



# Environmental Defenders Office

## Access to Information in NSW

*Disclaimer: This factsheet is a guide only and is designed to give readers a plain English overview of the law. It does not replace the need for professional legal advice in individual cases. To request free initial legal advice on a public interest environmental or planning law issue, please visit our [website](#).*

*While every effort has been made to ensure the information is accurate, the EDO does not accept any responsibility for any loss or damage resulting from any error in this factsheet or use of this work.*

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### Overview

Public access to information held by government departments and local councils is important in promoting open, accountable government. Access to NSW Government information is governed by the [Government Information \(Public Access\) Act 2009 \(NSW\)](#) (**GIPA Act**). Access to Australian Government information, the relevant law is the [Freedom of Information Act 1982 \(Cth\)](#) (**FOI Act**).

There are independent bodies which provide information and advice on access to information laws. The Office of the Australian Information Commissioner (**OAIC**) at the national level, and the Information and Privacy Commission (**IPC**) at the State level are responsible for ensuring the objectives information access and privacy laws are achieved.

These agencies are able to provide advice directly to the community about accessing information. The OAIC is led by the Australian Information Commissioner and Privacy Commissioner, and the IPC is led by the Information Commissioner.

The OAIC and IPC are independent of other government agencies. The role of the Information Commissioners is to promote public awareness and understanding of the GIPA laws, and provide information, support, advice, assistance and training to agencies and the general public. The OAIC and IPC also have the power to review decisions made by government agencies and to deal with complaints.

Visit: [The OAIC website](#)

Visit: [The IPC website](#)

## The public's right to access information

Access to Federal and State government information is governed separately.

If you wished to access information about the Federal Government's approval of an action impacting a matter of national environmental significance, e.g. nationally listed threatened species, you would need to follow the process set out under national law – the FOI Act.

If you wished to access information held by the NSW Department of Planning, Industry and Environment or your local council about a development consent, you would need to follow the process set out under NSW law – the GIPA Act.

### Accessing Australian Government information

Every person has a right to access a document of an agency or an official document of an Australian Government Minister in accordance with the FOI Act. Australian Government agencies must publish certain information including:

- information about the agencies' structure, functions and operations
- operational information including the agencies' rules, guidelines and practices
- annual reports
- information that is routinely given to the public
- information that is routinely given to the Parliament

If the information required is not published by the agency, you can request a copy of the document. An agency or Minister must give you the requested document unless the document is an exempt document or a conditionally exempt document.

Exempt documents include:

- documents that would or could be expected to cause damage to the security, defence or international relations of the Commonwealth;
- official records of Cabinet or a document submitted to Cabinet for consideration;
- documents which may prejudice the investigation of a breach of law, expose confidential sources of information, endanger the life or physical safety of a person, prejudice a fair trial, disclose law enforcement methods which would prejudice their effectiveness or prejudice the protection of public safety;
- documents to which secrecy provisions of other legislation apply;
- documents subject to legal professional privilege;
- documents that contain information which, if disclosed, would be a breach of confidence;
- documents originating from the Parliamentary Budget Office;

- documents whose disclosure would be contempt of Parliament or contempt of court;
- documents that disclose trade secrets or commercially valuable information, and/or;
- documents relating to Electoral rolls.<sup>1</sup>

Access to conditionally exempt documents must be given unless disclosure would be contrary to the public interest. Conditionally exempt documents include documents that may affect Commonwealth-State relations, deliberative processes, financial or property interests of the Commonwealth or Norfolk Island, certain operations of agencies, personal privacy, business, research and the economy.

#### Factors relating to public interest exemptions

To determine whether access to a document would be in the public interest the decision maker considers factors that favour access to the information against public interest factors against disclosure. Factors that favour access to the document include:

- the promotion of public participation in Government processes and increasing scrutiny, discussion and review of Government activities;
- increasing recognition that Government information is a public resource;
- facilitating and promote public access to information promptly and cost effectively;
- informing debate on a matter of public importance;
- promoting the effective oversight of public expenditure; and
- allowing a person to access their personal information.<sup>2</sup>

The decision maker must not take into consideration factors such as whether the document may cause embarrassment to or loss of confidence in the Australian Government, the possibility of misinterpretation or misunderstanding the document, whether the author is of high seniority in the relevant agency or if access to the document may cause confusion or unnecessary debate.

