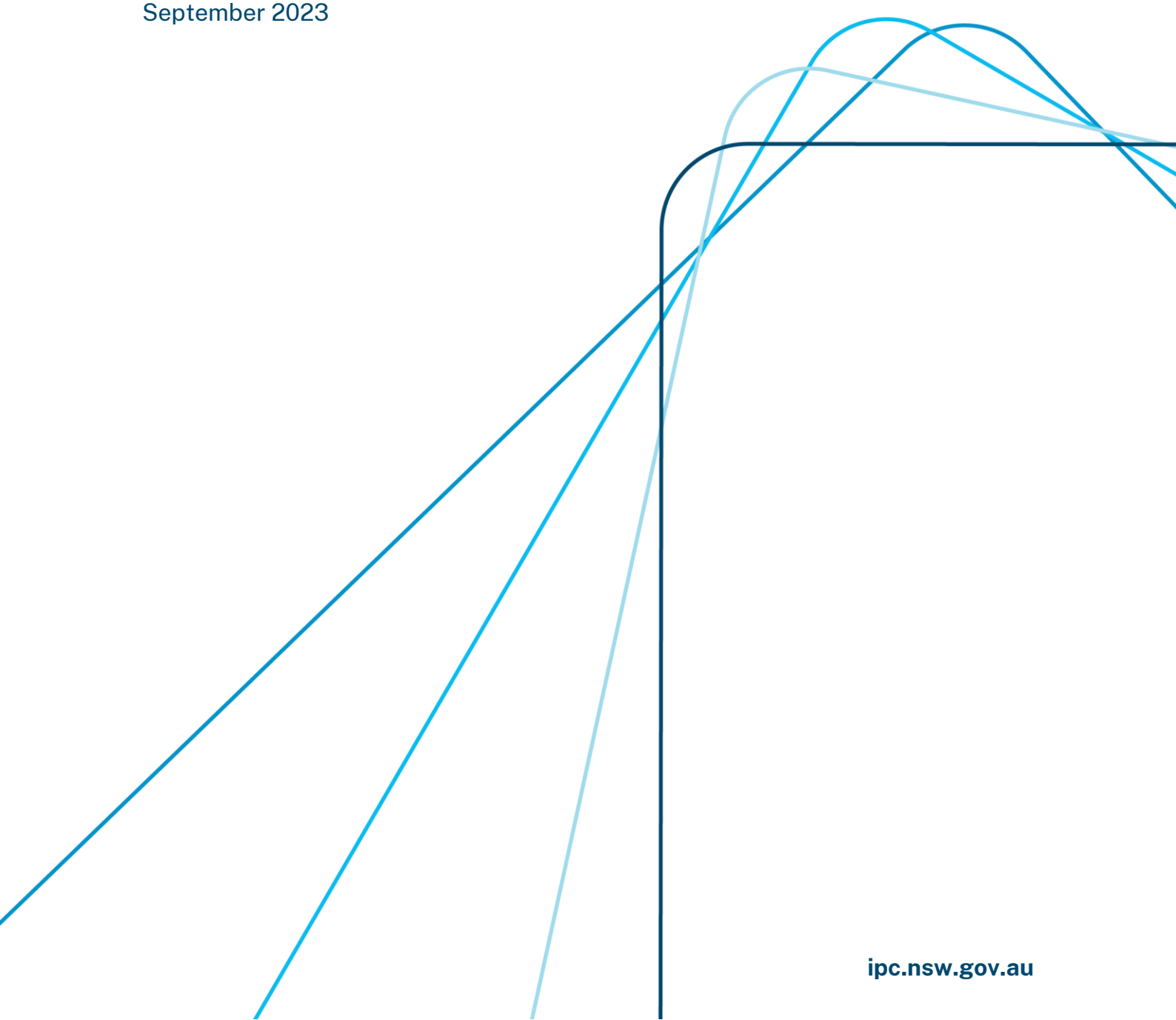
Information and Privacy Commission NSW

Information Access Guideline 11 – Informal Release of Information

September 2023



ipc.nsw.gov.au

Contents

1. The four access pathways under the GIPA Act 4

2. Understanding informal release 5

3. Informal release process essentials 6

4. Strategies to promote the informal release of information 7

5. When should informal release be used? 7

6. Considerations in favour of and against disclosure 9

7. Implementation tools 12

8. Other useful resources 13

9. Conclusion 13

Information Access Guideline 11 – Informal Release of Information

The principle of open government is paramount to preserving the doctrine of responsible government and to governmental legitimacy. In NSW the *Government Information (Public Access) Act 2009* (GIPA Act) provides the primary authority for open government and it protects and preserves the right to access government information.

This Guideline is part of a suite of information access resources provided by the Information Commissioner to facilitate informal access to information. Independent research conducted by the University of New South Wales (UNSW) and an audit of agency practices by the Information and Privacy Commission NSW (IPC) identified the need to support agencies in the exercise of this function and to promote better administrative decision-making practices under the GIPA Act.[1]

There are four pathways under the GIPA Act that promote the release of government information to citizens. The four pathways act in concert to form a virtuous circle for continuous release of information. This reflects the government environment in which information is continuously acquired, revised and produced.

The informal release pathway stimulates the continuous release of information by providing access in a timely and informal manner which may be subject to conditions, redactions or take a particular form.[2] Informal release decisions are made with the authority of the principal officer of the agency and staff informally releasing information are protected from criminal or civil action.[3]

Once released informally agencies should consider release beyond the individual request and determine if the information should be released broadly through their proactive release program. Updating their agency information guide (AIG) to reflect the availability of this information will ensure that citizens and agencies are aware of government information holdings and can more effectively obtain and provide information.[4]

A primary consideration in the informal release of information is the public interest in the release of that information. Agencies hold a significant amount of information that should be released publicly because there are no identified considerations against disclosure that would override the considerations in favour of disclosure. Additionally, redactions, conditions or changing the form of the information may overcome any potential considerations against disclosure.

