



Informal release of information

knowledge update

June 2010

The Government Information (Public Access) Act 2009 (NSW) (GIPA Act) provides for government information to be released in four ways:

1. Mandatory proactive release
2. Authorised proactive release
3. Informal release, and
4. Release subject to a formal access application.

The Office of the Information Commission (OIC) has released guidance material on the type of open access information agencies must make available on a mandatory and proactive basis, and has produced templates to assist agencies to deal with formal access applications.

For guidance regarding open access information, see *GIPA Act* sections 6 and 18 and the examples provided on the OIC website at www.oic.nsw.gov.au. Simply follow the Guidance Material link, and click on the For Agencies section, where web page samples for open access information are available.

In relation to the procedures for dealing with formal applications, see *GIPA Act* Part 4 and the templates provided on the OIC website at www.oic.nsw.gov.au. Access the Guidance Material link, and click on the For Agencies section, where the templates are available.

The *GIPA Act* provides agencies with a considerable discretion concerning the information they may consider releasing informally. To assist agencies with the 'informal release' provisions of the *GIPA Act*, this knowledge update deals with:

- what 'informal' release means
- the circumstances when agencies should consider releasing information informally
- what might be considered 'reasonable conditions' on informal release
- how the release may be authorised, and
- whether informal release should be recorded.

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Attached to this update we also include an example of a hypothetical agency that exercises a range of functions and holds a variety of information.

We have chosen to use a broad hypothetical example that has relevance across portfolios. Agencies may draw guidance from the example to suit their own circumstances. The example is not intended to limit the type of information that can, or should, be given out informally.

Informal release of information

Section 8 of the *GIPA Act* provides as follows:

- (1) An agency is authorised to release government information held by it to a person in response to an informal request by the person (that is, a request that is not an access application) unless there is an overriding public interest against disclosure of the information.
- (2) An agency can release government information in response to an informal request subject to any reasonable conditions that the agency thinks fit to impose.
- (3) An agency cannot be required to disclose government information pursuant to an informal request and cannot be required to consider an informal request for government information.
- (4) An agency can decide by what means information is to be released in response to an informal request.
- (5) An agency can facilitate public access to government information contained in a record by deleting matter from a copy of the record to be released in response to an informal request if inclusion of the matter would otherwise result in there being an overriding public interest against disclosure of the record.
- (6) The functions of an agency under this section may only be exercised by or with the authority (given either generally or in a particular case) of the principal officer of the agency.

The discretion given to agencies under section 8 in terms of whether they release information, and the conditions they impose on release, need to be exercised

in accordance with the objects of the *GIPA Act* in section 3 which states:

- (1) In order to maintain and advance a system of responsible and representative democratic Government that is open, accountable, fair and effective, the object of this Act is to open government information to the public by:
 - a. authorising and encouraging the proactive public release of government information by agencies, and
 - b. giving members of the public an enforceable right to access government information, and
 - c. providing that access to government information is restricted only when there is an overriding public interest against disclosure.
- (2) It is the intention of Parliament:
 - a. that this Act be interpreted and applied so as to further the object of this Act, and
 - b. 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.

What does 'informal' mean?

Informal release will occur when an agency gives out information in response to a request, without requiring the person requesting it to lodge a formal application under Part 4 of the *GIPA Act*.

Section 8 removes the red tape from disclosing information, and can be applied and interpreted flexibly. Agencies can decide how information is released, for example by phone, email, letter, fax, or handed over in person. Most agencies already release information in this way. This practice will not change, and is indeed encouraged, under the *GIPA Act*. However, agencies may now choose to release additional information informally, that previously might have required a formal request under the *Freedom of Information Act (FOI Act)*.

Informal release is not limited to particular documents or types of information.

Section 8 can cover the informal release of open access information that is done everyday, such as when front counter staff distribute brochures or provide information over the phone in response to requests from members

of the public. It can also cover requests for other, more specific information, such as personal records or copies of correspondence (see below for the authorisation requirements for informal release).

Protection from liability

Staff of agencies 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 defamation or breach of confidence, that may result from the disclosure (see sections 113 and 115). Section 114 also protects staff from criminal liability that may arise merely because of a decision to disclose information made in good faith under the *GIPA Act*.

When should agencies consider releasing information informally?

Agencies may release any information informally unless there is an overriding public interest that would prevent this. It is not possible or desirable to prescribe in advance the circumstances in which information should be released informally. This will depend on the context of each request, and will be different for each agency. However, some general guidance may be helpful. Some relevant questions for agencies to ask themselves regarding informal release of information include:

- Is it in the public interest to release the information to the person or organisation requesting it?
- If an individual requests the information, is it his or her personal information?
- Can any sensitive information, including information about a third party, be easily deleted, allowing the rest to be released?
- Could a summary of the information be easily and quickly prepared if it is not possible to release all of the information?
- Is the information relatively simple to search for and obtain?

If the answer to any of these questions is 'yes', and there is no overriding public interest against disclosure, then agencies should consider releasing the information in the most appropriate format without requiring a formal application.

