information and privacy commission
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Guideline 2: Discounting charges

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Contents

Summary of GIPA Act and GIPA Regulation provisions dealing with discounting fees and charges 3
Introduction 3
Part 1: Overview of fees and charges 3
Part 2: Overview of discounts 6
Part 3: What is 'special benefit to the public generally'? 7
Part 4: Examples of circumstances where releasing information may be a special benefit 10
Appendix 1 11
Appendix 2 12
Government Information (Public Access) Act 2009 12
Government Information (Public Access) Regulation 2009 13
Document information 14
Document history 14

The object of the *Government Information (Public Access) Act 2009* (GIPA Act) is to open government information to the public to maintain and advance a system of responsible and representative democratic government.

The GIPA Act places various obligations on agencies within NSW in respect of their publication and release of the information that they create and hold. The GIPA Act also provides rights for persons to apply for access to government information.

These Guidelines are made to assist agencies decide whether to reduce processing charges on the ground that the information is of special benefit to the public generally in accordance with section 66(3) of the GIPA Act.

These Guidelines are an aide to the application of the provisions of the GIPA Act.

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Summary of GIPA Act and GIPA Regulation provisions dealing with discounting fees and charges

Four provisions of the *Government Information (Public Access) Act 2009* (GIPA Act) and *Government Information (Public Access) Regulation 2009* (GIPA Regulation) are of direct relevance to the consideration of discounting fees and charges. Sections 65; 66 and 127 together with clause 9 of the GIPA Regulation These provisions are attached at Appendix 2

Introduction

These Guidelines are made to assist agencies in dealing with fees and charges under the GIPA Act and in particular focus on sections 65 and 66 of the GIPA Act to assist in determining whether to apply a 50 per cent reduction in a processing charge on the grounds that the information applied for is of special benefit to the public generally. These Guidelines have also been informed by recent decisions of the NSW Civil and Administrative Tribunal (NCAT) on reducing or discounting processing charges.

In order to interpret and apply sections 65 and 66 of the GIPA Act, agencies need to have a general understanding of how fees, processing charges and discounts are encompassed under the GIPA Act.

- Part 1 of these Guidelines provides an overview of fees and processing charges
- Part 2 provides an overview of discounts under the GIPA Act
- Part 3 provides a discussion of what is 'special benefit to the public generally and
- Part 4 provides examples of circumstances that may be a special benefit

Part 1: Overview of fees and charges

1. The GIPA Act aims to foster and promote responsible and representative government that is open, accountable, fair and effective by encouraging proactive and informal release of information free of charge or at the lowest reasonable cost.
2. Further section 3(2) of the GIPA Act confirms that the intention of Parliament is that the GIPA Act be interpreted and applied so as to further the object of the Act and that the discretions conferred by the Act are to be exercised to facilitate and encourage, promptly and at the lowest reasonable cost, access to government information. Accordingly, most government information should be available free of charge.
3. The following sections of the GIPA Act provide for four pathways for the release of information held by agencies.

   3.1 Section 6 of the GIPA Act – Mandatory release of open access information

   Open access information is provided free of charge and comprises:

   - An agency information guide;
   - Documents tabled in Parliament by, or on behalf of, an agency;
   - An agency's policy documents;

- A disclosure log of information released under formal access applications;
- A register of contracts an agency has with private sector entities for a value of more than $150,000; and
- A record of the open access information that is not made public due to an overriding public interest against disclosure (section 18).

The *Government Information (Public Access) Regulation 2009* (GIPA Regulation) also includes the following as open access information:

- Ministers to disclose media releases and details of overseas travel;
- Government departments to publish a list of major assets, the total number and value of properties disposed of in a previous financial year, and their guarantees of service and code of conduct (if any); and
- An advertising compliance certificate issued under the *Government Advertising Act 2011*.

Local councils are required to provide additional open access information, including:

- Annual, financial, and auditors' reports, management plans and various codes;
- Agendas, business papers and minutes of meetings;
- Information contained in certain registers;
- Plans and policies;
- Development applications and associated documents; and
- Information concerning approvals, orders and other documents.

