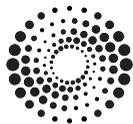


The Law Handbook

YOUR PRACTICAL GUIDE TO THE LAW IN NEW SOUTH WALES

15th EDITION



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Note to readers: While every effort has been made to ensure the information in this book is as up to date and as accurate as possible, the law is complex and constantly changing and readers are advised to seek expert advice when faced with specific problems. *The Law Handbook* is intended as a guide to the law and should not be used as a substitute for legal advice.

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Freedom of Information

Joanna Davidson – Barrister

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[25.10] The federal *Freedom of Information Act 1982* (Cth) (*FOI Act*) came into force in 1982. Under the Act, anyone can get access to any document held by a federal government department or agency unless the agency, or the document or part of the document, is exempted by the legislation. Substantial amendments to the federal Act came into force in 2010.

People seeking information under the Act do not need *standing* of the kind required under

the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (see Judicial review in Chapter 9, Complaints, for more about this).

In 2009, NSW repealed the *Freedom of Information Act 1989* (NSW) and replaced it with the *Government Information (Public Access) Act 2009* (NSW) (*GIPA Act*). It provides for a similar right of access to information held by state departments, state authorities, local councils and ministers.

Right of access

[25.20] The federal *FOI Act* gives people a right of access to a document held by an agency or an official document of a minister (other than an exempt document) (*FOI Act*, s 11). The NSW *GIPA Act* gives people a right of access to information contained in a record held by an agency (unless there is an overriding public interest against disclosing the information) (*GIPA Act*, s 9). Although the terminology is different, the substance of the access rights is the same.

[25.30] Terminology

The key terms – like agency, document, document of an agency, exempt document and official document of a minister – are defined in the Acts (*FOI Act*, s 4(1); *GIPA Act*, s 4 and Sch 4).

What is a document?

Under the federal Act

Under the federal Act, *document* is defined to include:

- written or printed matter;
- maps, drawings, plans and photographs;
- materials such as films, slides, tapes and videotapes;
- articles on which information has been stored electronically.

It does not include material maintained for reference purposes that is otherwise publicly available or Cabinet notebooks (*FOI Act*, s 4).

Access is available to computer-stored material by production of a written document by printout or similar means (*FOI Act*, s 17) and in electronic form.

Under the NSW Act

Government information in a record is also defined broadly under the *GIPA Act*, and includes information

recorded or stored in written form or by electronic process, and information held by a private sector entity to which the agency has an immediate right of access (*GIPA Act*, Sch 4, cl 10, 12).

Both the federal and NSW Acts provide that documents created or held by private entities, which provide services to government under contract are accessible (*FOI Act*, s 6C; *GIPA Act*, s 121, Sch 4, cl 12). An application for a contractor's documents should be made to the agency with which that entity has the service contract.

[25.40] Documents that cannot be accessed

The Acts give a right of access to all the types of documents discussed above unless they are covered by an exemption (Cth) or are subject to an overriding public interest against disclosure ("opiad") (NSW). In both the Commonwealth and NSW Acts, there are two categories of documents: documents which are not accessible (*FOI Act*, ss 33–47A; *GIPA Act*, Sch 1), and documents to which access must be provided, unless it would be contrary to the public interest (*FOI Act*, ss 47B–47J; *GIPA Act*, ss 12–14).

Neither Act allows for access to Cabinet and Executive Council documents or legally professionally privileged information.

Exempt documents under the federal Act also include documents affecting law enforcement and public safety, documents which are subject to a legal obligation of confidence, documents to which secrecy provisions of other Acts apply or which contain commercially valuable information. Under the NSW *GIPA Act*, these categories of documents can be accessed unless there is an overriding public interest against disclosure.

Under both Acts, there are other categories of documents which must be released unless there is a public interest against disclosure. These include: documents recording advice, consultation or deliberation that is a part of the deliberative functions of an agency or minister; documents which would involve an unreasonable disclosure of an individual's private information (in NSW, a disclosure that would reveal an individual's personal information (*GIPA Act*, cl 3(a) of the Table to s 14)); documents that would involve an unreasonable disclosure of business information; or documents where disclosure could prejudice the management of the economy.

