements, it will become valid after payment of the required fee (or waiver) or provision of the required information. The application is deemed to have been made when the fee or information is received.

The applicant is eligible for a refund of the application fee where the application is determined to be invalid (unless the application subsequently becomes valid).

3. Searches for information held by agency (s.53)

Reasonable searches for information applied for must be conducted using the most efficient means reasonably available (including means for retrieval of electronic records).

Searches of electronic backup systems are not required unless a record containing the information has been destroyed or dealt with in contravention of the *State Records Act 1998* or the NSWEC's established record management procedures.

Searches that would result in an unreasonable and substantial diversion of the agency's resources are not required to be undertaken. An agency may refuse an access application on the grounds that provision of the information that is the subject of the application would require an unreasonable and substantial diversion of the agency's resources.

See **Appendix G** for guidelines on conducting reasonable searches.

4. Third party consultation prior to release of information (s.54)

When it is reasonably practicable, consultation with a person (which includes corporations and other agencies and governments) is required before release of the type of information in column A if it is considered that both of the factors in column B apply:

A. Type of information proposed to be disclosed	B. Consultation required if:
<ul style="list-style-type: none">• an individual's personal information;• a person/entity's business, commercial, professional or financial interests;• research that has been, is being, or is intended to be, carried out by or on behalf of a person; or• affairs of a government of the Commonwealth or another State.	<ul style="list-style-type: none">• the person is likely to be concerned about the release; and• those concerns are relevant to the public interest.

Note: Consultation concerning personal information about a deceased person is to be done by consultation with a close relative of the deceased (e.g. a spouse, an adult child, a parent or an adult sibling). If the information is historical and the person has been dead for more than 30 years, there is no requirement to consult.

Note: personal information under the GIPA Act does not include information about an individual (comprising the individual's name and non-personal contact details) that reveals nothing more than the fact that the person was engaged in the exercise of public functions.

Any objections to disclosure received must be taken into account in determining whether there is an overriding public interest against disclosure (see s. 54 of the GIPA Act and **Appendix F**). Consultation is relevant to determining both the existence of a public interest consideration against disclosure, and whether that consideration carries sufficient weight to make it an overriding one.

A decision to disclose information despite an objection is reviewable (see **Part 8** of this policy). If this was to occur, access is not to be provided until the NSWEC has first given the objector notice of the agency's decision to provide access to the information and notice of the objector's right to have that decision reviewed. Importantly, information is not to be provided while the objector's review rights on the decision are pending (see s. 54(6) of the GIPA Act).

The IPC website contains templates for third party consultation. See:

- Third party consultation letter
- Consultation with another government agency letter.

The Information Commissioner has published a guideline that explains how, when and who to consult with under s. 54 of the GIPA Act. The Information Commissioner has also published a guideline that explains how to deal with requests for personal information under the GIPA Act. The RIO or delegated officer must consider guidelines issued by the Information Commissioner when making a decision.

The consultation process must be flexible and special consideration may arise when consulting with people with limited literacy, people whose first language is other than English and people with a disability.

The consultation process may take time. The RIO or delegated officer must decide as soon as possible if consultation is required. The decision period can be extended if consultation is required (see "Required period for deciding application" below for details).

Third parties may be more willing to agree to the disclosure of information concerning them if they know who is requesting the information and the context of that request. It is advisable to obtain the consent of the applicant prior to disclosing his or her identity and other particulars to third parties.

The RIO or delegated officer must keep records of all consultation undertaken by the NSWEC e.g. who was consulted, when and how consultation occurred and outcome of consultation.

5. Consideration of personal factors of application (s.55)

In determining whether there is an overriding public interest against disclosure, the personal factors of the application as set out in column A can be taken into account if relevant to any of the considerations in the table in s.14 of the GIPA Act against disclosure set out in column B:

A. Personal factors	B. Considerations against disclosure
<ul style="list-style-type: none"> • the applicant’s identity and relationship with any other person; • the applicant’s motives for making the access application; • any other factors particular to the applicant. 	<ul style="list-style-type: none"> • Item 2 – Law enforcement and security; • Item 3 – Individual rights, judicial processes and natural justice; • Item 4 Business interests of agencies and other persons; • Item 5 Environment, culture, economy and general matters.

