



office of the
information
commissioner
new south wales

Government Information (Public Access) Act 2009 (NSW)

compliance guide

Developed for government agencies by the Office of the
Information Commissioner

March 2012

promoting open government

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GIPA Act compliance guide – agencies – March 2012

Contents

A	Contents.....	2
B	Introduction	3
C	1. Principles of compliance.....	4
D	2. Public interest considerations.....	6
E	3. Open access information	8
F	4. Proactive and informal release of information	11
G	5. Access applications.....	12
H	6. Internal review	19
I	7. Private sector contractors	21
J	8. Reporting	22
K	9. Notices	23
L	10. Information excluded under the GIPA Act	24
M	11. Transitional arrangements.....	25
N	Questions?	26

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Introduction

The *Government Information (Public Access) Act 2009 (GIPA Act)* commenced on **1 July 2010**.

The object of the GIPA Act is to open government information to the public by:

- authorising and encouraging the proactive release of information,
- giving members of the public an enforceable right to obtain government information, and
- only restricting access to government information when there is an overriding public interest against disclosure.

Good compliance processes are fundamental to good compliance practice. This document sets out the processes and practices that will help agencies to comply with the GIPA Act. It provides a reference guide to the applicable sections of the legislation and includes some practical tips.

All references to sections of legislation in this document are from the GIPA Act, unless otherwise specified. This guide is not a replacement for reading and understanding the legislation itself.

Exercising discretions

The GIPA Act confers both obligations and discretions on agencies. Agencies must exercise discretions in accordance with the objectives of the GIPA Act.

Section 3(2) of the GIPA Act:

It is the intention of Parliament:

- that this Act be interpreted and applied so as to further the object of this Act, and*
- 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.*

We welcome feedback on our resources and encourage you to contact us with suggestions.

If you have any questions about how the GIPA Act applies to your agency or how to use this resource, or if you would like more information or assistance, you may contact the Office of the Information Commissioner (OIC) in the following ways:

- go to www.oic.nsw.gov.au
- email ocinfo@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 and 5pm, Monday to Friday (excluding public holidays).

1. Principles of compliance

Successful compliance, in the view of the Information Commissioner, rests on six key principles.

These key principles, and examples of how they may apply to your agency, are listed below.

Commitment

- Identify and assess your agency's right to information obligations.
- Have written policy and procedures to support your right to information practice, endorsed and promoted by senior management.
- Align your right to information policy to your agency's strategic and business objectives.
- Allocate sufficient resources to develop, implement, maintain and improve your agency's right to information system.
- Ensure all staff know about the policy and can easily gain access to it.
- Ensure senior management review and monitor the effectiveness of your agency's right to information system.

Communication and visibility

- Publicise the contact details of your Right to Information Officer widely (through your website, at customer service centres and in letters to customers).
- Inform the public about how to request information in a way that is easy to understand. Communicate this in a range of formats to assist people with diverse needs.
- Keep everyone who requests information or submits an access application informed of progress and the final outcome.
- Encourage contact with applicants by phone as well as in writing.
- Provide resources to staff so they can assist applicants and people requesting information.

Responsiveness and fairness

- Have processes and procedures in place to respond to requests quickly and fairly. You may respond more quickly than the timeframes in the GIPA Act.
- Be guided by the principles of procedural fairness and natural justice.
- Give informative reasons for decisions about access applications, including options for review.

Implementation

- Clearly allocate responsibility for compliance with the GIPA Act to staff, including to sub-agencies and discrete business units with frontline functions or independent identities.

- Identify existing information that can be made public, and consider public access when creating new information.

Resources, people and training

- Train Right to Information Officers to effectively and consistently deal with requests for information according to the GIPA Act.
- Train all authorised staff on how to deal with informal requests for information according to the GIPA Act.
- Help staff develop skills such as dealing with difficult behaviour, customer service and communicating in plain English.

Reviewing your systems

- Regularly review your right to information system to evaluate how well it is working. Encourage feedback from the public and staff.
- Monitor the outcomes of requests to ensure they are fair and reasonable and comply with the requirements and objectives of the GIPA Act.
- Use this information to continuously improve your right to information system.

Seeking assistance

- Ensure your staff are aware of avenues for information and assistance (including the OIC).
- Encourage applicants to contact the OIC if they remain dissatisfied with the outcome of a request for information or internal review process.

2. Public interest considerations

When deciding whether to release information, you must apply the public interest test and weigh up public interest considerations *for* disclosure and public interest considerations *against* disclosure.

There is no limit on the number of public considerations for disclosure, but there is a limited number of public interest considerations against disclosure, listed in the GIPA Act.

Applying the public interest test is a balancing exercise – identifying public interest factors in a general way is not enough. To apply the public interest test, you must consider and assess whether the public interest against disclosure *outweighs* the public interest in favour of disclosure, on a case by case basis.

The public interest test

Section 13 of the GIPA Act:

*There is an **overriding public interest against disclosure** of government information... if (and only if) there are public interest considerations against disclosure and, on balance, those considerations outweigh the public interest considerations in favour of disclosure.*

Public interest considerations in favour of disclosure

There is a general public interest in favour of disclosure.