The Information Commissioner is empowered under sections 12(3) and 14(3) of the GIPA Act to issue guidelines to assist agencies regarding the public interest considerations in favour of, or against, disclosure.

This Guideline is made to assist agencies to determine the public interest considerations in favour of and against disclosure of information via informal release under section 8 of the GIPA Act. Additionally, it provides practical information to promote the informal release of information supported by sound administrative processes and decision-making.

This Guideline supplements the provisions of the GIPA Act. Agencies must have regard to Information Commissioner Guidelines in accordance with section 15(b) of the GIPA Act.

Elizabeth Tydd

IPC CEO, Information Commissioner
NSW Open Data Advocate

[1] https://www.ipc.nsw.gov.au/node/2657

[2] GIPA Act section8(2),s8(4),s8(5)
[3] GIPA Act ss113-115
[4] GIPA Act section 20

1. The four access pathways under the GIPA Act

The potency of the right to access information in NSW is achieved through the composite of the four access pathways under the GIPA Act. The pathways combine to generate the public release of information and preserve the human right of access to information for individuals. The aggregate effect of these pathways ensures that agencies can provide government information to the public 'promptly and at low cost'.

The four pathways should operate as a virtuous circle:

1. The first pathway, mandatory proactive release provides a core set of agency information that must be publicly available, free of charge. For example, agency policies, details of the information held by the agency, government contracts with the private sector, disclosures of interest in the local council sector and travel in the Ministerial sector.

2. The second pathway, authorised release, enables and encourages agencies to proactively release additional information such as reports or business cases. It is this ongoing release of information that should be included in each agency's update of its publicly available Agency Information Guide (AIG). An AIG sets out all of the information the agency makes available. This information will increase year on year. Therefore, yearly reviews are required to promote currency of the information provided and to ensure that agencies are aware of the information they hold.

3. The third pathway, informal release of information enables citizens to request information informally, for example in person or during a telephone call. It also allows agencies to impose conditions on the release of information, decide the format in which information is provided and delete information that might render the information inaccessible because of public interest considerations against disclosure. Information released informally should also be considered for proactive release to the public broadly and included in the AIG.