If the document does not fall into one of the defined categories, then it must be released.

Each Act also deals with other categories of documents. The legislation should be consulted for the full details.

Correcting personal records

People who find statements in their personal records that are incomplete, out of date, incorrect

or misleading have a right to request that they be corrected (*FOI Act*, Pt V, from s 48). In NSW, this right is now found in s 15 of the *Privacy and Personal Information Protection Act 1998* (NSW).

Deletion of material

Under both Acts, the agency must consider whether it is practicable to edit the document, so as to delete the exempt or "opiad" material so that an applicant can be given access to the balance of the document (*FOI Act*, s 22; *GIPA Act*, s 74).

[25.50] Exempt agencies

A number of agencies are not subject to freedom of information legislation either in whole or in relation to certain types of documents. The exempt and partially exempt agencies are set out Sch 2 to the federal Act and also in Sch 2 to the NSW Act. In NSW, an application to an agency to seek information which is excluded from the Act is not a valid application, and need not be processed by the agency (*GIPA Act*, s 43).

Obtaining access

[25.60] Proactive disclosure of information

Both the *GIPA Act* and the federal *FOI Act* provide for a regime of proactive disclosure. Certain kinds of documents about the agency's structure, functions, policies and guidelines, annual reports and material provided to parliament must be posted on the agency's website. Agencies are encouraged to consider other kinds of information that might be of public interest and post that information too. NSW has a contracts register, where agencies are required to post key information about contracts to which they are a party and which exceed \$150,000 in value. The kinds of information required to vary with the value and type of the contract.

Under the federal Act, an agency is required to post documents to which the agency routinely gives access in response to requests under the *FOI Act* (*FOI Act*, s 8(2)). The NSW Act provides that an agency must publish a list of all the applications, where the agency has decided to release information which may be of interest to other

members of the public (referred to as a disclosure log (*GIPA Act*, s 25)). Presumably, this is so other members of the public can also request copies of the same documents.

[25.70] How to apply

Requests for access to documents must:

- be in writing;
- include information that enables the agency to identify the document(s) sought.

Most agencies have their own printed or online forms for applicants to fill in, although using the form is not a legal requirement.

To limit costs, and the possibility that applications will be refused as being too large to process (see [25.90]), applicants should think carefully about the kinds of documents or information that is sought and frame their request as narrowly as possible. It is often worthwhile contacting the agency's FOI/Right to Information Officer to discuss the terms of the request before making the formal application.

The agency is now obliged to advise the applicant in writing that the request has been

received (*FOI Act*, s 15; *GIPA Act*, s 51). In NSW, the agency must advise the applicant whether it considers the application to be valid, and the timeframe within which it must make its decision.

The federal Act authorises agencies to provide information outside of the *FOI Act* process. The *GIPA Act* authorises informal release of government information (*GIPA Act*, s 8) but does not say what form informal access might take. Presumably, a simple request to an agency for informal access referring to the *GIPA Act* (without the need to pay an application fee) is sufficient. However, an agency does not have to process an informal application and is not entitled to provide information where there is an overriding public interest against disclosure.

[25.80] Time limits for agencies

Agencies must deal with requests as soon as possible, with a time limit of:

- 30 days from receipt under the federal Act (*FOI Act*, s 15);
- 20 working days from receipt under the NSW Act (*GIPA Act*, s 57).

In certain circumstances, mostly where there is an obligation to consult with third parties, the agency can get a further extension of time of 10 working days in NSW (*GIPA Act*, s 57) or 30 days for the Commonwealth (*FOI Act*, s 15(6)).

Both federal and NSW Acts allow for this time frame to be extended by agreement with the applicant (*FOI Act*, s 15AA; *GIPA Act*, s 60(4)). The federal Act allows the agency to apply to the Information Commissioner for an extension of time (*FOI Act*, s 15AB).

If a decision is not made within the required timeframe, the agency is deemed to have refused the application and the applicant can start down the path of review (*FOI Act*, s 15AC; *GIPA Act*, s 63).