The personal factors of the application in Column A can also be taken into account as factors in favour of disclosure.

The NSWEC may require an applicant to provide proof of his or her identity when determining whether there is an overriding public interest.

6. Applicant can object to inclusion in disclosure log (s.56)

An applicant and any other person with whom the agency has consulted (or is required to consult) under s. 54 can object to the inclusion of information on the disclosure log but only on the grounds that the information:

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

A decision to include the information in the disclosure log despite an objection is reviewable.

Deciding access applications

1. Required period for deciding application (s.57)

Notice of the decision must be given within 20 working days after the agency receives the application (the decision period).

Section 57(2)(a) of the GIPA Act enables the decision period to be extended by up to:

- 10 working days if consultation is necessary under s. 54,
- 10 working days if records need to be retrieved from archives, or
- 15 working days if both consultation and retrieval of records is required.

Note: The decision period can only be extended to allow for mandatory consultation, not just consultation that the agency chooses to do.

The applicant must be notified of a decision to defer and that the decision is reviewable.

The decision period can also be extended (and further extended) by agreement with the applicant.

2. How applications are decided (s.58 GIPA Act)

One or more of the following decisions can be made:

- to provide access;
- that the information is not held by the NSWEC;
- that the information is already available to the applicant (see **Appendix A** and s.59 of the GIPA Act);
- to refuse access because there is an overriding public interest against disclosure (see **Appendix F**);
- to refuse to deal with the application (see **Appendix G** and s.60 of the GIPA Act);
- to refuse to confirm or deny that the information is held (because there is an overriding public interest against disclosure of information confirming or denying that fact).

Note: These decisions are reviewable (see **Part 8** of this policy and Part 5 of the GIPA Act). The IPC website has a template available, titled *Notice of Decision Template*.

2.1. Decision that information already available to applicant (s.59)

A decision can be made that information is already available to an applicant but only if the information is:

- made publicly available by any agency in accordance with any Act, whether or not availability of the information is by inspection only or subject to a charge;
- available to the applicant from, or for inspection at, the agency free of charge in accordance with the GIPA Act or the agency's policies and practices; or
- contained in a document that is usually available for purchase.

If a decision is made that the information is already publicly available, notice of the decision must be given to the applicant indicating how the information can be accessed.

2.2. Decision to refuse to deal with application (s.60)

An agency may only refuse to deal with an access application (in whole or in part) for any of the following reasons:

- dealing with the application would require an unreasonable and substantial diversion of resources;

Note: In deciding whether dealing with an application would require an unreasonable and substantial diversion of an agency's resources, the agency is entitled to consider 2 or more applications (including any previous applications) as the one application if they are related and made by the same applicant (or someone in connection with the applications). The applicant is to be given a reasonable opportunity to amend the application. The decision period stops running while the applicant is being given an opportunity to amend the application.

- the NSWEC has already decided a previous application for the information concerned (or information that is substantially the same) made by the applicant and there are no reasonable grounds for believing that the agency would make a different decision;
- the applicant has previously been provided with access to the information concerned;
- the applicant has failed to pay an advance deposit (see "Processing charges and advance deposits" below as well as s. 70 of the GIPA Act);
- the information was available to the applicant as documents produced in compliance to a subpoena or other order of a court.

An applicant is not entitled to a refund of the application fee if the NSWEC refuses to deal with the application.

2.3. Deemed refusal if application not decided within time (s.63)

If the application is not decided within the decision period (see "Required period for deciding application (s.57)" above), the agency is deemed to have refused to deal with the application and the application fee is to be refunded.

Note: A deemed decision to refuse to deal with an application is reviewable (see Part 5 of the GIPA Act).

The agency may continue to deal with, and subsequently decide the application (**a late decision**).

No processing charge can be imposed for deemed refusals (whether or not a late decision is made).

Processing charges and advance deposits

1. Processing charge for dealing with access application (ss.64, 65)

The processing charge is \$30 per hour for each hour of processing.

Note: The decision to impose a processing charge is reviewable under Part 5 of the GIPA Act.

The processing time for an application is the total amount of time that is necessary to be spent by any officer of the agency in dealing efficiently with the application. This includes time expended to consider the application, searching for records, consulting any third parties, and making a decision. If the RIO decides to impose processing charges, it will be necessary for the RIO to keep a record of the amount of time spent. This may be in the form of a ledger.