3.2 Section 7 of the GIPA Act - Proactive release of information

3.2.1 Agencies are authorised to release other information (that is information not subject to mandatory release) proactively, unless there is an overriding public interest against disclosure. Agencies can facilitate the proactive release of information in a record by deleting or redacting that part of the information in the record that is subject to an overriding public interest against disclosure.

3.2.2 Such information proactively disclosed should be free of charge or at the lowest reasonable cost. The IPC strongly encourages agencies to release information proactively or informally where there is no overriding public interest against disclosure.

3.2.3 Agencies should consider as part of proactive release of information providing more clarity in the agency information guide, in particular details identifying each of the business units and their work. This will assist citizens in better understanding the functions of agencies.

3.3 Section 8 of the GIPA Act - Informal release of information

3.3.1 Agencies are authorised to release any government information they hold to people requesting it without requiring a formal access application to be lodged where there is no overriding public interest against disclosure. Agencies can facilitate the informal release of

information in a record by deleting or redacting that part of the information in the record that is subject to an overriding public interest against disclosure.

3.3.2 An agency may deal with a formal application informally by refunding the application fee and processing the request for free (with the applicant's consent and after advising the applicant that they will not have a right to have the decision reviewed if they agree to the agency processing the application informally). Alternatively, the agency could process the request as a formal application with attached review rights, but waive the application fee and processing charges.

3.4 Section 9 of the GIPA Act – Formal access applications

3.4.1 An agency may receive a formal access application for information.

3.4.2 Alternatively, following the consideration of proactive and informal mechanisms for release of information, an agency may require an applicant seeking access to government information to submit a formal access application for that information.

3.4.3 Section 41(1) of the GIPA Act outlines the formal requirements for making an access application including the requirement to have an access application accompanied by a fee of $30 (Section 41(1)(c)).

Formal access applications – application fee and processing charges

3.5 An applicant is required to pay an application fee of $30 unless the agency waives or reduces this fee (see section 127 – general discretion and section 4.2 of this guideline).

3.6 An agency may also impose a processing charge for dealing with an access application. In accordance with section 64 of the GIPA Act, the agency may only charge at a maximum rate of $30 per hour for each hour required to process the access application.

3.7 If a processing charge is imposed, the application fee will count as payment towards a processing charge. Thus, if an agency charges at the full rate of $30 per hour, the application fee counts as a payment towards processing the access application. This is generally the first hour of processing the application. However, if a 50 per cent discount on charges is granted by the agency, then the application fee will pay for the first two hours of processing the access application. The NCAT decision of *National Tertiary Education Union v Southern Cross University [2015] NSWCATAD 151* provides authority for including the application fee in the calculation of the total processing charge before applying the reduction. The Tribunal at paragraph 62 stated:

> *The discount to which an applicant is entitled under section 66(1) of the GIPA Act is 50% of the total processing charge (that is, 50% of the processing charge before the application fee is deducted from it).*

3.8 The processing charge covers the total amount of time that it takes an agency to deal efficiently with the application and to provide a response to the application. This includes time expended to consider the application, searching for records, consulting any third parties, and making a decision.

3.9 The IPC's view is that agencies cannot charge for registering the application, conversations with the applicant to clarify the request or reduce the scope, drafting file notes, drafting letters (including notification of a valid application, or advance deposit letters; however, the

determination letter may be charged for), postage, internal conversations, printing and other general administration incidental to or associated with processing the application.

3.10 Section 64 of the GIPA Act does not empower an agency to make a decision about processing charges, rather it provides that the agency may impose a charge. The practical application being that charges are not imposed until it is known how long it has taken to deal with the application, which is at the time the application is decided. This was confirmed in the NCAT decision of *National Tertiary Education Union v Southern Cross University [2015] NSWCATAD 151* where the Tribunal at paragraph 30 confirmed:

> *Further, it is not until an agency has decided an access application that it can determine whether it is entitled or empowered to impose a processing charge.*

3.11 Therefore, advice to an applicant on estimated processing charges is not a decision to impose processing charges, merely an indication of what the charges are likely to be.