[25.90] Costs

The cost of accessing documents under federal freedom of information legislation has been reduced in the most recent reforms.

Under the federal Act

Under the federal Act, the charges are dealt with under the *Freedom of Information (Charges) Regulations 2019* (Cth). There is no charge for making an application, and there is no charge for processing an application for personal

information. An agency can charge \$15 an hour for the time spent in searching for documents and, if it takes more than five hours to make a decision about the application, \$20 an hour for each extra hour. If information is not available to an agency in discrete form in existing agency documents, a charge can be imposed (not exceeding actual costs incurred) for using a computer or other equipment to produce a document containing the information in discrete form. Photocopying is charged at 10c a page and the cost of postage is also recouped. Charges are assessed in advance and a deposit of \$20 may be sought if the preliminary assessment of the charge is between \$25 and \$100, or 25% if the proposed charge is greater than \$100.

If a charge is imposed and a deposit sought, the applicant must indicate that he or she accepts the charge within 30 days, or the application will be deemed to be abandoned (*FOI Act*, s 29(2)). The timeframe for processing an application is suspended until the charge is paid.

If the application is not determined within the statutory timeframe, no charges can be imposed.

When fees can be reviewed or waived

Application fees or charges can be reviewed or waived under the federal Act, either on the grounds of financial hardship or because the person can show that it is in the public interest to disclose the documents (*FOI Act*, s 29).

Under the NSW Act

For information requested under the NSW Act, there is an initial application fee of \$30. Further costs depend on whether the application relates to the applicant's personal information. If it does, there are no other charges provided the application takes no more than 20 hours to process. After that, there is a processing charge of \$30 an hour to cover all the costs of processing (photocopying, decision-making, consultation (*GIPA Act*, s 64)). For non-personal requests, \$30 per hour applies to all processing time.

An advance deposit of up to 50% of the estimated charges can be sought by the agency. The timeframe for processing the application stops running until the deposit is paid, and the agency can refuse to deal further with the application if the deposit is not paid on time (*GIPA Act*, ss 68–70).

Estimate of fees

Under both Acts, an agency must give an applicant an estimate of the charges likely to be incurred in

processing an application before going ahead with it. Applicants have an opportunity to challenge the charges or an estimate of charges (*FOI Act*, s 29; *GIPA Act*, s 70).

Fee reductions

There is a 50% reduction of charges under the NSW Act for people who are able to demonstrate financial hardship or that the information applied for is of special benefit to the public generally (*GIPA Act*, ss 65, 66). Applicants should therefore provide supporting evidence if they are seeking a reduction in charges. The *Government Information (Public Access) Regulation 2018* (NSW) requires an agency to give a 50% reduction to holders of current pensioner concession cards, full-time students and non-profit organisations (cl 10).

If the information is made publicly available within three working days after the applicant is provided with access, then no fees can be charged (*GIPA Act*, s 66(2)).

Review and appeal

[25.110] The federal Act

First stage review – internal review and/ or Information Commissioner

Under the federal Act, a person whose application for access to a document or information has been denied or deferred may seek an internal review by a more senior officer within the agency (*FOI Act*, Pt VI). The aggrieved applicant can also apply directly to the Information Commissioner for a review (*FOI Act*, Pt VII). There is no fee associated with either path and no obligation to seek an internal review before going to the Information Commissioner.

If a person begins with an internal review, but remains dissatisfied, that person can then seek a review by the Information Commissioner.

Internal review is not available if the decision to deny or defer access was made by:

- the minister; or
- the principal officer of the agency (*FOI Act*, ss 54(1), 54A(1)).

[25.100] Denial or deferral of access

Grounds for denying access

Obviously an agency can deny access to documents if the information in those documents is exempt or subject to an overriding public interest against disclosure.

However, under both federal and NSW Acts, a request for documents may also be refused if the work involved in giving access would substantially and unreasonably divert the resources of the agency from its other operations (*FOI Act*, s 24AA; *GIPA Act*, s 60(1)(a)). However, an agency cannot refuse to process an application for this reason unless the applicant has been consulted and given the chance to narrow the request.