#### **Request for access**

To request access to a document of an agency or an official document of a Minister the request must be in writing and include the following information:

- state that the application is made under the FOI Act;
- provide sufficient information about the document so that the agency or Minister can identify it;

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<sup>1</sup> [Freedom of Information Act 1982 \(Cth\)](#), Part 4, Div 2 (**FOI Act**).

<sup>2</sup> *Ibid*, s 11B(3).

- provide an address (which may include an electronic address) for the delivery of notices issued under the FOI.<sup>3</sup>

The request may be sent to the relevant agency or Minister by post, or to an email address provided by the agency or Minister, or hand delivered to an officer of the agency or staff of the Minister. Government agencies and Ministers have a duty to assist a person to make a request that meets the requirements.

The relevant agency must acknowledge that it has received your request within 14 days from the day the request has been received.<sup>4</sup> The agency must notify you of its decision to grant or deny access to the information within 30 days of receiving the request unless an extension of time has been agreed to.<sup>5</sup>

### Charges

The relevant agency or Minister may decide whether you will be required to pay a charge to process the request for information and to provide access to the information.<sup>6</sup> The charges that an agency or Minister may apply in relation to considering the request for information includes:

- \$15.00 per hour to search for and retrieve the document;
- a charge for producing a document containing the requested information;
- \$4.40 per page for written transcripts of recorded information, and/or;
- \$20.00 per hour (after the first 5 hours) to decide whether to grant access to the document.<sup>7</sup>

The agency or Minister may also apply the following charges for providing access to the document:

- \$6.25 for every half hour when inspecting a document or listening to or viewing information under supervision;
- 10c per page for a photocopied document;
- \$4.40 per page for copies of documents provided other than photocopies;
- \$4.40 per page for providing information that must be transcribed;
- The cost of producing documents in which irrelevant information has been deleted;
- The cost of reproducing documents in electronic form;
- The cost of arrangements to view images or hear or audio information, and;

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<sup>3</sup> Ibid, s 15(2).

<sup>4</sup> Ibid, s 15(5)(a).

<sup>5</sup> Ibid s 15 (5)(b).

<sup>6</sup> [Freedom of Information \(Charges\) Regulations 2019 \(Cth\)](#), s 3 (**Charges Regulations**).

<sup>7</sup> Ibid, Sch 1.

- Postage costs.<sup>8</sup>

## **Refusal of access**

An agency or Minister may refuse access to information for practical reasons if it is determined that the work involved in providing access to the information would substantially interfere with the agency or Minister's operations.

If a request is refused for practical reasons, the agency or Minister must notify you in writing of its intention to refuse access and provide you with assistance within a 14 day consultation period to revise your application so that it may no longer be refused for practical reasons.<sup>9</sup>

Requests may also be refused if the information requested cannot be found, does not exist or has not been received.<sup>10</sup>

## **Review of decisions**

### Internal reviews

You may request that a decision made by an agency be reviewed by that agency (by a person other than the decision maker). An application for internal review must be submitted to the agency within 30 days of receiving notification of the decision.<sup>11</sup>

Agencies are required to complete internal reviews within 30 days of receiving the application for review however this period may be extended.<sup>12</sup> The two types of decisions that may be reviewed internally are:

- access review decisions, and;
- access grant decisions.

An *access review decision* includes decisions made in relation to providing access to a document or decisions made in relation to charging a fee for providing access to the information.<sup>13</sup>

An *access grant decision* relates to decisions made in relation to conditionally exempt documents and public interest factors.<sup>14</sup>

If the agency reviewing the decision does not provide a decision to you within 30 days of commencing the internal review, the original decision is taken to be affirmed.<sup>15</sup>

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<sup>8</sup> Charges Regulations, Sch 1.

<sup>9</sup> FOI Act, s 24AB.

<sup>10</sup> Ibid, s 24A.

<sup>11</sup> Ibid, s 54B(1).