- ⇒ Section 12 provides that there is no limit to the public interest considerations in favour of disclosure that an agency can take into account when applying the public interest test. Examples include:
- promoting open discussion of public affairs
 - enhancing government accountability
 - contributing to positive and informed debate on issues of public importance
 - informing the public about the operations of agencies
 - ensuring the effective oversight of expenditure of public funds
 - personal information is disclosed to the person concerned
 - disclosure reveals or substantiates misconduct, negligence, improper or unlawful conduct of an agency.
- ⇒ Section 55 provides that agencies can consider the personal factors of an application as a factor for (or against) disclosing government information.

Public interest considerations against disclosure

The GIPA Act lists the only public interest considerations against disclosure.



Section 14 provides that:

- agencies can conclusively presume there is an overriding public interest against disclosure for government information outlined in schedule 1 of the GIPA Act, and
- the only other considerations against disclosure that can be taken into account by agencies in applying the public interest test are listed in the table under section 14.



Section 55 provides that, in applying the public interest test, agencies can consider the personal factors of the application as a factor against (or for) disclosure in limited circumstances.

Principles in applying the public interest test

Your agency must act in accordance with the principles set out in section 15 of the GIPA Act when it applies the public interest test.



Section 15 provides that agencies are to:

- exercise their functions so as to promote the object of the GIPA Act
- take into consideration any guidelines issued by the Information Commissioner
- consider as irrelevant whether disclosure of information will result in embarrassment or loss of confidence in the Government
- consider as irrelevant whether disclosure of information might be misinterpreted or misunderstood
- consider as relevant that disclosure in response to an access application cannot be made subject to any conditions.

Tips

- Ensure your agency has identified the government information it holds to which schedule 1 or schedule 2 applies.
- Train staff in how to weigh up public interest considerations in favour of disclosure and public interest considerations against disclosure.

3. Open access information

Agencies must make 'open access information' publicly available unless there is an overriding public interest against disclosure.

What is open access information?

Your agency must make the following information publicly available as open access information:

Current agency information guide

- ⇒ Section 18(a) states that agencies must make their current agency information guide publicly available.
- ⇒ Sections 20 to 22 sets out the agency information guide requirements, including:
 - what to include in the agency information guide,
 - that agency information guides are to be adopted within six months of 1 July 2010, can be updated and amended at any time and must be reviewed at least once every 12 months, and
 - agencies are to submit their agency information guide to the Information Commissioner.

Further information and an example of an agency information guide can be found on the OIC's website.

Information about your agency tabled in Parliament

- ⇒ Section 18(b) provides that agencies must make publicly available any information about the agency contained in any document tabled in Parliament by or on behalf of the agency.

Policy documents

- ⇒ Section 18(c) requires an agency's policy documents to be made publicly available.
- ⇒ Sections 23 defines what constitutes an agency's policy documents

Disclosure log of access applications

- ⇒ Section 18(d) provides that an agency's disclosure log of access applications must be made publicly available.
- ⇒ Sections 25 states that: agencies must keep a record of access applications where the agency decides to release the information (noting the date of decision, description of the information, whether the information is now available to other members of the public and if so how it can be accessed if the information may be of interest to others).
- ⇒ Section 26 sets out the exceptions to this requirement.

Further information and an example of a disclosure log can be found on the OIC's website.

Register of government contracts

- ⇒ Section 18(e) provides that agencies must maintain a publicly available register of government contracts.
- ⇒ Sections 27 to 40 set out the requirements relating to government contracts with the private sector and provide that certain government contracts (as defined in schedule 4) and applicable details of each type of contract (Class 1, Class 2 and Class 3) need to be included in the register. These sections also cover requirements where there are subsequent variations to contracts, the minimum public access period for the register to be published, how to deal with third party disputes with respect to these sections and exceptions.
- ⇒ Under schedule 3,
 - the government contracts register requirements apply to contracts entered into after 1 January 2007
 - the government contracts register requirements apply to contracts entered into by a state-owned corporation or local authority on or after 1 July 2010.

Further information and a sample register can be found on the OIC's website.

A record of open access information not made publicly available

- ⇒ Section 18(f) provides that an agency must keep a record of information that is not publicly available because of an overriding public interest against disclosure and must make this record publicly available.
- ⇒ Section 6 states that the record only needs to indicate the general nature of the information concerned.

A sample record can be found on the OIC's website.

Information prescribed as 'open access information' by regulations

- ⇒ Section 18(g) provides that any information that may be prescribed as open access information by regulations is to be made publicly available. A link to the regulations is available on the OIC's website.

How do you provide access?

- ⇒ Open access information must be available:
 - on a website maintained by the agency (unless this would impose unreasonable additional costs to the agency) or
 - in at least one other way (as appropriate for the agency), free of charge.
- ⇒ Section 6 sets out the requirements for making open access information publicly available.

What other information can be made publicly available under the GIPA Act?

In addition to the requirement to make open access information publicly available, agencies are encouraged to proactively and informally release information unless there is an overriding public

interest against disclosure.