4. The fourth pathway, formal application provides transparent and consistent procedures and timeframes for citizens making applications and agencies dealing with applications. Notices of decisions are required, and the pathway provides rights of review if a citizen is not satisfied with the agency's decision. Information released to one person through the formal release pathway should also be considered for proactive release to the public broadly and included in the AIG. This process is facilitated by the agency's disclosure log.[5]

In 2020/21the Information Commissioner reported a 30% increase in formal applications for government information.[6] In the face of such a dramatic increase in formal applications the Information Commissioner commissioned research by UNSW to examine the least understood of the four access pathways – informal release. The aim of the research into the informal access pathway was to:

- better understand its use,
- identify its benefits to agencies and citizens,
- provide guidance, and
- potentially decrease the need for more resource intensive formal applications under the fourth access pathway under the GIPA Act.[7]

[5] GIPA Act section 25
[6] Report on the Operation of the GIPA Act 20201/21
[7] GIPA Act section 9

The GIPA Act provides that agencies can release information upon request of a person in two ways without requiring the formal lodgement of a valid access application.[8] Firstly, the GIPA Act declares that it does not intend to prevent or discourage agencies from giving access as permitted or required by other Acts or laws.[9] Secondly, the Act recognises that 'informal release of government information' is one of the four designated information access pathways.[10]

Use of the informal access pathway does not impair the legally enforceable and reviewable right to access information under the formal access pathway.

2. Understanding informal release

Informal release under the GIPA Act provides agencies with a flexible and efficient pathway to exercise their discretion to release information. In doing so agencies are acting in accordance with the overarching objective of promoting an open, accountable, fair and effective system of democratic government.

There are a number of reasons why the use of the informal release of information pathway is not well understood. They include the:

- absence of a legislative requirement for agencies to collect and report data on this pathway;
- limited documentation of policies and procedures setting out the way in which agencies manage informal information access requests;
- diverse and decentralised practices adopted by agencies to manage informal requests for information
- limited training for officers regarding the use of the informal release pathway
- limited guidance by the Information Commissioner.

The IPC audit conducted in 2021/2 accompanying the UNSW research found that most agencies lacked established procedures to manage informal release requests. In the absence of established procedures and where the functions are exercised by a wide variety of staff, risks to agencies compliance with their legislative requirements are heightened.

Importantly agencies are exercising a decision-making function and they are required to document that administrative decision in a proportionate way. However, agencies' powers of informal release are non-compellable, and a decision of a government agency to refused to release information informally is not a 'reviewable decision' under Part 4 of the GIPA Act.

Informal and proactive release go hand-in-hand in enhancing government efficiency and transparency in decision-making processes. The GIPA Act:

- provides informal and proactive release pathways in order to minimise the need for formal requests for information;
- promotes the timely release of information;
- mandates ongoing review by agencies of their information release practices; and
- ensures regular public updates of agency information holdings.

[8] GIPA Act section 41
[9] GIPA Act section 10
[10] GIPA Act section 8

2.1 The Benefits of Informal Release

The GIPA Act presents agencies and citizens with opportunities for informal release of information that offer many advantages. It is important to view informal release as more than a single transaction. Informal release provides an opportunity to release information broadly.

It is only through implementing procedures to activate broader release that the many benefits of informal release will be activated and the object of the GIPA Act realised.[11]

Accordingly informal release should be viewed as a program.

An informal release program will ensure agencies:

- Record information that they make available and do not make available
- Can better predict and manage both informal and formal requests
- Use less resources managing information access obligations
- Comply with their proactive, authorised and informal release obligations
- Efficiently document their decisions regarding the informal release of information
- Provide access to more information
- Apply conditions/redactions to information to enable release of information
- Avail themselves of the protections from criminal and civil liability in the exercise of functions under the GIPA Act[12]
- Facilitate effective ministerial decision-making through an efficient regime of open government and transparency;
- Demonstrate a commitment to openness, accountability and transparency, which in turn may increase confidence in the administration of government.