Further details about fees and charges may be found in the IPC fact sheet GIPA Act fees and charges.

Charges must be reasonable

3.12 Under the GIPA Act, an agency is required to estimate the processing charge based on the time that would be spent by a reasonably competent officer with appropriate knowledge and familiarity with processing access applications and document management systems.

3.13 Under section 80 of the GIPA Act, a decision to impose a charge or require an advance deposit (section 80(j)) and a decision not to reduce a processing charge (section 80(k)) are all reviewable.

3.14 The IPC's view is that agencies should keep a record of **estimates** for processing charges, including calculations, and **actual** costs of processing the application to demonstrate how the processing charge was calculated should the decision be reviewed.

3.15 The IPC's view is that agencies should advise the applicant about the likely costs before the costs are incurred. This provides the applicant with the opportunity to reduce their scope or even withdraw their application if the costs will be an issue and the agency has determined, based on all the circumstances, that they are unable to waive or discount the application fee or charges.

Part 2: Overview of discounts

4. An applicant may apply for a 50 per cent reduction in processing charges on the grounds:

of financial hardship (section 65). Under clause 9 of the GIPA Regulation, financial hardship includes if the applicant can provide evidence that he or she is:

- the holder of a Pensioner Concession card issued by the Commonwealth that is in force;
- a full-time student;
- a non-profit organisation, including a person applying for or on behalf of a non-profit organisation.

and/or

that the information applied for is of special benefit to the public generally (section 66).

4.1 The reduction in processing charges is not cumulative. That is, an applicant cannot seek to apply both sections 65 and 66 of the GIPA Act to proposed processing charges to mean that the charges are reduced by 100 per cent, to nil. The maximum reduction in processing charges is 50 per cent, even where an applicant applies for a reduction in charges under both sections 65 and section 66. This was confirmed by NCAT in *National Tertiary Education Union v Southern Cross University [2015] NSWCATAD 151.*

4.2 However, the agency may exercise its discretion under section 127 of the GIPA Act to waive, reduce or refund the application fee and/or processing charges in any case that it thinks appropriate.

4.3 The IPC strongly encourages agencies to exercise the discretion to waive, reduce or refund the application fee and/or processing charges whenever appropriate to further the objects of the GIPA Act and consistent with the intent of Parliament to facilitate and encourage, promptly and at the lowest reasonable cost, access to government information.

4.4 Additionally, subsection 66(2) requires full waiver of the processing charge and processing fee if the agency makes the information applied for publicly available either before or within three working days after providing access to the applicant.

Part 3: What is 'special benefit to the public generally'?

5. Reduction of charges on the special benefit ground relies on the particular information applied for having a special interest or benefit to the public generally. It may not be obvious to a decision-maker on the face of the access application as to why the particular information should have a special benefit or be of special interest to the public. Whilst section 16 of the GIPA Act places an obligation on agencies to provide advice and assistance, applicants can also assist a decision maker in their consideration of a request for a discount in processing charges on the basis that the information applied for is of special benefit to the public generally.

6. In considering the application and applying the test (or legislation) the decision-maker needs to consider the information applied for in the GIPA application. The NCAT concluded, in the matter of *Shoebridge v Forestry Corporation [2016] NSWCATAD 93* (*Shoebridge*) *at 23* that a decision-maker, in considering whether the information applied for is of special benefit to the public:

> *Must decide whether he or she is satisfied that there is a benefit that is different from what is ordinary or usual to the general public and thus not merely the private interests of the applicant alone.*

7. At paragraph 24 the Tribunal outlined the factors relevant to consideration of a special benefit to the public generally in relation to the information applied for by the Applicant. These factors can be summarised to include:

   - public health and safety;
   - the application of public funds;

- proper record keeping and legislative compliance generally by the agency in the exercise of its functions;
- the existence of a special interest group and the benefits of accountability and transparency of decision-making by government, in particular Members of Parliament; and
- the need to ensure that citizens have sufficient information to enable them to actively participate and contribute to consideration of relevant issues through submissions or enquiry.