Tips

- Make open access information easy to find on your agency's website. For example have a clear link to the open access information on the home page.
- If your agency is unable to maintain a website, have your open access information available (if possible) in electronic format so that it can be provided easily and quickly.
- Allocate the responsibilities of maintaining and updating the agency information guide to an appropriate staff member.
- Ensure your agency information guide is reviewed and updated at least once every 12 months. The Information Commissioner has directed that the annual review date for agency information guides is to be 31 July each year.

4. Proactive and informal release of information

Agencies are authorised to make any information held by an agency publicly available either proactively or in response to an informal request unless there is an overriding public interest against disclosure.

Proactive release of information

- ⇒ Section 7(1) states that an agency is authorised to make any information it holds publicly available so long as there is no overriding public interest against disclosure. This means that your agency can identify government information that may be of interest to the general public and make this information publicly available unless there is an overriding public interest against disclosure.
- ⇒ Section 7(2) states that an agency may decide how proactively released information is made available (either free of charge or at the lowest reasonable cost).
- ⇒ Section 7(3) requires proactive release programs to be reviewed at least once every 12 months.
- ⇒ Section 7(5) provides that these discretions are to be exercised by the principal officer of the agency or an officer with delegated authority. Schedule 4 defines principal officer.

Informal release of information

Your agency may release information in response to informal requests unless there is an overriding public interest against disclosure.

- ⇒ Section 8 authorises an agency to:
 - make any information it holds publicly available so long as there is no overriding public interest against disclosure,
 - impose reasonable conditions on releasing government information,
 - decide whether or not to deal with an informal request,
 - decide how information will be released, and
 - release requested information in part or in full.
- ⇒ Section 8(6) provides that these discretions are to be exercised by the principal officer of the agency or an officer with delegated authority. Schedule 4 defines principal officer.

Tips

- Regularly identify information within your agency that can be proactively released.
- Where it is not possible for your agency to publish proactively released information on its website, use the website to indicate what information is available, how it can be accessed and who the public can contact to organise access.
- If you cannot release government information for free, compile a list of estimated costs for release of information and have this available on the agency website and on request.
- Maintain a record of information released in response to informal requests and consider if that information should be proactively released.

5. Access applications

Under the GIPA Act, people have an enforceable right to access government information. The public can exercise their right to request government information that is not released proactively or informally by submitting an access application.

Flow charts outlining how to work through an access application can be found on the following pages.

Access application requirements and procedures

Access applications are written applications for government information accompanied by a fee. They must be assessed within set timeframes. Access applications may be transferred between agencies.

- ⇒ Sections 41 to 43 describe the process for making access applications.
- ⇒ Sections 44 to 50 set out the procedures for transferring, amending and withdrawing access applications.
- ⇒ Sections 51 to 56 describe the process for dealing with access applications.
- ⇒ Sections 57 to 63 describe how to decide access applications.
- ⇒ Sections 64 to 71 explain processing charges and advanced deposits.