3. Informal release process essentials

The informal release research report found that:

> *Clear and consistent processes make it more likely that records will identify common categories of information, through alignment of terminology about each request. Increasing the use of the proactive release pathway also enhances transparency and consistency (given everyone can access the information on the same terms).*

Linking proactive release to informal release by implementation of a common taxonomy and aligned procedures will streamline the operation of all four access pathways under the GIPA Act. Likewise, a common taxonomy will also enable ready identification of information that can be released.

Agencies require established systems, policies and practices to ensure that their informal access is operating effectively. In summary those requirements include mandated and recommended practices:

i. Authorisations/delegations[13]

ii. Agency Information Guides[14]

[11] GIPA Act section 3
[12] GIPA Act sections 113-115
[13] GIPA Act section 8(6)
[14] GIPA Act section 20

iii. Availability, free of charge of all open access information, including the agency's disclosure log[15]

iv. Procedures for maintaining a record of open access information that the agency does not make publicly available [16]

v. Procedures to conduct at least an annual review of their program for proactively releasing information [17]

vi. Search procedures

vii. Templates to communicate with informal access applicants

viii. Decision making checklist

ix. Procedures and spreadsheets for recording the date of application, date of decision and decision outcomes

x. Strategies to promote informal release of information

This Guideline provides additional information to guide a number of those procedures. Additional tools and guidance on informal release are included in part 8 of this Guideline.

Importantly, a pro-disclosure culture is required to support informal access to information. This culture must be reinforced by strategies to promote the informal release of information.

4. Strategies to promote the informal release of information

Promoting informal access to information should begin with an understanding of the value of information held by government agencies. Government information is a public asset and a valuable public resource.

Australian Information Commissioners released principles to promote the proactive release of information and those principles have application to informal release of information.

Four key strategies are set out in those principles:

1. Embed a proactive disclosure culture in all public sector agencies and public institutions
2. Implement a best practice Open by Design approach to proactive disclosure
3. Engage with the Australian community in relation to the information that is of most value and interest to them
4. Adopt a customer service approach to the proactive disclosure of information

There are practical actions underpinning these strategies that can be readily implemented by agencies. Those practical actions are contained within the Principles.

5. When should informal release be used?

Any person can make an informal access request and there are no legislative requirements modifying this right. However, agencies can refuse to deal with an informal access request and refuse access to information that has been requested informally under the GIPA Act.[18]

[15] GIPA Act section 18
[16] GIPA Act section 6(5)
[17] GIPA Act section 7(3)
[18] GIPA Act section 8(3)

Firstly, the request should be considered and that involves two steps: an assessment of the request and secondly identifying the information held by the agency relevant to the request.

5.1 Assessing the request for information

There are a series of questions that should inform an assessment of the informal request:

i. Is it an individual or body requesting the information?

ii. If it is a person requesting information, are they seeking personal information?

iii. Is the information usually held by the agency?

iv. Can the information be released swiftly either as a summary or with other conditions and/or redactions?

v. Can the information be prepared for release with minimal costs to the agency?

In general, the sorts of information that may be suitable for informal release include information that:

- Is publicly available and routinely made available by the agency
- Is available on the agency's website that the person would like to access in a different format (for example, in hard copy)
- Was previously provided to the agency by the person seeking access to that same information for example, correspondence sent to the agency from the applicant
- Was previously provided by the agency to the person seeking access for example, previous correspondence sent by the agency to the applicant

To answer these questions agencies must identify information that is:

1. Held by the agency
2. Proactively released by the agency
3. Suitable for release by the agency even if conditions or deletions or a change of form of access are necessary to facilitate release of information
4. Likely that an overriding public interest against the disclosure of the information might apply.

Identifying information from the four categories above can be supported by the information governance features of the GIPA Act that apply to agencies. For example, agencies are required to publicly report information regarding open access information that it does not make available. Likewise, agencies are required to report access applications in their disclosure log.[19]

5.2 Costs

Unlike the formal access applications conditions, deletions, different forms of access including provisions of summaries are all contemplated under the informal access pathway. In these circumstances the costs to the agency and the citizen should also be considered.