8. The elements of the special benefit ground are:

1. The information applied for confers the special benefit

8.1 Disclosure of government information is presumed to be in the public interest under section 5 of the GIPA Act. The decision-maker must also exercise their discretion to reduce processing charges in a way that is consistent with the intentions of Parliament outlined in section 3(2) of the GIPA Act – that the discretions conferred by this Act be exercised, as far as possible, so as to facilitate and encourage, promptly and at the lowest reasonable cost, access to government information.

8.2 The NCAT in *Shoebridge* observed that the GIPA Act is to be construed beneficially, in favour of disclosure. The NCAT was satisfied that there was no requirement to construe the term "special" as having an extraordinary or exceptional benefit to the wider community, merely that it is something different to what is ordinary or usual.

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

8.4 The GIPA Act does not include a definition of "special benefit to the public generally". However, as a general guide, information that better informs the public about government and or concerns a public issue would be of special benefit or special interest to the public generally. At paragraph 22 of *Shoebridge* the Tribunal found that it was not necessary to establish that the test required an extraordinary or exceptional benefit but "*merely something which is different from the ordinary or usual*". Further the Tribunal found that "*the non-exhaustive checklist…* [at Appendix 1 of these Guidelines] *is of assistance in determining whether there is a special benefit to the public generally*".

8.5 For example, if the information would inform public debate about an issue, increase public understanding about government functions, or contribute to the public's understanding of an issue of public significance (such as the environment, health, safety, civil liberties, social welfare, or public funds), then this would have a special benefit. Agencies are expected to consider the merits of each application separately and take into account all the circumstances of each case. For example, if an agency has already determined the public interest test in one application requesting a 50 per cent reduction on the grounds of special benefit to the public generally, and then receives another 50 per cent reduction application on the same ground concerning the same or majority of the same information, the agency cannot apply the public interest conclusion reached in the first decision to the latter or any other application. This is because the circumstances in each application for a 50 per cent reduction may differ.

8.6 However, agencies should consider the operation of section 7 of the GIPA Act in authorising the proactive release of information following a determination to release information in response to an access application made in accordance with section 9 of the GIPA Act.

2. The public generally

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

8.8 The public generally may include:

- a section of the community (e.g. single parents, persons aged over 65, persons with a disability, persons of a particular nationality);
- a community group (e.g. volunteer rescue groups, kids support service providers);
- a group of persons from a particular area (e.g. persons residing in a suburb where the information relates to issues, such as waste management proposals, within that suburb);
- a group of people with a common interest (e.g. local government constituents, a parents and citizens association, student unions or university students generally, advocacy groups);
- persons of a particular occupation or industry sector (e.g. medical practitioners, academics, newsagents); or
- any other members of the public other than the applicant (e.g. neighbours who may be interested in the same development proposal).

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

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

9. Generally factors that a decision-maker cannot take into account include:

- The information might mislead or be misunderstood by the public, for example, because the public might not understand the technicalities or jargon used in a document.
- That the information, if released, could be misrepresented, abbreviated or distorted, or presented in a biased way.
- Matters where a different process or legislative regime requires an agency to conduct some form of public interest assessment. For example, a public interest assessment may have been carried out during an environmental assessment or local council land development consultation. However, a council could not use the conclusion reached in the environmental or development assessment in determining the 'special benefit' for a GIPA access application.

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

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

11. In addition to the factors summarised at paragraph 7, some examples of circumstances where releasing the information may have a special benefit to the public generally are provided here for general guidance. The list is not a prescriptive or exhaustive list.

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

    The status of an applicant, for example a journalist or a Member of Parliament, will not give rise to an automatic right to discount charges on the grounds of special benefit to the public generally. It will depend on the nature of the information requested.