The Information Commissioner has issued a guideline on processing charges. The guideline provides that agencies “cannot charge for registering the application, conversations with the applicant to clarify the request or reduce the scope, drafting file notes, drafting letters (including notification of a valid application, or advance deposit letters; however, the determination letter may be charged for), postage, internal conversations, printing and other general administration incidental to or associated with processing the application”.

The application fee of \$30 counts as a payment towards any processing charge.

Access to information granted in response to an application may be made conditional on payment of any processing charge imposed.

The guideline advises agencies to inform the applicant about the likely costs before the costs are incurred. This provides the applicant with the opportunity to reduce their scope or even withdraw their application if the costs will be an issue and the agency has determined, based on all the circumstances, that they are unable to waive or discount the application fee or charges.

2. Discounted processing charge – financial hardship and special public benefit (ss.65, 66)

An applicant is entitled to a 50% reduction in a processing charge if suffering financial hardship or if the information is of special benefit to the public.

Clause 9 of the GIPA Regulation requires the NSWEC to reduce, by 50% the processing charge if the applicant provides evidence that the applicant:

- is the holder of a Pensioner Concession card issued by the Commonwealth;
- is a full-time student; or
- is a non-profit organisation.

The Information Commissioner has published a guideline explaining how to discount processing charges for information that is of special benefit to the public generally. The Information Commissioner notes that recent case law requires a decision maker to “...decide whether he or she is satisfied that there is a benefit that is different from what is ordinary or usual to the general public and thus not merely the private interests of the applicant alone.” The Information Commissioner summarises the factors relevant to consideration of a special benefit to the public generally as including:

- public health and safety;
- the application of public funds;
- proper record keeping and legislative compliance generally by the agency in the exercise of its functions;
- the existence of a special interest group and the benefits of accountability and transparency of decision-making by government, in particular Members of Parliament; and
- the need to ensure that citizens have sufficient information to enable them to actively participate and contribute to consideration of relevant issues through submissions or enquiry.

The Information Commissioner provides that the public generally may include:

- a section of the community (e.g. single parents, persons aged over 65, persons with a disability, persons of a particular nationality);
- a community group (e.g. volunteer rescue groups, kids support service providers);
- a group of persons from a particular area (e.g. persons residing in a suburb where the information relates to issues, such as waste management proposals, within that suburb);

- a group of people with a common interest (e.g. local government constituents, a parents and citizens association, student unions or university students generally, advocacy groups);
- persons of a particular occupation or industry sector (e.g. medical practitioners, academics, newsagents); or
- any other members of the public other than the applicant (e.g. neighbors who may be interested in the same development proposal).

Note: The discount applies only to the processing charge, not the application fee. If a 50% reduction in processing charge applies, the application fee will pay for the first 2 hours of processing time (not just the first hour).

Refusal to reduce a processing charge is reviewable under Part 5 of the GIPA Act.

3. Waiver of processing charge (s.66(2), 67, 127)

The applicant is entitled to a full waiver of the processing charge if the information applied for is made publicly available from the time after the application is submitted up to 3 working days after access is provided.

The applicant is entitled to a waiver of the processing charge for the first 20 hours of processing time where the information applied for is personal information about the applicant.

The NSWEC is entitled to waive, reduce or refund any fee or charge payable or paid under the GIPA Act in any case that it thinks appropriate.

4. Clock stops running when advance deposit for payment of processing charge is required (s.68)

The applicant may be required (by notice) to make an advance payment of a processing charge (as an advance deposit).

Note: The decision to require an advance deposit is reviewable under Part 5 of the GIPA Act.

The period within which the application is required to be decided stops running from when the decision to require an advance deposit is made until payment of the advance deposit is received.

5. Maximum advance deposit and termination of processing if not paid (s.69, 70)

The maximum advance deposit that can be required is 50% of the estimated amount of the total processing (ignoring any reduction in processing charge to which the applicant may be entitled).

Note: An applicant can pay the full amount of the agency's estimate of the total processing charge in advance if the applicant wants to, but the applicant cannot be required to pay more than 50% of the estimate as an advance deposit.