<sup>12</sup> Ibid, s 52.

<sup>13</sup> Ibid, s 53A.

<sup>14</sup> Ibid, s 53B.

<sup>15</sup> Ibid, s 54D.

## Reviews by the OAIC

Decisions that are reviewable by the OAIC include access review decisions and access grant decisions, agency decisions made under internal review, and decisions refusing to allow more time to submit an application for review of an access review decision.

You have 60 days after receiving notification of the decision to submit an application to the OAIC to review an access review decision.<sup>16</sup> If you require the Information Commissioner to review a decision made in relation to conditionally exempt documents or public interest factors, you must submit your application to the OAIC 30 days after notice is given to affected third parties in relation to the access grant decision.<sup>17</sup>

The OAIC has no power to grant access to exempt documents.<sup>18</sup>

You may appeal to the Federal Court in relation to decisions made by the OAIC.<sup>19</sup>

Visit: [The OAIC page on Reviews and Complaints for more information](#)

## Reviews by the Administrative Appeals Tribunal

An application may be made to the Administrative Appeals Tribunal (**AAT**) for the review of decisions made by the Information Commissioner.<sup>20</sup> The AAT has power to review original decisions made by an agency or Minister and may make decisions in relation to granting access to information held by the agency or Minister.<sup>21</sup> The AAT cannot provide access to exempt documents.<sup>22</sup>

## Accessing NSW Government information

In NSW, there are four different ways to obtain information from government agencies:

- Mandatory release - certain information *must* be disclosed to the public free of charge;<sup>23</sup>
- Proactive release – some information *may* be disclosed to the public free of charge or for lowest reasonable cost;
- Informal release – members of the public can ask for certain information and such requests *may* be considered by the government agency, and;
- Formal release - it will sometimes be necessary to make a formal application for information and such applications *must* be considered by a government agency.

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<sup>16</sup> FOI Act, s 54S(1).

<sup>17</sup> Ibid, s 54S(2).

<sup>18</sup> Ibid, s 55L.

<sup>19</sup> Ibid, s 56.

<sup>20</sup> Ibid, Part VIIA.

<sup>21</sup> Ibid, s 57A–58.

<sup>22</sup> Ibid, s 58(2).

<sup>23</sup> [Government Information \(Public Access\) Regulation 2018 \(NSW\)](#), Part 2 & Part 3 (**GIPA Regulations**).

All of these methods of obtaining government information are subject to public interest considerations, which means that information may be withheld on the grounds that it is against the public interest to disclose it.

Visit: [The NSW IPC page on How to Access NSW Government Information for more](#)

### **Mandatory release**

Information that is defined as ‘open access’ *must* be made publicly available free of charge, unless there is an overriding public interest against disclosure.<sup>24</sup>

Certain information held by government agencies is assumed to be open access. This includes:<sup>25</sup>

- an agency’s current agency information guide;
- information about an agency contained in any document tabled in Parliament by or on behalf of the agency, other than any document tabled by order of either House of Parliament;
- an agency’s policy documents;
- an agency’s disclosure log of access applications;
- an agency’s register of government contracts;
- an agency’s record of the open access information (if any) that it does not make publicly available on the basis of an overriding public interest against disclosure;
- other government information as may be prescribed by the regulations as open access information

Similarly, certain information held by local councils is deemed to be open access, including:<sup>26</sup>

- information about the local council;
- plans and policies;
- information about development applications and approvals, including associated documents such as environmental assessment reports, town planner reports, etc, and;
- approvals, orders and other documents.

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<sup>24</sup> GIPA Act, s 6.

<sup>25</sup> Ibid, s 18.

<sup>26</sup> GIPA Regulations, Sch. 1.

## **Proactive release**

For information that is not deemed to be open access, government agencies and local councils may decide to make information publicly available. This is known as proactive release. Information released this way may be free of charge or at the lowest reasonable cost.<sup>27</sup> State and local government agencies are encouraged to make as much information as possible publicly available in an appropriate manner, including on the internet.

