



office of the
information
commissioner
new south wales

Guideline 2:

Discounting charges – special benefit to
the public generally

March 2011

promoting open government

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Government Information (Public Access) Act 2009 (NSW) section 66

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

These Guidelines, made pursuant to those sections of the GIPA Act, are made to assist agencies decide whether to reduce processing charges on the ground that the information is of special benefit to the public generally in accordance with section 66 of the GIPA Act.

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

The operation and effectiveness of the Guidelines will be reviewed after twelve months.

Deirdre O'Donnell

Information Commissioner

14 March 2011

Government Information (Public Access) Act 2009 (NSW)

66 Discounted processing charge—special public benefit

- (1) An applicant is entitled to a 50 per cent reduction in a processing charge imposed by an agency if the agency is satisfied that the information applied for is of special benefit to the public generally.

Note. The discount applies only to the processing charge, not the application fee. If a 50 per cent reduction in processing charge applies, the application fee will pay for the first 2 hours of processing time (not just the first hour) (see section 64). Although an agency may choose to waive or reduce the application fee as well (see section 127).

A decision to refuse to reduce a processing charge is reviewable under Part 5.

- (2) If the information applied for was not publicly available at the time the application was received but the agency makes the information publicly available either before or within 3 working days after providing access to the applicant, the applicant is entitled to a full waiver of the processing charge imposed by the agency.
- (3) The Information Commissioner may, for the assistance of agencies, publish guidelines about reductions in processing charges under this section.

Introduction

Under sections 12(3) and 14(3) of the *Government Information (Public Access) Act 2009* (the GIPA Act), the Information Commissioner may make guidelines to assist agencies regarding the public interest considerations in favour of, or against, disclosure of information. These Guidelines are made under those sections to assist agencies interpret section 66 of the GIPA Act in determining whether to apply a 50 per cent reduction in a processing charge on the grounds that the information applied for is of special benefit to the public generally. Agencies are required to have regard to these Guidelines in accordance with section 15(b) of the GIPA Act.

In order to interpret and apply section 66 of the GIPA Act, agencies need to have a general understanding of how fees, processing charges and discounts are encompassed under the Act. Part 1 of these Guidelines provides an overview of fees and processing charges and Part 2 provides an overview of discounts as encompassed under the GIPA Act.

Part 1: Overview of fees and charges

- 1.1 The GIPA Act aims to foster and promote responsible and representative government that is open, accountable, fair and effective by encouraging proactive and informal release of information free of charge or at the lowest reasonable cost. Accordingly, most government information should be available free of charge via:
- 1.1.1 **Mandatory release of open access information (section 6)**
Open access information comprises:
- An agency information guide
 - Documents tabled in Parliament by, or on behalf of, an agency
 - An agency's policy documents
 - A disclosure log of information released under formal access applications
 - A register of contracts an agency has with private sector entities for a value of more than \$150,000, and
 - A record of the open access information that is not made public due to an overriding public interest against disclosure (section 18).
- The *Government Information (Public Access) Regulation 2009* (GIPA Regulation) also requires:
- Ministers to disclose media releases and details of overseas travel
 - Government departments to publish a list of major assets, the total number and value of properties disposed of in a previous financial year, and their guarantees of service and code of conduct (if any)
 - Local councils to provide additional information, including:
 - Annual, financial, and auditors' reports, management plans and various codes
 - Agendas, business papers and minutes of meetings
 - Information contained in certain registers
 - Plans and policies
 - Development applications and associated documents, and
 - Information concerning approvals, orders and other documents.
- 1.1.3 **Proactive release of information (section 7)**
Section 7 of the GIPA Act authorises agencies to release other information (information not subject to mandatory release) proactively, unless there is an overriding public interest against disclosure. Such information proactively disclosed should be free of charge or at the lowest reasonable cost. The OIC strongly encourages agencies to release information proactively or informally where there is no overriding public interest against disclosure.
- 1.1.4 **Informal release of information (section 8)**
Agencies are authorised to release any government information they hold to people requesting it without requiring a formal access application to be lodged where there is no overriding public interest against disclosure.
- 1.2 If a formal application is received, the agency may deal with the application informally by refunding the application fee and processing the request for free (with the applicant's consent and after advising the applicant that they will not have a right to have the decision reviewed if they agree to the agency

processing the application informally). Alternatively, the agency could process the request as a formal application with attached review rights, but waive the application fee and processing charges.

