

GIPA access applications for reportable conduct information

The NSW Reportable Conduct Scheme – Fact Sheet 12

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The Office of the Children's Guardian (OCG) is a public authority subject to the requirements of the *Government Information (Public Access) Act 2009* (GIPA Act).

The OCG supports the objects of the GIPA Act to maintain and advance a system of responsible and representative democratic Government that is open, accountable, fair and effective by making government information publicly available, unless there is an overriding public interest against disclosure.

DISCLAIMER: the contents of this Fact Sheet is for general information purposes only and does not constitute legal advice. Please seek your own legal advice where appropriate.

Not all government information can be accessed through an access application made under the GIPA Act (GIPA access application). This Fact Sheet sets out the way in which reportable conduct information can and cannot be accessed under the GIPA Act, through the OCG, government relevant entities and non-government relevant entities. The technical detail is outlined below, however, in summary:

- generally, a person cannot make a valid GIPA access application to the OCG for reportable conduct information. Please see: ‘Access to “information about the finding”’ below, for the exception to this rule
- a person can make a valid GIPA access application to a relevant entity for reportable conduct information
- if a relevant entity receives a valid GIPA access application for reportable conduct information, the entity must consult with the OCG before deciding the application and it cannot disclose the information without the OCG’s consent
- the GIPA Act applies to non-government relevant entities to the extent that a person makes a GIPA access application seeking access to information about a finding made against them with regards to sexual offence, sexual misconduct or serious physical assault involving children (as referred to in Schedule 1, clause 2 of the *Child Protection (Working with Children) Act 2012*).

Reportable conduct information is “excluded information”

Information is “excluded information of an agency” if it “relates to” any functions specified in Schedule 2, clause 2 of the GIPA Act in relation to the agency.

“Excluded information” of the OCG is information that relates to:

“reportable conduct matters under Part 4 of the *Children’s Guardian Act 2019* (including report handling, investigative and reporting functions, and any functions of the Children’s Guardian relating to Official Community Visitors appointed under the *Children’s Guardian Act 2019*).”¹ [emphasis added]

The reference to “reportable conduct matters under Part 4 of the *Children’s Guardian Act 2019*” extends to:

1. All information held by the OCG in connection with the execution of the OCG’s Reportable Conduct functions.

This includes information obtained as part of a reportable conduct inquiry, through complaints to the Reportable Conduct Directorate, and any matter notified or otherwise reported to the Reportable Conduct Directorate, even if it is assessed as not falling within the reportable conduct jurisdiction. It also includes records associated with the analogous Reportable Conduct Scheme that was administered by the NSW Ombudsman under Part 3A of the *Ombudsman Act 1974* before the function was transferred to the Children’s Guardian upon commencement of the Children’s Guardian Act 2019 (CG Act) on 1 March 2020.²

2. All information held by relevant entities in connection with fulfilling their Part 4 obligations.

Information generated by and in the possession of relevant entities in connection with their reportable conduct obligations is the ‘excluded information’ of the OCG, whether or not the OCG

¹ Schedule 2, clause 2 of GIPA Act

² Upon commencement of the CG Act, records kept in relation to Part 3A of the Ombudsman Act 1974 were transferred to the OCG. Such a record is to be treated as if it were a record that the Children’s Guardian had lawfully obtained in the performance of the Children’s Guardian’s functions (see Schedule 4, clause 9 of the CG Act)

has a copy of the records.

Under the GIPA Act, there is conclusive presumption that there is an overriding public interest against disclosure of the excluded information of an agency unless the agency consents to disclosure of the information.³

What does this mean in practice?

- As reportable conduct information is the excluded information of the OCG, a GIPA access application to the OCG for reportable conduct information is not a valid application, and an access application cannot be made to the OCG for such information. This is because of the operation of section 43 of the GIPA Act.
- Section 43 of the GIPA Act does not prevent a valid GIPA access application to a relevant entity for reportable conduct information. This is because reportable conduct information is not the excluded information of the relevant entity (it is the excluded information of the OCG).
- HOWEVER, as it is the excluded information of the OCG, it is to be conclusively presumed that there is an overriding public interest against disclosure unless the OCG consents to the disclosure of the information. This means that relevant entities cannot release reportable conduct information in response to a GIPA access application without the OCG's consent.
- Further, before a relevant entity refuses access to information on the basis that it is the excluded information of OCG, it must ask the OCG whether it (the OCG) consents to the disclosure of the information. This is a requirement set out in Schedule 1, clause 6(2) of the GIPA Act.

For more details, please see 'Consulting with the OCG is required' below.

Access to "information about the finding"

Section 46 of *Child Protection (Working with Children Check) Act 2012* (section 46) enables a person against whom a relevant entity has made a sustained finding of sexual offence, sexual misconduct or serious physical assault involving children, to apply for access under the GIPA Act to "information about the finding".

It should be noted that "information about the finding" under section 46:

- is limited to information that is directly "about" the finding in the sense that the finding is the subject matter of the information. This might include the finding itself, analysis of the evidence that leads directly to the finding, and the rationale for the finding
- does not extend to all information that may be 'related to' or 'in connection with' the findings. It would not include an entire investigation report or supporting documentation (which pre-date the finding) such as interview transcripts and submissions
- is information the employee would ordinarily already have been given by the relevant entity as part of a procedurally fair investigation.

Section 46 states that for the purposes of the section, the GIPA Act applies whether or not the agency is an agency to which the GIPA Act applies. This means that where section 46 applies, the GIPA Act can apply to a government relevant entity or a non-government relevant entity that receives an access application for reportable conduct information.

As "information about the finding" is reportable conduct information, it is the excluded information of the OCG (and remains "excluded information" notwithstanding the operation of section 46). As entities (government and non-government) are subject to the provisions of the GIPA Act when

³ Schedule 1, clause 6(1) of GIPA Act

responding to access applications under section 46, they cannot disclose “information about the finding” without the consent of the OCG (as per clause 6(1) of Schedule 1 to the GIPA Act).

For more details, please see ‘Consulting with the OCG is required’ below.

Consulting with the OCG is required

As stated, a relevant entity cannot release reportable conduct information in response to a GIPA access application unless the Children’s Guardian consents to the release.

Further, before the relevant entity decides to refuse to provide access to the information, it must ask the OCG whether it (the OCG) consents to disclosure of the information.

In both scenarios, a relevant entity must consult with the OCG before it makes its decision on an access application for reportable conduct information.

If the OCG declines consent, the relevant entity cannot release the information.

The fact that the OCG consents to the disclosure does not prevent the relevant entity from refusing to release the information on other grounds in the GIPA Act.

If a relevant entity receives a GIPA access application which relates – in full or in part – to reportable conduct information, the entity should contact the OCG’s General Counsel as a priority to ascertain whether the OCG consents to the disclosure of reportable conduct information, at Legal@ocg.nsw.gov.au. Please include:

- a copy of the valid GIPA access application
- a copy of the records containing reportable conduct information the entity identifies as falling within the scope of the access application, with any redactions the entity proposes making if it obtains the OCG’s consent to release the records,
- any information the entity considers relevant to the decision by the OCG about whether to consent to the disclosure (for example, whether the GIPA applicant has already been provided a copy of a document, or particular information)
- a due by date for a response.

A member of the OCG’s General Counsel Directorate will contact you in response to the consultation.

Office of the Children’s Guardian

www.ocg.nsw.gov.au

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