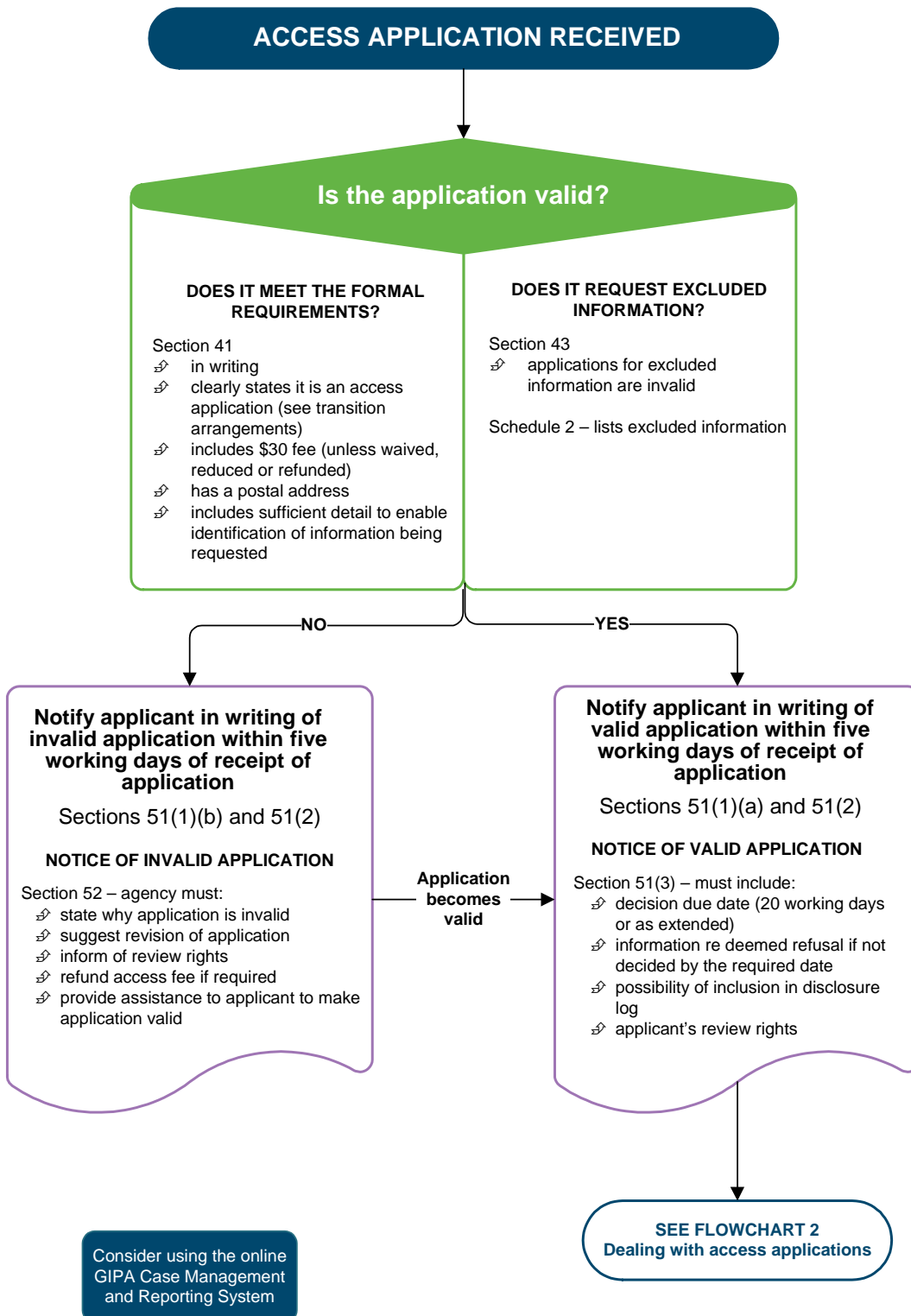
How to provide access

Agencies must comply with the GIPA Act when providing access to government information in response to an access application:

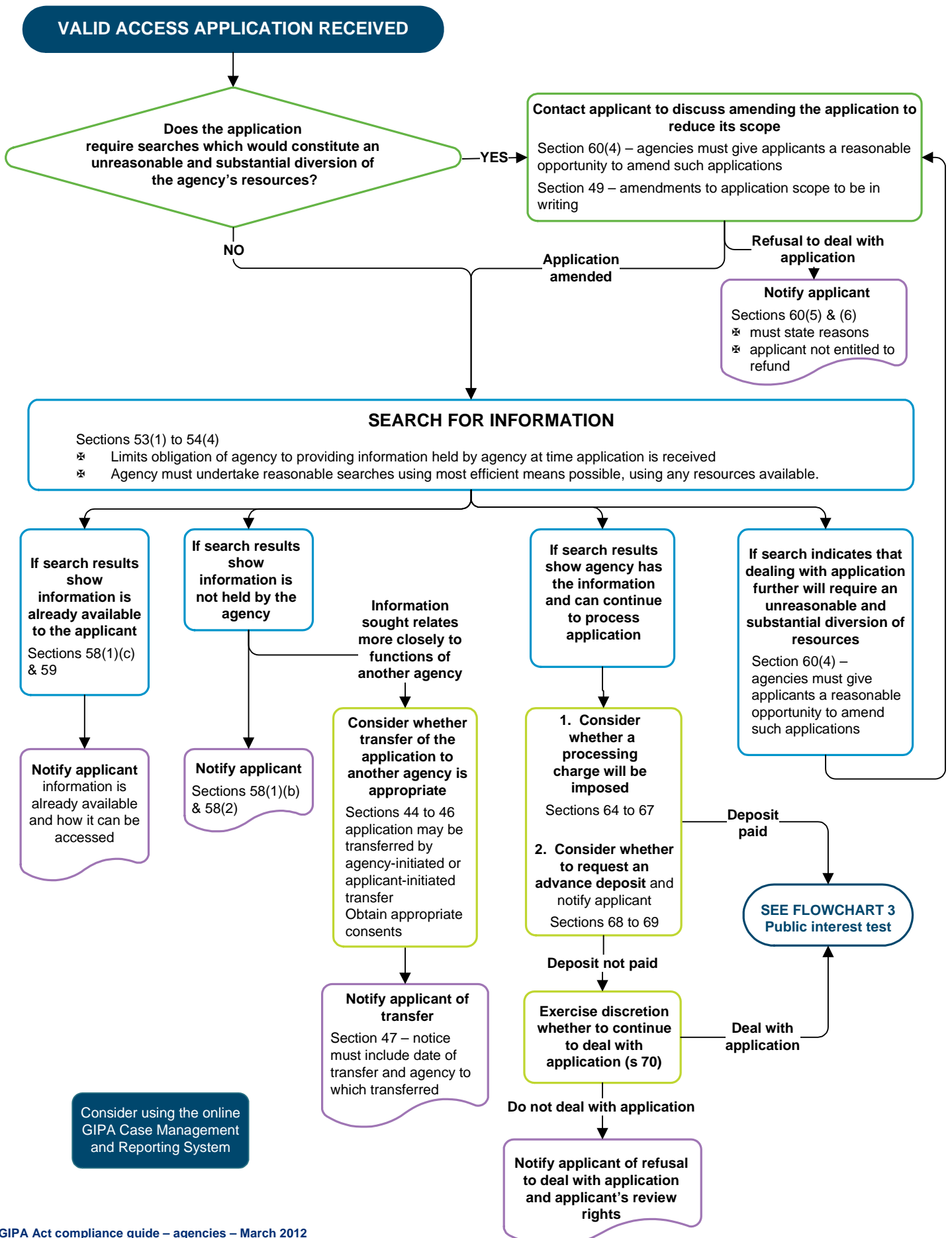
- ⇒ Section 72 explains how access may be provided in response to an access application, and that an agency must provide access in the way requested by the applicant, subject to certain exceptions.
- ⇒ Section 73 provides that your agency cannot impose conditions on how an applicant can use and disclose the information, however conditions may sometimes be imposed on how the applicant can access the information.