If the advance deposit is not paid within the time required, the NSWEC may give notice that it refuses to deal further with the application (unless the applicant has applied for review of the time required for the advance deposit).

Note: The decision to refuse to deal further with an access application is reviewable under Part 5 of the GIPA Act.

6. Refund of advance deposit (s.71)

Advance deposit amounts that exceed total processing charges are refundable. The full advance deposit is refundable if the application is not decided within time.

Note: A processing charge cannot be imposed if the application is not decided within time.

How access is provided

1. Forms of access (s.72)

Access to a record containing information in response to an access application may be provided in one of the forms set out under Column A. Access must be provided in the way requested by the applicant (so long as that is in a form set out in Column A) unless to do so would cause any one of the circumstances set out under Column B.

A. Forms of access	B. Circumstances preventing access in form requested
<ul style="list-style-type: none">• reasonable opportunity to inspect;• provision of a copy;• provision of access together with necessary facilities to enable the information to be read, viewed or listened to (as appropriate);• provision of a written transcript (where information is in an audio record or recorded in an encoded format).	<ul style="list-style-type: none">• unreasonable interference with the operations of the agency;• incurring unreasonable additional costs;• detrimental to the proper preservation of the record;• infringement of copyright;• overriding public interest against disclosure in the form requested by the applicant.

Note: Decisions about forms of access are reviewable under Part 5 of the GIPA Act.

2. Access to be unconditional (s.73)

Conditions **cannot** be imposed on the use or disclosure of information provided in response to an access application.

However, a condition may be imposed as to how a right of access may be exercised (such as a condition that prevents an applicant making notes from or taking a copy of a record that is made available for inspection) but only to avoid there being an overriding public interest against disclosure of the information.

Note: Access can also be made conditional on the **payment** of processing charges (s 64) and on the provision of evidence of identity or other personal factors relevant to the agency's decision to provide access (s. 55).

3. Deletion of information from copy of record (s.74)

Information may be deleted from a copy of a record to be provided in response to an access application either because the deleted information is not relevant to the information applied for or because (if the deleted information was applied for) access to that information has been refused.

4. Access period (s.77)

Where access is granted, the applicant has a period of 6 months (the access period) to access the information after which entitlement to access lapses.

The access period starts from when notice of the decision to grant access is given to the applicant (or from the end of any deferral to provide access – see below).

5. Deferral of access (s.78)

Where access is granted, provision of access may be deferred if the information is contained in a record (or a draft of or extract from a record) that:

- is required to be published by law but is yet to be published; or
- has been prepared for presentation to Parliament but is yet to be presented; or
- has been prepared for submission to a particular person or body, but is yet to be submitted.

Note: A decision to defer access is reviewable under Part 5 of the GIPA Act. The applicant must be advised of the deferral and when the deferral period will end in the notice of decision to grant access.

If access is deferred for more than 12 months, the applicant is entitled to make a further access application for the information. No application fee or processing charge is payable in respect of the further application and access pursuant to the further application cannot be deferred under this section.

Appendix F – Applying the public interest test

The NSWEC must apply the public interest test having regard to the obligation to promote the objectives of the GIPA Act and to any relevant guidelines issued by the Information Commissioner.

The public interest test involves three steps:

1. Identifying the relevant public interest considerations *for* disclosure;
2. Identifying any relevant public interests *against* disclosure;
3. Assessing whether the public interest against disclosure outweighs the public interest in favour.

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

The GIPA Act allows for consideration of any public interest in favour of disclosure.

Examples of public interests in favour of disclosure are listed under s. 12 of the GIPA Act and include:

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

The NSWEC is not limited to these examples but can take into account any public interest in favour of disclosure. The NSWEC must also have regard to any guidelines on additional considerations favouring disclosure that may be issued by the Information Commissioner from time to time.

Step 2: Identify relevant public interest considerations against disclosure

The GIPA Act provides an exhaustive list of public interest considerations against disclosure. These are the only considerations against disclosure that the NSWEC may consider in applying the public interest test. The considerations most relevant to the NSWEC are listed below. See the Table in s. 14 of the GIPA Act for the full list of considerations.