Government frequently compiles data and reports for internal management purposes. These reports generally take the form of business analytics reports and are regularly generated. Often the reports are applied in aggregate in an agency's annual report. Once prepared as either an ad hoc or routine report the agency is required to assess the information created as a possible state record.

[19] GIPA Act section 25

Where the report falls within this category it will be preserved and can therefore be reproduced at little cost to the agency and citizen.

Ensuring that consideration is given to the type of information held by the agency and the costs of release informally, is essential to the effective operation of the informal release pathway.

There is also an overall cost saving to be delivered to agencies that operate their access pathways in a holistic and therefore effective manner. Informal release is designed to achieve a low-cost mechanism for provision of information especially in comparison to the formal access pathway.

5.3 Check the agency's information holdings

The following image provides a framework for assessing information holdings and identifying information released and not released by the agency.

Application of the framework will also enable decision makers to identify what information is released in full, in part, free of charge or with conditions. If information has not been released because it is subject to an overriding consideration against disclosure decision-makers should consider the possibility of redaction to satisfy themselves that it cannot be released with redactions or subject to conditions. If satisfied that the considerations against disclosure override the factors in favour of disclosure, then decision makers should advise applicants of the formal release pathway.

Considering Information Holdings

Where to search?

Information held by the agency	Information that is proactively released	Information that could be released	Information that may be subject to a COPIAD
•Mandatory proactive release information •Agency Information Guide •Statistics •Business Reports	•AIG •Open Access information •Statistics	•AIG •Authorised proactive release •Disclosure log	•AIG •s6(5) information •Disclosure log •Schedules 1 and 2 of the GIPA Act

6. Considerations in favour of and against disclosure

It is important to consider the types of information usually dealt with in each of the four access pathways in deciding if information should be released informally. For example, open access information may still be subject to considerations against disclosure and those considerations may be sufficient to displace the factors in favour of disclosure. However, those factors may decrease overtime. Additionally, the New South Wales Civil and Administrative Tribunal (NCAT) has found that the presumption in favour of disclosure of open access information operates more persuasively to tip the balance in favour of disclosure.[20] NCAT has also found that commercial or business interests may decrease in significance over time and therefore fail to displace the factors in favour of disclosure.[21]

Accordingly, a disclosure log as required by section 25 of the GIPA Act is only a starting point to examine open access information that may not be suitable for informal release.

[20] *McEwan v Port Stephens Council [2021] NSWCATAD 110*
[21] *Taylor v Office of Destination NSW* [2018] NSWCATAD 195;; *Forbidden Foods Pty Ltd V Rice Marketing Board for the State of New South Wales (No 3) [2020]*

However, an agency cannot be required to disclose government information pursuant to an informal request and cannot be required to consider an informal request for information.[22]

If information is described in such a manner within a disclosure log to indicate current or enduring consideration against disclosure such as law enforcement and security this may indicate that the individual circumstances should be considered in a more detailed and robust decision-making process as provided under the formal access pathway.

Alternatively considering factors in favour of disclosure of information such as climate data that is of a type that is usually released may also be considered for release by extension of those existing arrangements. This is particularly the case in contemporary government environments where information is amassed and shared in an ongoing manner. Additionally considering the non-exhaustive factors in favour of disclosure information subject to public debate should also be considered for informal release if it is not prescribed for release.

The public interest factors in favour of disclosure are broad:

> **12 Public interest considerations in favour of disclosure**
>
> (1) There is a general public interest in favour of the disclosure of government information.
>
> (2) Nothing in this Act limits any other public interest considerations in favour of the disclosure of government information that may be taken into account for the purpose of determining whether there is an overriding public interest against disclosure of government information.
>
> **Note —**
>
> The following are examples of public interest considerations in favour of disclosure of information —
>
> (a) Disclosure of the information could reasonably be expected to promote open discussion of public affairs, enhance Government accountability or contribute to positive and informed debate on issues of public importance.
>
> (b) Disclosure of the information could reasonably be expected to inform the public about the operations of agencies and, in particular, their policies and practices for dealing with members of the public.
>
> (c) Disclosure of the information could reasonably be expected to ensure effective oversight of the expenditure of public funds.
>
> (d) The information is personal information of the person to whom it is to be disclosed.
>
> (e) Disclosure of the information could reasonably be expected to reveal or substantiate that an agency (or a member of an agency) has engaged in misconduct or negligent, improper or unlawful conduct.