- ⇒ Section 74 provides that information can be deleted from a record to which access is provided.
- ⇒ Section 75 provides that access can be provided by creating a new record.
- ⇒ Section 76 explains that additional information that was not applied for can also be provided, unless there is an overriding public interest against disclosure.
- ⇒ Section 77 provides the time frame for exercising access rights.
- ⇒ Section 78 sets out that access can be deferred in limited circumstances.
- ⇒ Section 79 explains how to deal with a subpoena and an access application for the same information.

FLOWCHART 1: RECEIVING FORMAL ACCESS APPLICATIONS

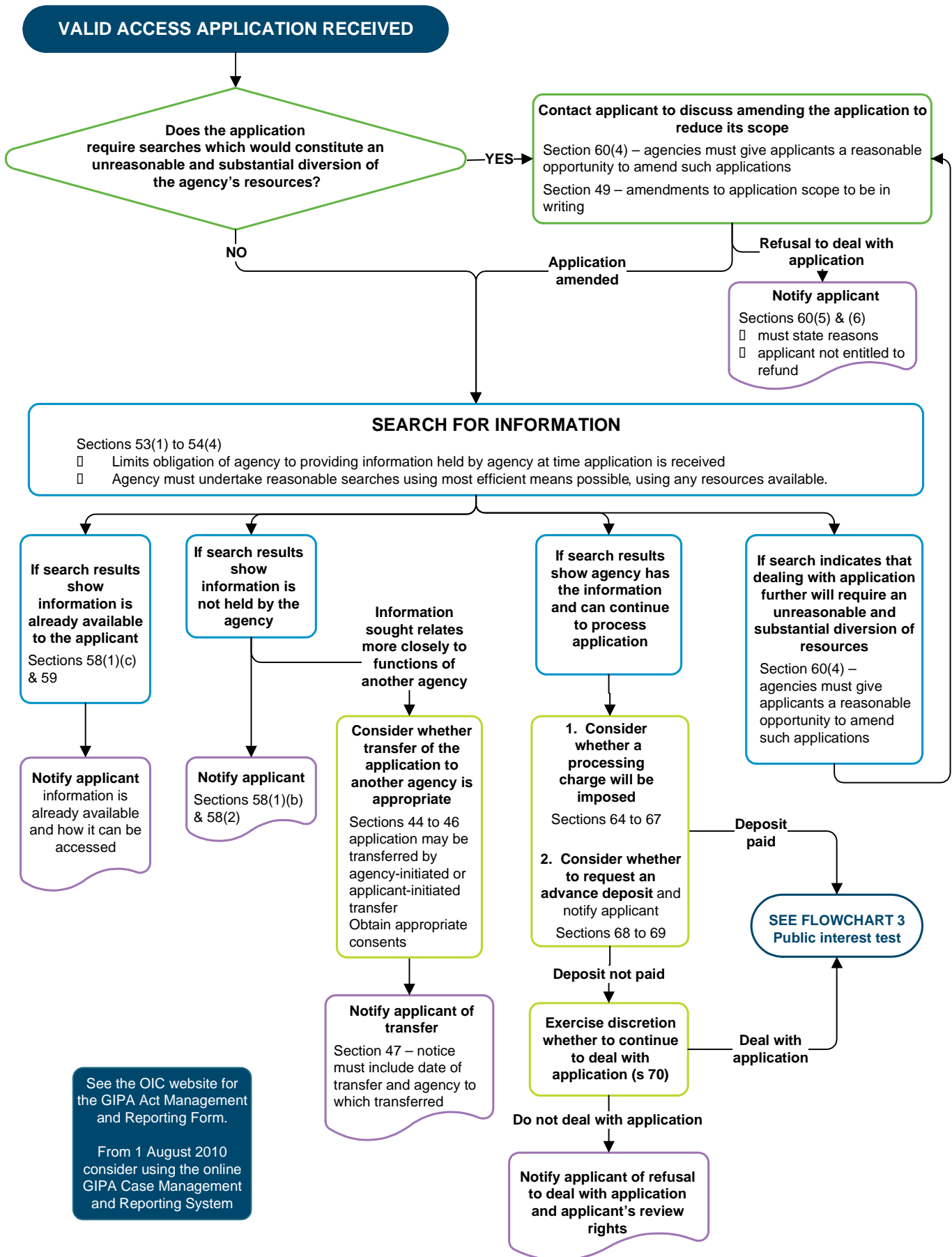


FLOWCHART 2: DEALING WITH ACCESS APPLICATIONS



Consider using the online GIPA Case Management and Reporting System

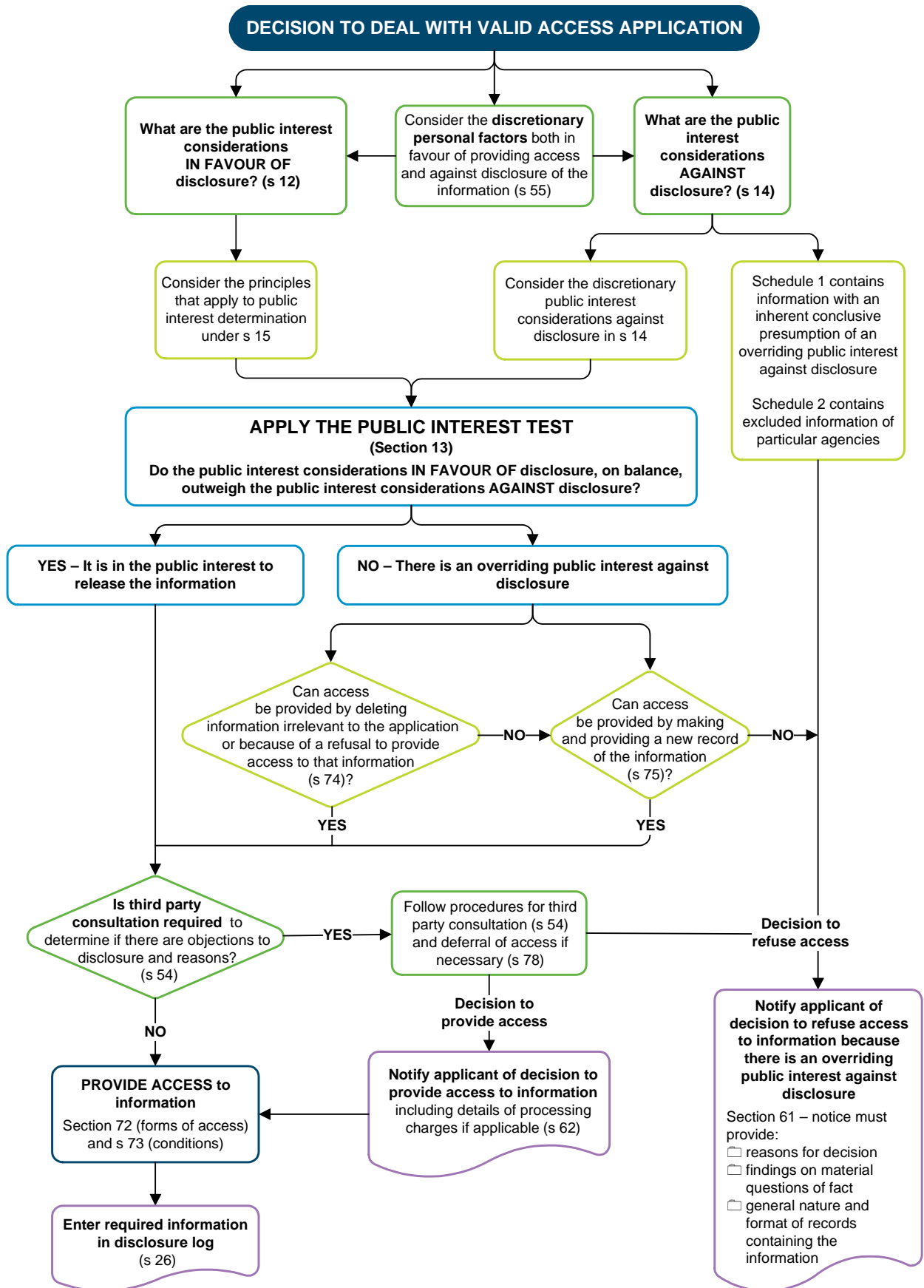
FLOWCHART 2: DEALING WITH ACCESS APPLICATIONS



See the OIC website for the GIPA Act Management and Reporting Form.

From 1 August 2010 consider using the online GIPA Case Management and Reporting System

FLOWCHART 3 PUBLIC INTEREST TEST



Tips**Receiving applications**

- To assist your agency process access applications and record data for reporting purposes, the OIC has developed an online case management and reporting system. This system is available from the OIC's website.
- Develop a pro forma application form, such as the template available on the OIC's website that clearly notes the validity requirements and agency contact details.

Processing valid applications

- Document the searches carried out in response to access applications to help your agency to prepare for any internal or external reviews of its compliance with the GIPA Act.

6. Internal review

People can apply for an internal review of an agency decision about an access application if they are unhappy with the outcome.

Internal review requirements and procedures

An internal review should 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.

An internal review is not available to an applicant if the principal officer of the agency made the original decision or either the OIC or the Administrative Decisions Tribunal has reviewed the original decision.