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

    - A Member of Parliament requests information to assist a constituent and that constituent would ordinarily have been entitled to a discount of charges on the basis of special benefit to the public generally.
    - A Member of Parliament requests information about the costs and uses of chemicals by agencies on government owned lands because it is likely to result in public scrutiny, debate and accountability including facilitating submissions and questions to Ministers and agencies.
    - A journalist seeks information about government spending on a project that is likely to result in public scrutiny of and enhance government accountability.

    The above examples are illustrative and not intended to limit consideration of special benefit to the public.

Appendix 1

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

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

Special Benefit

1. Does the information relate to an issue of public debate?
2. Does the information relate to an issue that is different from the ordinary or usual (e.g. environment, health, safety, civil liberties, social welfare, public funds etc)?
3. Does it interest or benefit the public in some other way? (e.g. assist public understanding about government functions)
4. Would release of the information contribute to further analysis or research?
5. Would the information add to the public's knowledge of the issues of public interest? For example, if the information is outdated then the information may not add to or be of benefit to the public's knowledge. Although in some circumstances historical information may still add to the public's knowledge of the issues of public importance, particularly where it may inform the public of a state wide view, greater participation and enquiry by the public regarding the issue/s and whether the agency or agencies have complied with their legislative obligations However, if the information is outdated, then the agency should advise the applicant about the existence of updated information, or ensure that the historical nature or context of the information is made explicit. (Applies to agencies only)

Public generally

6. Would any of the following have a special interest in the information:
    a) a section of the community (e.g. single parents, persons over 65, persons with a disability, persons of a particular nationality etc).
    b) a community group (e.g. volunteer rescue groups, kids support service providers etc).
    c) a group of persons from a particular area (e.g. persons residing in a suburb X where the information relates to issues, such as waste management proposals, within suburb X).
    d) a group of people with a common interest (e.g. local government constituents, a Parents and Citizens association, student unions or university students generally, advocacy groups etc).
    e) any other members of the public other than the applicant (e.g. neighbours who may be interested in the same development proposal).
    f) persons of a particular occupation or industry sector (e.g. medical practitioners, academics, newsagents).
7. Is the information, if disclosed, likely to lead to publication of the information?
8. Will the information be analysed or likely to lead to further analysis?

Appendix 2

Government Information (Public Access) Act 2009

65 Discounted processing charge – financial hardship

(1) An applicant is entitled to a 50 per cent reduction in a processing charge imposed by an agency if the agency is satisfied that the applicant is suffering financial hardship.

Note. The discount applies only to the processing charge, not the application fee. If a 50 per cent reduction in processing charge applies, the application fee will pay for the first 2 hours of processing time (not just the first hour). See section 64.

(2) The agency may refuse to allow the discount if satisfied that the applicant is making the application on behalf of another person in order to obtain the discount for that person.

(3) The regulations may prescribe circumstances that constitute financial hardship.

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

66 Discounted processing charge – special public benefit

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

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

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

(2) If the information applied for was not publicly available at the time the application was received but the agency makes the information publicly available either before or within three working days after providing access to the applicant, the applicant is entitled to a full waiver of the processing charge imposed by the agency.

(3) The Information Commissioner may, for the assistance of agencies, publish guidelines about reductions in processing charges under this section.

127 Waiver, reduction or refund of fees and charges

(1) An agency is entitled to waive, reduce or refund any fee or charge payable or paid under this Act in any case that the agency thinks appropriate, subject to the regulations.

Note. See section 51A concerning the effect of a waiver, reduction or refund of the fee for an access application.

Government Information (Public Access) Regulation 2009

9 Discounted processing charge

An agency is required to reduce, by 50 per cent, the processing charge payable under the Act for dealing with an access application if the applicant provides evidence that the applicant:

(a) is the holder of a Pensioner Concession card issued by the Commonwealth that is in force, or

(b) is a full-time student, or

(c) is a non-profit organisation (including a person applying for or on behalf of a non-profit organisation).

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