Additionally, the principles that guide decision making under the GIPA Act apply to informal access decision making with the exception of section 15(e) which applies only to formal access applications. Having regard to these principles will also facilitate decision-making and assist in determining if an informal application can be dealt with by the agency.

> **15 Principles that apply to public interest determination**
>
> A determination as to whether there is an overriding public interest against disclosure of government information is to be made in accordance with the following principles —
>
> (a) Agencies must exercise their functions so as to promote the object of this Act.

[22] GIPA Act section 8(3)

(b) Agencies must have regard to any relevant guidelines issued by the Information Commissioner.

(c) The fact that disclosure of information might cause embarrassment to, or a loss of confidence in, the Government is irrelevant and must not be taken into account.

(d) The fact that disclosure of information might be misinterpreted or misunderstood by any person is irrelevant and must not be taken into account.

(e) In the case of disclosure in response to an access application, it is relevant to consider that disclosure cannot be made subject to any conditions on the use or disclosure of information.

There are also particular considerations against disclosure of information that may be commonly associated with informal release of information.

14 Public interest considerations against disclosure

(1) It is to be conclusively presumed that there is an overriding public interest against disclosure of any of the government information described in Schedule 1.

(2) The public interest considerations listed in the Table to this section are the only other considerations that may be taken into account under this Act as public interest considerations against disclosure for the purpose of determining whether there is an overriding public interest against disclosure of government information.

(3) The Information Commissioner can issue guidelines about public interest considerations against the disclosure of government information, for the assistance of agencies, but cannot add to the list of considerations in the Table to this section.

(4) The Information Commissioner must consult with the Privacy Commissioner before issuing any guidelines about a privacy-related public interest consideration (being a public interest consideration referred to in clause 3(a) or (b) of the Table to this section).

Schedules 1 and 2 of the GIPA Act establish conclusive presumptions against disclosure of information and should be considered in assessing any informal access application.

In particular section 43 provides that an access application cannot be made for excluded information. Whilst this provision operates within the context of the formal access pathway it would undermine the operation of the GIPA Act if information subject to Schedule 1 and/or Schedule 2 was made available under the informal access pathway.

The GIPA Act contains a number of references to the preservation of copyright[23] and recognises the business interests of agencies and other persons as factors against disclosure of information[24]. As a general rule information published on an agency's website, tabled in NSW Parliament or referenced in an annual report will not infringe copyright. Likewise, data that is collected by government agencies should in general be free from claims of copyright and therefore be available for release.

The IPC has published information to guide agencies in making decisions about access to information in circumstances where copyright might arise.[25] The form of access contemplated under the informal release pathway may ensure access to information is provided in a manner that is copyright preserving, for example view only or with redactions.

[23] See for example GIPA Act section 6(6)
[24] GIPA Act s14 item 4 of the Table
[25] https://www.ipc.nsw.gov.au/node/2765

7. Implementation tools

7.1 Advice to applicants about the informal access regarding review and complaint rights

The informal release pathway does not provide the individual seeking access with a detailed decision if information is withheld, review rights or strict timeframes. Agencies should inform applicants of this and, if the individual indicates they would like the opportunity for independent review if refused access, the agency should inform the individual their request may be more appropriately made formally under the GIPA Act.

Recommended practice is to include this information in standard template letters used by the agency.

7.2 Recording and adopting timeframes

Unlike a formal access request made under the GIPA Act, there is no time limit for a decision and provision of access to information under the informal pathway.

However, agencies are required to exercise their functions and discretions under the GIPA Act so as to facilitate and encourage, promptly and at the lowest reasonable cost, access to government information.[26]

Practically agencies should advise applicants of the timeframes involved and unless there are significant impediments beyond the control of the agency, information should be provided within the timeframes established under the formal access pathway.

