

Fact sheet

Access by Auditor-General to Confidential Information

The Auditor-General is entitled to access confidential information (including Cabinet information and information subject to legal professional privilege), and may disclose that information in the public interest, subject to consultation with the Premier

The Audit Office is entitled to access confidential information

- The Government Sector Audit and Other Legislation Amendment Act 2022 commenced on 28 November 2022.
- The Act made changes to the *Government Sector Audit Act 1983 (GSA Act)* and the *Local Government Act 1993 (LG Act)*, including to:
 - give the Auditor-General¹ full and free access to Cabinet information and information that could be subject to a claim of legal professional privilege (**confidential information**) for the purposes of an audit or other function conferred or imposed on the Auditor-General.
 - prevent the public disclosure of confidential information except where the Auditor-General considers that disclosure is in the public interest and is necessary for the exercise of the Auditor-General’s functions.
 - allow the Premier to issue a certificate that the disclosure of confidential information is not in the public interest, with such a certificate to be conclusive of that fact.

Process for providing the Audit Office with access to confidential information

- The Audit Office is now entitled to access confidential information under the GSA Act. Agencies do not need to seek the Premier’s approval to provide Cabinet information that they hold to the Audit Office.
- To assist with the efficient exercise of the Auditor-General’s functions under the GSA Act, all agencies must accurately classify confidential information according to the NSW Government Information Classification, Labelling and Handling Guidelines, including accurately classifying documents as “Sensitive – NSW Cabinet” and “Sensitive – Legal” where appropriate.
- Requests for eCabinet records – including Cabinet agendas, submissions, decisions and other official Cabinet records that are stored in eCabinet – should continue to be referred by the NSW Audit Office to The Cabinet Office (TCO) so that authoritative and final records can be provided to the Audit Office securely via eCabinet.
- The process by which the Audit Office may obtain access to Cabinet information is as follows:

¹ Auditors appointed by the Auditor-General under section 35 of the GSA Act and other persons authorised by the Auditor-General are also entitled to access confidential information under the GSA Act.

- Agencies are authorised to provide Cabinet information that they hold directly to the Audit Office. The Audit Office should liaise with relevant agencies to identify and access Cabinet information (within the meaning of the *Government Information (Public Access) Act 2009* (NSW) (**GIPA Act**)) and should generally only contact TCO where access to eCabinet records is required.
- Where the Audit Office requires access to eCabinet records (e.g. Cabinet agendas, submissions, decisions etc), the Auditor-General will write to the Deputy Secretary, General Counsel of TCO requesting access to the official records of Cabinet. The letter should specify the Cabinet document identifiers, titles, and dates. The letter should be emailed to governance@tco.nsw.gov.au.
- Agencies should assist the Audit Office with the identification of document-specific Cabinet reference numbers or other relevant specific search terms and dates to assist with the identification of records in eCabinet.
- TCO will conduct searches on eCabinet for the documents identified and then distribute these documents via eCabinet to primary users within the Audit Office. Primary users should then provide access to the relevant Cabinet documents to the relevant Audit Office staff working on the audit on a need-to-know basis via eCabinet.
- Once the Cabinet documents are no longer required, the Audit Office must notify TCO, and access to the documents in eCabinet will be revoked.
- Where physical copies of Cabinet documents have been provided as they are not accessible through eCabinet, the Audit Office must email governance@tco.nsw.gov.au to arrange for the physical Cabinet documents to be returned to TCO.

The Audit Office may disclose confidential information in the public interest

- Under section 36A, the Auditor-General may authorise the disclosure of confidential information if:
 - in the Auditor-General’s opinion, the disclosure of the confidential information is in the public interest and necessary for the exercise of the Auditor-General’s functions, and
 - the Auditor-General has given the Premier at least 28 days’ notice of the proposed disclosure, and
 - the Premier has not, within 28 days after being notified of the proposed disclosure, issued a certificate that the disclosure of the confidential information is, in the Premier’s opinion, not in the public interest.
- In forming an opinion about whether or not the disclosure of the confidential information is in the public interest, the Auditor-General and the Premier must consider the public interest factors for and against the disclosure.
- A certificate of the Premier that it is not in the public interest to disclose confidential information is conclusive of that fact.
- A claim of confidentiality or privilege is **not** waived merely because confidential information is accessed, provided, or produced under the GSA Act.

Process for disclosure of confidential information

- Before disclosing confidential information, the Auditor-General must notify the Premier of the Auditor-General’s intention to disclose that information.

- The notification letter to the Premier should be copied to governance@tco.nsw.gov.au and should identify:
 - the specific confidential information that is proposed to be disclosed, including its location in the audit report,
 - the source of the confidential information (for example, the document identifiers, titles, and dates for official records of Cabinet), and
 - the contact details of agency officers who provided the confidential information to the Auditor-General for the purposes of the audit.
- In fulfilling the above requirements, the Audit Office is reliant upon the accurate, specific, and complete classification of confidential documents provided to it by agencies.
- Using the contact details provided by the Audit Office, TCO will consult the relevant agencies about the confidential information, to inform the Premier's consideration of whether disclosure of the information is in the public interest.
- In line with established Cabinet conventions, where the confidential information is Cabinet information of a former Government, TCO will also notify and consult with the former Premier during whose tenure the Cabinet information was created.
- Where a certificate is issued by the Premier under section 36A of the GSA Act, the Auditor-General is not permitted to disclose the confidential information in the audit report. Where a certificate is issued, this may be noted in the Auditor-General's report to Parliament.
- Where a section 36A certificate is not issued by the Premier within the 28-day timeframe set out in the GSA Act, the Auditor-General may authorise disclosure of confidential information by the tabling and publication of the audit report. In these circumstances, TCO's Deputy Secretary, General Counsel will write to the Auditor-General to confirm that no certificate will be issued.

Contact us

For more information, please contact Governance Branch, TCO:

E: governance@tco.nsw.gov.au