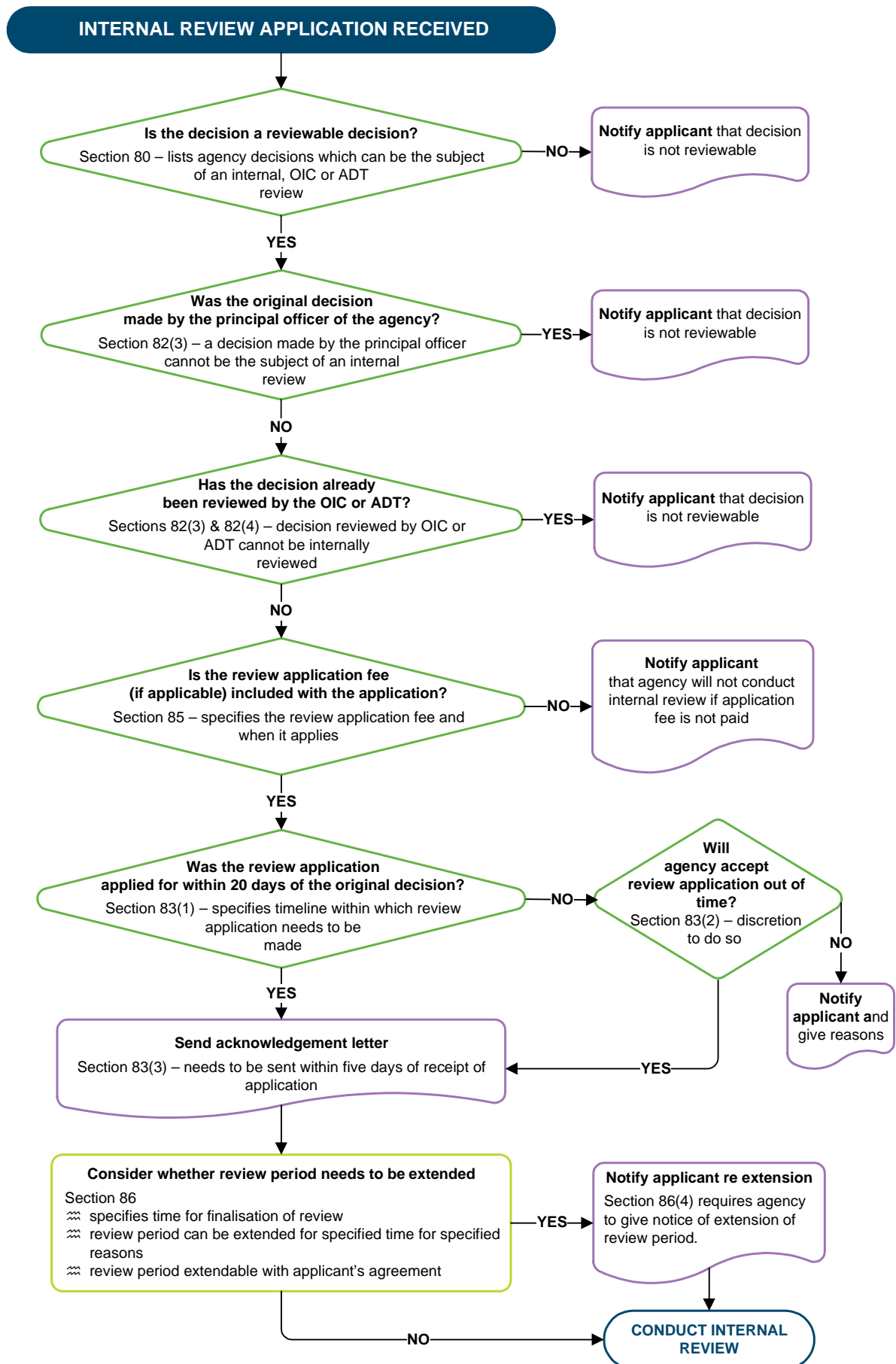
A third party must seek an internal review before seeking an external review by the OIC. Alternatively a third party can go straight to the Administrative Decisions Tribunal to seek a review.

However, if an internal review is not available to a third party (for example, if the principal officer made the reviewable decision), the third party can then go directly to the OIC or the Administrative Decisions Tribunal to seek an external review.

A fee should accompany an internal review application (unless the internal review is conducted as result of a recommendation by the Information Commissioner for the agency to reconsider its decision under section 93 of the GIPA Act) and specified timelines apply for both making and deciding an internal review application.

- ⇒ Sections 80 and 81 set out which decisions are reviewable decisions, and extended review periods.
- ⇒ Sections 82 to 88 provide information about internal reviews by an agency.
- ⇒ Sections 89 to 99 provide information about reviews by the Information Commissioner.
- ⇒ Sections 100 to 112 provide information about reviews by the Administrative Decisions Tribunal.

FLOWCHART 4: RECEIVING INTERNAL REVIEW APPLICATION



7. Private sector contractors

For agencies that enter into government contracts with private sector entities where the private contractor will be providing services to the public on their behalf, the agency must ensure it has an immediate right of access to certain information contained in the records of the private contractor.

Contractual provisions

To ensure compliance with the GIPA Act, your agency should include appropriate contractual provisions in the government contract with the private contractor. Template clauses are available on the OIC's website.