Application fee and processing charges

- 1.4 For all other information, an agency may require an applicant seeking access to government information to submit a formal access application. Where an access application is required, the applicant is required to pay an application fee of \$30 unless the agency waives or reduces this fee (see section 127 – general discretion and section 2.2 of this guideline). An agency may also impose a processing charge for dealing with an access application. In accordance with section 64 of the GIPA Act, the agency may only charge at a maximum rate of \$30 per hour for each hour required to process the access application.
- 1.5 If a processing charge is imposed, the application fee will count as payment towards a processing charge. Thus, if an agency charges at the full rate of \$30 per hour, the application fee will pay for the first hour of processing the access application. If a 50 per cent discount on charges is granted by the agency, then the application fee will pay for the first two hours of processing the access application.
- 1.6 The processing charge covers the total amount of time that it takes an agency to deal efficiently with the application and to provide a response to the application. This only includes time expended to legitimately consider the application, searching for records, consulting any third parties, and making a decision.
- 1.7 The OIC's view is 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.

Further details about fees and charges may be found in the OIC's ['GIPA Act fees and charges'](#) fact sheet.

Charges must be reasonable

- 1.8 Under the GIPA Act, an agency is required to estimate the processing charge based on the time that would be spent by a reasonably competent officer with appropriate knowledge and familiarity with processing access applications and document management systems.
- 1.9 Under the Act, a decision to impose a charge or require an advance deposit and a decision not to reduce a processing charge are all reviewable (section 80 of the GIPA Act).
- 1.10 The OIC's view is that agencies should keep a record of estimates for processing charges, including calculations, and actual costs of processing the application to demonstrate how the processing charge was calculated should the decision be reviewed.
- 1.11 The OIC's view is that agencies should advise 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.

TIPS:

The OIC's view is that:

- charges must be reasonable.
- agencies should keep records of estimated calculations and actual costs.

Part 2: Overview of discounts

- 2.1 An applicant may apply for a 50 per cent reduction in processing charges on the grounds:
 1. of financial hardship (section 65). Under clause 9 of the GIPA Regulation, financial hardship includes if the applicant can provide evidence that he or she is:
 - a. the holder of a Pensioner Concession card issued by the Commonwealth that is in force,
 - b. a full-time student,
 - c. a non-profit organisation, including a person applying for or on behalf of a non-profit organisation.
 2. that the information applied for is of special benefit to the public generally (section 66).

- 2.2 Additionally, the agency may exercise its discretion under section 127 of the GIPA Act to waive, reduce or refund the application fee and/or processing charges in any case that it thinks appropriate.
- 2.3 The OIC strongly encourages agencies to exercise the discretion to waive, reduce or refund the application fee and/or processing charges whenever appropriate to further the objects of the Act and consistent with the intentions of Parliament to facilitate and encourage, promptly and at the lowest reasonable cost, access to government information.
- 2.4 Subsection 66(2) requires full waiver of the processing charge and processing fee if the agency makes the information applied for publicly available either before or within three working days after providing access to the applicant.

Part 3: What is a ‘special benefit to the public generally’?

- 3.1 Reduction of charges on the special benefit ground relies on the particular information applied for having a special interest or benefit to the public generally.
- 3.2 The elements of the special benefit ground are:

3.2.1 The information applied for confers the special benefit

The particular information the subject of the application, if released, should have special benefit or special interest to the public. The decision-maker needs to consider the content of the document and the context of its release.

3.2.2 Special benefit

i) Disclosure of government information is presumed to be in the public interest under section 5 of the GIPA Act. The decision-maker must also exercise their discretion to reduce processing charges in a way that is consistent with the intentions of Parliament outlined in section 2 of the GIPA Act – that the discretions conferred by this Act be exercised, as far as possible, so as to facilitate and encourage, promptly and at the lowest reasonable cost, access to government information.

ii) There is no prescriptive definition of “special benefit to the public generally”. However, as a general guide, information that better informs the public about government or concerns a publicly significant issue would be of special benefit or special interest to the public generally. For example, if the information would inform public debate about an issue, increase public understanding about government functions, or contribute to the public’s understanding of an issue of public significance (such as the environment, health, safety, civil liberties, social welfare, or public funds), then this would have a special benefit. Information that could be viewed as satisfying public curiosity would not ordinarily satisfy the special benefit ground.

iii) The issue the decision-maker must consider is whether the release of the information would result in a special benefit to the public, rather than whether reducing the charges would result in a special benefit.

iv) Agencies are expected to consider the merits of each application separately and take into account all the circumstances of each case. For example, if an agency has already determined the public interest test in one application requesting a 50 per cent reduction on the grounds of special benefit to the public generally, and then receives another 50 per cent reduction application on the same ground concerning the same or majority of the same information, the agency cannot apply the public interest conclusion reached in the first decision to the latter or any other application. This is because the circumstances in each application for a 50 per cent reduction will differ.

v) Agencies cannot use a non-GIPA public interest determination that may have been carried out in a related process in determining the GIPA public interest test when assessing whether to grant a 50 per cent reduction in processing charges. For example, a public interest assessment may have been carried out during an environmental assessment or local council land development consultation. However,

TIP:

- Assess each application on its merits.