## **Informal release**

Informal requests can be made in relation to specific information. This is done by contacting the agency and asking for the information. An agency is not required to provide information in response to an informal request, although it is encouraged to do so.<sup>28</sup> The agency may impose conditions on the release of such information.

## **Formal release**

If a formal access application is made, the applicant has a legal right to be provided with the requested information, unless there is an overriding public interest against disclosure.<sup>29</sup>

A valid formal application must be accompanied by a \$30 application fee and meet certain requirements, such as:<sup>30</sup>

- be in writing;
- sent to or lodged at an office of the agency concerned;
- clearly indicate that it is an access application made under the GIPA Act;
- provide a postal address in Australia as the address for correspondence in connection with the application, and;
- include such information as is reasonably necessary to enable the government information applied for to be identified.

An access application cannot be made in relation to excluded information.<sup>31</sup> Excluded information includes particular information relating to court proceedings, complaints handling and investigative information and competitive and market sensitive information of particular agencies.<sup>32</sup>

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<sup>27</sup> GIPA Act, s 7.

<sup>28</sup> Ibid, s 8.

<sup>29</sup> Ibid, s 9.

<sup>30</sup> Ibid, s 41.

<sup>31</sup> Ibid, s 43.

<sup>32</sup> Ibid, Sch. 2.



## Charges

As well as the \$30 application fee, an applicant may be asked to pay a processing charge.<sup>33</sup> Processing costs \$30 per hour.<sup>34</sup> For this reason it is important that requests for information are not too broad and clearly indicate the information that is requested. Otherwise, if the net is cast too wide or the request is not clear enough, the agency may spend unnecessary time looking for and collecting the information which will add significantly to the processing costs.

Agencies may ask the applicant to pay up to 50 per cent of the expected processing charge in advance.<sup>35</sup> This request must be in writing and the applicant must be given at least four weeks to pay.<sup>36</sup> However, if an applicant seeks his or her own personal information, the first 20 hours of processing time are free of charge.<sup>37</sup>

The applicant can seek a 50 per cent reduction in processing costs on the grounds of financial hardship,<sup>38</sup> or seek a waiver of the fee entirely if the information will be of special benefit to the public generally.<sup>39</sup>

**N.B.** The [Government Information \(Public Access\) Regulation 2018 \(NSW\)](#) also provides for discounted processing charges (up to 50%) for pensioners, full-time students and/or non-profit organisations.<sup>40</sup>

## **Public interest**

All government agencies must disclose or release information unless there is an overriding public interest against disclosure.<sup>41</sup> When deciding whether to release information, staff must apply the public interest test,<sup>42</sup> which means they must weigh the factors in favour of disclosure against the public interest factors restricting disclosure.

The limited and specific public interest considerations that an agency must take into account when deciding whether to release particular information include:<sup>43</sup>

- responsible and effective government;
- law enforcement and security;
- individual rights, judicial processes and natural justice;
- business interests of agencies and other persons;

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<sup>33</sup> GIPA Act, s 64.

<sup>34</sup> Ibid, s 64(1).

<sup>35</sup> Ibid, s 68.

<sup>36</sup> Ibid., ss 68-69.

<sup>37</sup> Ibid, s 67.

<sup>38</sup> Ibid, s 65.

<sup>39</sup> Ibid, s 66.

<sup>40</sup> GIPA Regulations, s 10.

<sup>41</sup> GIPA Act, div 2.

<sup>42</sup> Ibid, s 13.

<sup>43</sup> Ibid, s 14.

- environment, culture, economy and general matters;
- secrecy provisions, and;
- exempt documents under interstate Freedom of Information legislation.

Certain matters are considered to be against the public interest to disclose.<sup>44</sup> These matters relate to (but are not limited to) certain cabinet documents, executive council documents, overriding secrecy laws, contempt, legal professional privilege, excluded information, documents affecting law enforcement and public safety, transport safety, adoption, care and protection of children, ministerial code of conduct documents and certain documents relating to Aboriginal and environmental heritage.<sup>45</sup>

### **Decision and review rights**

The relevant government agency is required to assess the validity of a formal access application within 5 working days of receiving it.<sup>46</sup> A decision must be made within 20 working days unless an extension of time is agreed to.<sup>47</sup> If the access application is not decided upon within 20 working days, it is considered to be refused.<sup>48</sup> The \$30 application fee must be refunded and the applicant can seek a review of the refusal.<sup>49</sup>

An applicant can seek review of a number of decisions made in relation to requests for information, including (but not limited to):<sup>50</sup>

- a decision to refuse access to information;
- a decision to refuse a reduction in the processing charge;
- a decision to refuse to confirm or deny that information is held by the agency, and;
- a decision that government information is not held by the agency.