- ⇒ Section 121 describes the information held by private contractors to which agencies must have a right of immediate access, as well as the information to which agencies do not have to have an immediate right of access.

Consultation

Your agency may need to consult with a private contractor when considering providing access to information. If so, your agency needs to take any objections the private contractor may raise into account when applying the public interest test.

- ⇒ Section 54 sets out:
- an agency's obligations to consult with third parties before disclosing information
 - the types of information in relation to which consultation may be necessary
 - how to deal with an objection to disclosure
 - the review rights of the objector.

Tips

- Identify government contracts that your agency commonly enters into with private contractors and ensure any contracts entered into on or after 1 July 2010 include appropriate provisions regarding access to information.
- Refer to the OIC's website at www.oic.nsw.gov.au for examples of template clauses that may be used in government contracts.

8. Reporting

Your agency must prepare an annual report to be tabled in Parliament in relation to its obligations under the GIPA Act and provide a copy of the report to the Information Commissioner.

Reporting obligations

Your agency's annual report must comply with section 125 of the GIPA Act.



Section 125 sets out:

- when to submit the annual report to the Minister responsible for the agency and to the OIC.
- when the Minister responsible for the agency must provide the agency's annual report to the Minister administering the GIPA Act.
- when the Minister responsible for the agency must table the annual report in Parliament.
- the reporting period for an agency.

Tips

- Ensure your agency records all data necessary to meet the agency's annual reporting requirements in a consistent manner. To assist with recording this data, the OIC has developed an online case management and reporting system that is available from the OIC's website.
- Consider reporting on your agency's GIPA Act requirements in a separate section of your annual report, as was the practice under the FOI regime.

9. Notices

Any notification given by your agency under the GIPA Act must comply with specified requirements.

Requirements for giving notices

Notifications issued by your agency must comply with section 126 of the GIPA Act.



Section 126 provides:

- requirements agencies need to comply with when issuing notifications under the GIPA Act, and
- when a notification sent via post is considered to be given by an agency.

Tips

- Have templates that can be used for the purposes of issuing notices and notifications under the GIPA Act. For examples of templates that comply with notice requirements refer to the OIC website at www.oic.nsw.gov.au.
- To assist your agency meet the notification requirements, the OIC has developed an online case management and reporting system that is available from the OIC's website.

10. Information excluded under the GIPA Act

Excluded information

- ⇒ Schedule 2 of the GIPA Act lists agencies that hold certain information for which there is a conclusive presumption against disclosure. For example, it lists agencies that hold:
- judicial and prosecutorial information
 - complaints handling and investigative information
 - competitive and market sensitive information
 - certain other information.

Your agency may refuse access to information that is excluded under schedule 2. Your agency may, however, choose to consent to the disclosure of this information.

- ⇒ Schedule 2 sets out information in relation to specified functions of specified agencies that is to be considered excluded information.
- ⇒ Schedule 1(6) provides that:
- an overriding public interest against disclosure exists in relation to release of excluded information
 - the agency can consent to the release of this information
 - where the information sought is excluded information in relation to another agency, the agency processing the application must obtain the consent of the other agency prior to disclosure
 - review rights do not apply to decisions to consent or decline consent to release excluded information.

Access applications

- ⇒ Section 43 prevents an access application from being made for excluded information.

Tips

- If your agency is listed in schedule 2, it should consider whether to consent to disclose any of its excluded information.
- Where an access application is made for excluded information, you may wish to make it agency practice to contact the applicant to discuss amendment of the application.

11. Transitional arrangements

Continued application of the Freedom of Information Act 1989

Your agency must continue to comply with the provisions of the *Freedom of Information Act 1989* (**FOI Act**) for applications made under that Act, for a certain period of time.

- ⇒ Schedule 3(3)(1) states that the FOI Act continues to apply to applications for access to agency or Minister's documents or determinations made before 1 July 2010.
- ⇒ Schedule 3(4)(1) states that the FOI Act continues to apply to applications to amend agency records or determinations with respect to any such applications made under that Act.

Applications under the FOI Act made on or after 1 July 2010

Your agency must consider applications to access government information made under or for the purposes of the FOI Act from 1 July 2010 to 30 June 2011 as being made under the GIPA Act (see schedule 3(3)(3)).

Your agency must consider applications for amendment of agency records made under or for the purposes of the FOI Act from 1 July 2010 to 30 June 2011 as being made under the *Privacy and Personal Information Protection Act 1998* (see schedule 3(4)(3)).

Tips

- Where an application is deemed to be made under the GIPA Act, ensure the applicant is advised of these provisions and consider if the application can be more appropriately dealt with informally or whether the information requested has already been made publicly available in keeping with your obligations under the GIPA Act.
- Ensure information on your agency website, application forms and any documentation referencing the FOI Act are replaced from 1 July 2010 with information about the GIPA Act.

Questions?

If you have any questions or require any assistance in complying with the GIPA Act you can contact the OIC in the following ways:

The Office of the Information Commissioner

- visit: 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 and 5pm, Monday to Friday (excluding public holidays)
- You can also call us through the National Relay Service (for deaf people and people with a speech or hearing impairment) on 133 677 or the Translating and Interpreting Service) on 131 450.