TIPS:

Information may have special benefit if it:

- Concerns a publicly significant issue
- Informs public debate about an issue
- Contributes to public understanding

a council could not use the public interest conclusion reached in the environmental or development assessment in determining the 'special benefit' for a GIPA access application.

3.2.3 The public generally

For the purpose of a reduction in processing charges under section 66, the benefit as a result of the release of the information should flow to members of the public and not just to the applicant.

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. neighbours who may be interested in the same development proposal).

The agency need only be able to envisage that the information may be of special benefit to other members of the public other than the applicant. They need not be satisfied that it will be a large group of persons.

Note: If the information applied for is not of special benefit to the public generally but the applicant is likely to suffer a detriment as a result of their inability to pay the assessed charges, the applicant may be entitled to a 50 per cent reduction of charges on the grounds of financial hardship. The agency should advise the applicant of this and consider discounting the charges on those grounds.

3.3 Factors that a decision-maker cannot take into account:

- i) The information might mislead or be misunderstood by the public, for example, because the public might not understand the technicalities or jargon used in a document.
- ii) That the information, if released, could be misrepresented, abbreviated or distorted, or presented in a biased way.

3.4 To assist agencies interpret the elements of section 66, Part 4 of these Guidelines provides examples of circumstances where there may be a special benefit.

Part 4: Examples of circumstances where there may be a special benefit

4.1 Below are some examples of circumstances where releasing the information may have a special benefit to the public generally. The list is intended to provide guidance only and is not a prescriptive or exhaustive list.

4.2 Examples where there may be a special benefit to the public generally:

- A researcher seeking government information where the information will be used in published work that may benefit the academic community.
- A post-graduate student seeking to use government information as part of their thesis.
- An advocacy group seeking information that will be analysed to report on government program delivery, such as expenditure on an infrastructure project.
- Not-for-profit bodies operating in environmental, health, social welfare, disability, or law reform seeking the information for a public interest purpose or to be used in a manner which will benefit a substantial section of the public. Examples could include a legal centre seeking information to prepare law reform reports, or a social welfare body seeking a list of community funding providers or community venues to provide information to their stakeholders.

- 4.3 The status of an applicant, for example a journalist or a Member of Parliament, will not give rise to an automatic right to discount charges on the grounds of special benefit to the public generally. It will depend on the nature of the information requested and whom the information will benefit (the benefit should not just flow to the organisation or body). An example of information which would only benefit the individual or body include a person seeking information relating to a recruitment process for a position they applied for in the agency.

However, information requested by a journalist or Member of Parliament would be of special benefit to the public in these examples:

- o A Member of Parliament requests information to assist a constituent and that constituent would ordinarily have been entitled to a discount of charges on the basis of special benefit to the public generally.
- o A journalist seeks information about government spending on a project that is likely to result in public scrutiny of government accountability.

Appendix A

Checklist – Is there a special benefit to the public generally?

Does the information you seek/or being sought have a special benefit to the public generally? Information may have a special benefit to the public generally if you can answer yes to any of the questions under both the 'special benefit' and 'public generally' sections:

Special Benefit:

- 1) Does the information relate to an issue of public debate?
- 2) Does the information relate to an issue of public significance (e.g. environment, health, safety, civil liberties, social welfare, public funds etc)?
- 3) Does it interest or benefit the public in some other way? (e.g. assist public understanding about government functions)
- 4) Would release of the information likely result in further analysis or research?

Additional questions which apply to agencies only:

- 5) Would the information add to the public's knowledge of the issues of public interest? For example, if the information is outdated then the information may not add to or be of benefit to the public's knowledge. However, if the information is outdated, then the agency should advise the applicant about the existence of updated information, or ensure that the historical nature or context of the information is made explicit.

Public generally:

- 6) Would any of the following have a special interest in the information:
 - a section of the community (e.g. single parents, persons over 65, persons with a disability, persons of a particular nationality etc).
 - a community group (e.g. volunteer rescue groups, kids support service providers etc)
 - a group of persons from a particular area (e.g. persons residing in a suburb X where the information relates to issues, such as waste management proposals, within suburb X),
 - 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 etc),
 - 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. neighbours who may be interested in the same development proposal).

Note: the agency need only be able to envisage that the information may be of special interest to other members of the public other than the applicant. They need not be satisfied that it will be a large group of persons.

- 7) Is the information, if disclosed, likely to lead to publication of the information?
- 8) Will the information be analysed or likely to lead to further analysis?