There are three options for review of a government agency's decision:<sup>51</sup>

- internal review;
- external review by the Information Commissioner, and;
- review by the NSW Civil and Administrative Tribunal (**NCAT**).

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<sup>44</sup> GIPA Act, Sch. 1.

<sup>45</sup> Ibid.

<sup>46</sup> Ibid, s 51.

<sup>47</sup> Ibid, s 57.

<sup>48</sup> Ibid, s 63.

<sup>49</sup> Ibid, s 63 and Pt 5, Div 1.

<sup>50</sup> See GIPA Act, s 80 for full list of reviewable decisions.

<sup>51</sup> See GIPA Act, Pt 5 Div 2 (Internal review by agency); Div 3 (Review by Information Commissioner); Div 4 (Administrative review by Civil and Administrative Tribunal).

### Internal review

An internal review can be requested at a cost of \$40.<sup>52</sup> You have 20 working days after notice of the decision has been posted to you to ask for an internal review.<sup>53</sup> The review must be carried out by an officer who is no less senior than the original decision-maker.<sup>54</sup> If the Minister or the principal officer of the agency made the decision,<sup>55</sup> you cannot seek an internal review but you can ask for an external review.

### External review by the Information Commissioner (from the IPC)

If you are the access applicant, you do not have to have an internal review of the decision before asking the Information Commissioner to review it.<sup>56</sup> If you are not the access applicant, you must seek an internal review before applying to the Information Commissioner.<sup>57</sup>

Either way, you have eight weeks from being notified of the decision to seek external review.<sup>58</sup>

Visit: [The IPC's page on How to Lodge an Application for a Review of a Government Information Access Decision](#) to learn more

### Review by the NSW Civil Administrative Tribunal

If you disagree with the outcome of internal or external review, you can ask for a review by the NSW Civil and Administrative Tribunal (**NCAT**).<sup>59</sup> You do not have to have the decision reviewed internally or by the Information Commissioner before applying to the NCAT.<sup>60</sup>

You have up to 40 working days from being notified of the decision to apply to the NCAT for review.<sup>61</sup> However, if you have applied for review by the Information Commissioner, you have up to 20 working days from being notified of the outcome of that review to apply to the NCAT.<sup>62</sup>

Visit: [The NCAT page on Access to Government Information](#) to learn more

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<sup>52</sup> GIPA Act, s 85.

<sup>53</sup> Ibid, s 83.

<sup>54</sup> Ibid, s 84.

<sup>55</sup> Ibid, s 82(2).

<sup>56</sup> Ibid, s 89(2).

<sup>57</sup> Ibid.

<sup>58</sup> Ibid, s 90.

<sup>59</sup> GIPA Act, Part 5, Div 4.

<sup>60</sup> Ibid, s 100.

<sup>61</sup> Ibid, s 101(1).

<sup>62</sup> Ibid, s 101(2).

## Glossary

**AAT** means the Administrative Appeals Tribunal

**Charges Regulations** means the [\*Freedom of Information \(Charges\) Regulations 2019 \(Cth\)\*](#)

**FOI Act** means the [\*Freedom of Information Act 1982 \(Cth\)\*](#)

**GIPA Act** means the [\*Government Information \(Public Access\) Act 2009 \(NSW\)\*](#)

**GIPA Regulations** means the [\*Government Information \(Public Access\) Regulation 2018 \(NSW\)\*](#)

**IPC** means the Information and Privacy Commission NSW

**NCAT** means the NSW Civil and Administrative Tribunal

**OAIC** means the Office of the Australian Information Commissioner