Agencies retain the discretion to require a formal application to be lodged in appropriate circumstances. Some examples may include where:

- searching for and retrieving the information sought would require a significant diversion of resources

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- the material contains information about a third party that cannot be deleted easily or without rendering the information useless, and consultation would need to occur, or
- the material is sensitive in nature and requires careful balancing of public interests.

What conditions might be considered 'reasonable'?

Section 8 enables agencies to impose 'reasonable conditions' on the informal release of information. This is a benefit to agencies that they do not have when releasing information under a formal access application.

The conditions that may reasonably be imposed will depend greatly on the circumstances and context of each request.

Three frequently asked questions about 'reasonable conditions' are:

- Would a reasonable condition include charging for photocopying or imposing other processing charges?
- Can an agency place conditions on how information may be accessed or used?
- Is it reasonable to place a time limit on meeting informal requests?

Charges

The *GIPA Act* is very specific in setting out the circumstances in which fees and charges may be imposed. However, section 8 is silent on the question of charges. Therefore, there is **no legislative authority to charge** for the informal release of information under section 8.

Where it is not feasible to release the information for free, for example where the volume is too great, or the request is not specific enough, agencies could consider inviting the person making the request to view the documents, and provide access to photocopying facilities that the person may use at his or her expense.

Where the information would involve significant cost to obtain and disclose, a further option would be to suggest that a formal application be lodged. While this would require the applicant to pay a fee and may incur processing charges, the applicant would have the right to seek review of decisions about access and charges in accordance with Part 5 of the *GIPA Act*. This right does not exist in relation to informal release.

Conditions on access and use

Section 8(4) provides that agencies are able to decide how information is released pursuant to an informal request. It may be reasonable in some circumstances for agencies to limit the way in which the information may be accessed or used. For example, where material is subject to copyright, it would be reasonable for an agency to permit 'view only' access, and not permit photocopying.

Time limits

In accordance with the objects of the *GIPA Act*, agencies should endeavour to meet requests for information promptly. However, where providing the information in response to an informal request would take staff away from their other duties for a significant amount of time, it may be reasonable to impose a time limit beyond which a formal application may be required.

Time limits should be interpreted and applied flexibly, however, and adjusted depending on factors such as:

- the size of the agency
- the number of staff at work on that day, and
- whether the person making the request has any special needs.

If an agency decides that meeting an informal request for information would take an unreasonable amount of time, it should explain to the person making the request that a formal application would be the best way to proceed. Agencies should also point out that although this would involve charges, it would also enable the information request to be considered in greater depth, and provide a right of review.

Form of authorisation

Under section 8, an employee releasing information informally under the *GIPA Act* must be authorised by the principal officer of that agency. That authorisation may be general or specific.

Authorisations under section 8 may constitute a formal delegation, but do not have to be in this form. For example, if a job description requires a person to provide information and assistance to the public or to other agencies, then this serves as a general authorisation to release certain types of information informally.

In certain situations, agencies may wish to authorise specific staff to release particular types of information. An example may be authorising a division head to approve the informal release of correspondence.

Authorisations can take the form that best suits each agency. The key factor is that managers and staff discuss how they will release information they hold informally to ensure that everyone is confident of their obligations under section 8.

Can agencies suggest that a formal application be dealt with informally?

Yes. If an agency receives an access application, they may contact the applicant and suggest that the request could be dealt with informally. The agency would need to explain to the applicant that this would mean they did not have to pay an application fee, but that they would not have any review rights.

Should agencies record the information released informally?

Agencies are not required to report under the *GIPA Act* on the information they release informally, and the OIC is not currently planning to ask for any statistics or other details.

However, agencies may decide to keep their own records concerning the information they release informally and any conditions attached to release. They may choose to do this to monitor the type of requests they receive so that any information requested repeatedly may be released proactively.

Agencies should keep in mind that any records generated regarding informal release will need to comply with the requirements of the *State Records Act 1998 (NSW)* (see <http://www.records.nsw.gov.au>).

What if there are repeated requests for the same information?

If agencies receive repeated requests for the same type of information, it is a good indication that this information is of general interest to the public. Agencies may wish to disclose it proactively, subject to any overriding public interest considerations. This would save time and agency resources dealing with the same types of requests over and over again, and satisfy the public interest in favour of disclosure.

Where can I get more information about right to information?

- Go to www.oic.nsw.gov.au
- Email oiinfo@oic.nsw.gov.au
- Mail GPO Box 7011, Sydney NSW 2001
- Visit Level 11, 1 Castlereagh Street, Sydney NSW 2000

- Call 1800 INFOCOM (1800 463 626) between 9am to 5pm, Monday to Friday (excluding public holidays).

PLEASE NOTE

The GIPA Act commences on 1 July 2010.

Informal release – hypothetical example

The following example of a mythical department is provided as a guide to assist agencies in interpreting and applying the informal release provisions in section 8 of the *GIPA Act*. We have given the department a range of functions in the hope that at least one will be relevant to most agencies.

The examples are guides only, and agencies can draw on them to suit their own needs.