Prohibitions against disclosure under other Acts (“secrecy provisions”) (cl. 6 of the Table)

- consider whether the disclosure of the information would constitute a contravention of a provision of any other Act that prohibits the disclosure of that information.

Responsible and effective government (cl. 1 of the Table)

- consider whether the disclosure of the information could reasonably be expected to have one of the following effects:
 - prejudice the supply to the NSWEC of confidential information that facilitates the effective exercise of its functions;
 - prejudice the effective exercise by NSWEC of its functions;
 - found an action against the NSWEC for breach of confidence;
 - prejudice any audit, test, investigation or review conducted by or on behalf of the NSWEC.

Law enforcement and security (cl. 2 of the Table)

- consider whether the disclosure of the information could reasonably be expected to have one of the following effects:
 - reveal the identity of an informant or prejudice the future supply of information from an informant;
 - prejudice the investigation of a contravention or possible contravention of the law or prejudice the enforcement of the law.

Individual rights, judicial processes and natural justice (cl. 3 of the Table)

- consider whether the disclosure of the information could reasonably be expected to have one of the following effects:
 - reveal an individual's personal information (this consideration against disclosure of personal information should be interpreted as referring to third party information – see also the definition of “reveal” in schedule 4 of the GIPA Act);
 - contravene an information protection principle under the PPIP Act;
 - prejudice any court proceedings;
 - prejudice the fair trial of any person, the impartial adjudication of any case or a person's right to procedural fairness;
 - reveal false or unsubstantiated allegations about a person that are defamatory;
 - expose a person to a risk of harm or of serious harassment or serious intimidation.

Note: The Information Commissioner has issued a guideline with respect to personal information as a public interest consideration under the GIPA Act. In this guideline, the Information Commissioner notably points out that if an agency finds that either or both of the first two subparagraphs above, “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.”

Business interest of agencies and other persons (cl. 4 of the Table)

- consider whether the disclosure of the information could reasonably be expected to have one of the following effects:
 - reveal commercial-in-confidence provisions of a government contract;
 - diminish the competitive commercial value of any information to any person;
 - prejudice any person's legitimate business, commercial, professional or financial interests;
 - 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).

Step 3: Assess whether the public interest against disclosure outweighs the public interest in favour

Any decision of the NSWEC must be made after balancing any relevant considerations for and against disclosure. In each case, the NSWEC will consider a range of factors, including:

- the nature and context of the information;
- any factors special to the applicant;
- the relative weight of public interest considerations for and against disclosure.

The NSWEC will refuse to disclose information where, on balance, there is an overriding public interest against disclosure. Where considerations are evenly balanced, the presumption in favour of disclosure stands.

Information for which there is conclusive presumption of overriding public interest against disclosure

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 of the GIPA Act (see s. 14(1) of the GIPA Act and paragraph 7.12 of the this policy).

Appendix G – Reasonable search

Section 53 of the GIPA Act provides that an agency must undertake such reasonable searches as may be necessary.

What is a 'Reasonable Search'?

Searches must be conducted using the most efficient means reasonably available, including electronic search facilities where available. A reasonable effort to locate the information is expected.

What is reasonable will depend on a particular application. As a guide, the following searches are necessary:

- A search of the NSWEC records management system (e.g. TRIM/HP Records Manager) for key terms used in the access application and then any files located by that search;
- A search for electronic files and any files or folders held by the relevant area (including shared drives and personal drives);
- A search of emails (personal and public folders);
- Inquiries to staff within a relevant area(s) that would likely hold such information;
- A search of presentations, photographs, audio or visual recordings;
- A physical search of hard copy documents or papers on files.

Unreasonable diversion of resources and creating documents

Notably, an agency is not required to undertake any search for information that would require an unreasonable and substantial diversion of the agency's resources. For example:

- the search would prevent the NSWEC from performing one of its core functions for an unreasonable length of time;
- the information is held in a number of electronic data bases and would require a specific program or skilled officer to manipulate the data in order to provide access to the information.

It is not expected that the NSWEC go to unreasonable lengths to search for documents in locations where the information would not ordinarily be expected to be found.

It is not necessary to create a document to satisfy a request.

There is no requirement to search electronic backup systems unless the information was lost or destroyed contrary to the NSWEC's record management procedures or the *State Records Act 1998*.