Consistent with the GIPA Act agencies should actively engage with applicants to discuss an estimated timeframe for release of information or coming to an agreement about the timeframe in which the agency will provide access.[27]

If a decision-maker decides informal release would take a substantial amount of time, they should discuss other options with the individual seeking access to ensure they are aware of statutory time frames and their review rights under the GIPA Act. Making a formal access application is one option that should be discussed with the applicant and documented by the agency.

7.3 Delegations and documentation

The authorisation to determine an informal access request can only be provided by the principal officer. Accordingly, all front line, customer service and specialist officers dealing with informal requests will require an authorisation/delegation from the agency head.

Unlike the formal application pathway, the informal pathway has no reporting requirements under the GIPA Act. However, decisions made about informal release of information are decisions that impact citizen rights and as such agencies should document the applications and their outcomes.

The decisions should be documented to *keep adequate records of agencies' activities, including decisions that are made and the reasons for those decisions* as described in the NSW Ombudsman's guideline Good Conduct and Administrative Practice 2017. Significantly, those guidelines provide that good administrative practices require documentation that articulates a justification as to why it is not in the public interest to disclose that information.

Additionally, State Records NSW advise that, in order to satisfy their statutory obligations under the *State Records Act 1998* (NSW), government agencies must:

[26] GIPA Act section 3(2)(b)
[27] GIPA Act section 16

- Record all activities that are conducted electronically or face-to-face, such as making informal decisions.
- Document the reasons for making a particular decision.
- File all correspondence (sent or received) that relates to an informal release request within the agency's (electronic or paper) records system.

In response to the audit findings and the research into the informal access pathway the Information Commissioner developed tools to assist agencies in implementing systems that will:

- optimise the use of the informal access pathway and the collection of data;
- promote transparent responses to applicants and
- facilitate the release of more information through their pro-active disclosure programs.

These actions will lead to greater transparency, accountability, efficiency, and effectiveness in agency practices and achieve the intent of the GIPA Act through timely and proactive release of information.

A checklist to guide decision-making under the informal release pathway has been developed to accompany this Guideline. Templates have also been developed to support communication with applicants and a data capture framework to facilitate good administrative practices.

8. Other useful resources

Other resources that may be useful on this to include:

- Fact Sheet – Informal release of information
- Fact Sheet – Delegation or authorisation of GIPA Act functions
- Checklist – Informal access
- Template - Agency Informal Release Record
- Template - Informal Release Decision Template Letters
- Statement of Principles to support proactive disclosure of government-held information – developed by all Australian Information Commissioners and Ombudsmen

9. Conclusion

Based upon the IPC's audit findings effectively activating this essential access pathway under the GIPA Act requires profound changes. Cultural change, robust processes, data collection and systematic review are all required. To assist agencies the IPC has developed a suite of tools to guide improvements in the understanding and application of the information access pathway. This Guideline should be read in conjunction with those tools.

Data collection including recording decisions is not contemplated under the GIPA Act for the informal access pathway. However, the object of the GIPA Act and good administrative practices provide sound reasons for maintaining a limited and manageable data set relevant to the informal access pathway.

Adopting these cultural and process changes, which of themselves are not considered onerous will have a profound impact on the operation of the informal access pathway and should result in a more effective and efficient information access scheme that better serves agencies and citizens alike.

NOTE: The information in this Guideline is to be used as a guide only. Legal advice should be sought in relation to individual circumstances.

Document information

Identifier/Title:	Information Access Guideline 11: Informal Release of Information
Business Unit:	IPC
Author:	Information Commissioner
Approver:	Information Commissioner
Date of Effect:	26 September 2023
Next Review Date:	26 September 2026
EDRMS File Reference:	D23/011188/DJ
Key Words:	informal release, GIPA Act, access to information,

Information and Privacy Commission NSW
T 1800 IPC NSW (1800 472 679)
www.ipc.nsw.gov.au

Information and Privacy Commission NSW