The agency

The General Office Governing Incantations, Potions and Alchemy (GOGIPA) is a super department employing 10,000 staff across five sub-agencies. The department has the following functions:

1. To fund educational institutions for the pursuit of excellence in the mystical arts.
2. To license mystical practitioners and investigate alleged breaches of licence conditions.
3. To procure essential magical equipment for approved use in GOGIPA's institutions.
4. To provide low cost housing for retired witches and warlocks.
5. To promote public awareness about the responsible use of magic.

GOGIPA is committed to the spirit and object of the *GIPA Act* and is working hard on ensuring that it complies.

The information it holds

GOGIPA holds a vast amount of information across a range of subjects, most of which is held by the sub-agencies. The following open access information can be found on GOGIPA's website (see www.gogipa.gov.ex) with links to the sub-agencies where relevant:

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- A list of educational institutions, including selection criteria and curriculum details
- A list of licensed GOGIPA practitioners
- The GOGIPA practitioners' code of conduct
- Reports of investigations into code violations
- Policies on approved magical practices
- Register of contracts with suppliers of cauldrons and wands, and leases of real property.

In addition, staff are authorised to release the following information proactively:

- Details of scholarships for outstanding occult practices
- Photos of the award ceremony for the winning entry in the 'Spellsafe' public education campaign
- Results of international research on relevant mystical arts.

GOGIPA receives many requests for information to be released informally, and documents how it deals with them. The following scenarios provide examples of the range of situations where the informal release provisions may be relevant.

Scenario 1

Maleficent works as an Information and Assistance Officer in one of the GOGIPA sub-agencies. She is asked on a routine basis for brochures advertising a forthcoming exhibition of exotic wands from around the world. She confidently gives out these brochures since providing information about her agency is part of her job description.

Yesterday, Maleficent received a phone call asking if any exhibitors had a name beginning with 'Q'. The caller was interested since he had always found artists with 'Q' names particularly fascinating. Maleficent knew that she could retrieve this information quickly and easily. Her manager has also assured her that she is authorised to deal with routine enquiries such as this. Maleficent phones the caller back and provides the information.

Scenario 2

Luthor manages the historical records section of GOGIPA. He has been authorised by the Director General of GOGIPA to release any information informally, subject to the public interest test. Luthor receives a request from Delores for photos taken 10 years earlier of one of GOGIPA's educational institutions

before it was renovated to assist in a research project she is undertaking. Luthor knows that some of the photos are subject to copyright.

He advises Delores that she can have copies of the photos that are copyright free, but cannot photocopy the others. He suggests to Delores that she come into GOGIPA's offices and view those photos.

NB: Luthor noted that the copyright was owned by a private photographer. If GOGIPA had owned the copyright, he would have considered providing a copy in this instance, subject to a condition that Delores only use the photos for her research project, and not for commercial gain.

Scenario 3

Zephyr is a retired warlock on a waiting list for the Shady Cauldron, GOGIPA's most sought-after dwelling for the over-365's whose magic just isn't what it used to be. He approaches Hepsiba, an officer in the GOGIPA retirement housing section, to find out where he is on the waiting list, and the names of the witches and warlocks ahead of him.

Hepsiba is authorised to release personal information in response to a request from the person to whom it relates, provided there is no overriding public interest against disclosure. Hepsiba is happy to advise Zephyr that he is 113th on the waiting list.

However, Hepsiba decides against revealing the names of the 112 witches and warlocks ahead of Zephyr, due to privacy considerations, and the unreasonable amount of time it would take to contact each person to ask their permission. She is also concerned that giving Zephyr this information could compromise the safety of the others on the list.

Scenario 4

Genie would like to know the best educational options for her 5 daughters. She is attracted to the idea of single sex education, but is concerned that most of the GOGIPA funding goes to schools for warlocks rather than witches.

She emails Xandor at the education funding section of GOGIPA and asks for a breakdown in the amount of funding directed to schools for witches in comparison with amount spent on warlocks. Xandor has this information readily available and sees no reason not to give it to Genie. In fact, this is the 10th time he has been asked that question this year. Xandor decides that this is

obviously an issue of considerable public interest, and therefore adds this information to GOGIPA's proactive release program.

Scenario 5

Murgatroyd is a wizard who was permanently struck off following an adverse finding by the wizard council. Murgatroyd has a copy of the council's report, but wants access to their working notes and witness reports on which the decision was based.

He writes to the council asking for this information. The Chief Wizard knows that this information will take a few days to compile, and contains sensitive information about other people and so would require consultation. The council is also short staffed at the moment, and complying with the request informally would mean that staff would be diverted from their regular duties which would have a significant impact on the council's operation.

The Chief Wizard writes back to Murgatroyd advising that his request would be time consuming and involve consultation, and the best way to give it proper consideration would be if Murgatroyd lodges a formal access application. The Chief Wizard notes that, while this would involve an application fee and possible processing charges, a formal application would give Murgatroyd the right to seek review if he is unhappy with any aspect of the council's decision.

The Chief Wizard also offers Murgatroyd the option of a summary of the decision-making process, which could be provided informally for free, but carried no review rights.

Murgatroyd agreed to lodge a formal application.