Grounds for deferring access

Agencies can defer access for a limited range of reasons (*FOI Act*, s 21; *GIPA Act*, s 78).

An application for internal review must be made within 30 days of being notified of the decision, but an application to the Information Commissioner can be made within 60 days (*FOI Act*, ss 54B, 54S). The Information Commissioner must conduct a review in order for the decision to be reviewable by the Administrative Appeals Tribunal (*FOI Act*, s 57A).

Second stage review – the AAT or the Federal Court

A person who is not satisfied with the decision of the Information Commissioner can then apply to have the matter reviewed by the Administrative Appeals Tribunal (AAT). The AAT's processes are dealt with in Chapter 9, Complaints.

There is a limited right of appeal to the Federal Court from a decision of the Information Commissioner, on a question of law only (*FOI Act*, ss 56, 56A). In determining the appeal, the Court has the power to make further findings of fact (if the conditions set out in the *FOI Act*, s 56A(1) are satisfied), and to make whatever order it thinks appropriate. It may affirm or set

aside the Information Commissioner's decision, or substitute its own decision for that of the Information Commissioner.

An application to the AAT or the Federal Court must be made within 28 days of the Information Commissioner's decision (*FOI Act*, s 56(2)).

Complaints to the Information Commissioner and Ombudsman

The Information Commissioner also has the power to investigate any action taken by an agency in the performance of functions or the exercise of powers, under the *FOI Act*. The Commonwealth Ombudsman retains some residual complaint investigatory powers and FOI complaints may be referred to the Ombudsman (*FOI Act*, Pt VIIB).

[25.120] The NSW Act

Under the NSW Act, a person who is not satisfied with a decision about access or charges can seek an internal review by a more senior officer in the agency; or an external review by the

Information Commissioner; or the NSW Civil and Administrative Tribunal (NCAT) (*GIPA Act*, Pt 5). Generally speaking, an applicant can choose any one of the three avenues available, but may not pursue more than one avenue at a time. There is no need for the Information Commissioner to review a decision before applying for review by the Tribunal (*GIPA Act*, s 100).

Time limit

An application for internal review must be made within 20 working days of the applicant being notified of the decision, although the agency can agree to conduct an internal review out of time (*GIPA Act*, s 83).

An application for review to the Information Commissioner or NCAT must be made within 40 working days of the applicant being notified of the decision. NCAT has the discretion to extend that timeframe (*GIPA Act*, ss 90, 101).

The NSW Information Commissioner may also investigate the conduct of agencies more generally under the *Government Information (Information Commissioner) Act 2009* (NSW).

Contact points

[25.130] If you have a hearing or speech impairment and/or you use a TTY, you can ring any number through the National Relay Service by phoning **133 677** (TTY users, chargeable calls) or **1800 555 677** (TTY users, to call an 1800 number) or **1300 555 727** (Speak and Listen, chargeable calls) or **1800 555 727** (Speak and Listen, to call an 1800 number). For more information, see www.communications.gov.au.

Non-English speakers can contact the Translating and Interpreting Service (TIS National) on **131 450** to use an interpreter over the telephone to ring any number. For more information or to book an interpreter online, see www.tisnational.gov.au.

Changes are expected to the websites for many NSW government departments that were not available at the time of printing. See www.service.nsw.gov.au for further details.

Administrative Appeals Tribunal

www.aat.gov.au

ph: 1800 228 333 or 9276 5000

Australasian Legal Information Institute (AustLII)

www.austlii.edu.au

Australian Human Rights Commission

www.humanrights.gov.au

Commonwealth Ombudsman

www.ombudsman.gov.au

ph: 1300 362 072

Council for Civil Liberties, NSW

www.nswccl.org.au

ph: 8090 2952

Information and Privacy Commission NSW

www.ipc.nsw.gov.au

ph: 1800 472 679

LawAccess NSW

www.lawaccess.nsw.gov.au

ph: 1300 888 529

NSW Civil and Administrative Tribunal (NCAT)

www.ncat.nsw.gov.au

ph: 1300 006 228

Office of the Australian Information Commissioner

www.oaic.gov.au

ph: 1300 363 992

