NSW GOVERNMENT | Education & Communities

Kathrina Lo
Director, Justice Policy
Department of Justice
GPO Box 6
SYDNEY NSW 2001

DGL14/759

Dear Ms Lo

I write in response to the communication from the Office of the Information and Privacy Commissioner of 3 July 2014, to the Secretary of Education and Communities, Dr Michele Bruniges AM, inviting submissions to the statutory review of the *Government Information (Public Access) Act 2009*. The Secretary has asked me to respond on her behalf.

The Department of Education and Communities appreciates the opportunity and provides the attached document (TAB A) to assist with your review.

The Department proposes that the Act and Regulation be amended to address three areas of concern:

1. Inadequate provision to deal with unreasonably persistent applicants;
2. Inadequate regime for reasonable recovery of agency costs; and
3. Inadequate provision for agencies to comply with the statutory timeframes during the annual government Christmas/New Year closedown period.

Details are provided in TAB A.

If you require any further information please contact Mr Michael Waterhouse, Director Legal Services on 9561 8127.

Yours sincerely

Michael Waterhouse
R/Deputy Secretary, Education and Communities
// August 2014

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Submission by the Department of Education and Communities for the statutory review of the *Government Information (Public Access) Act 2009*

Proposed amendments

1. Strengthen provisions for dealing with unreasonably persistent applicants
2. Improve regime for reasonable recovery of agency costs
3. Provide an extension of time for the annual Christmas/New Year closedown period

1. Inadequate provision to deal with unreasonably persistent applicants

Section 110 of the Act provides for NSW Civil and Administrative Tribunal (NCAT) to make an order restraining a person from applying for access to government information where it is satisfied that the person has made at least 3 applications in the last 2 years that lack merit.

The onus is on the government agency to prove that an access application is lacking merit. The cost of providing evidence to satisfy the Tribunal that such an order is required may well outweigh the cost to the agency of continuing to deal with unmeritorious applications. The Department is not aware of a restraint order being made by NCAT.

The experience of the Department is that a small number of applicants make a large number of access applications year after year, which require a substantial allocation of resources, often disproportionate to the public interest value of the information requested.

In the Department's view, this system is far too limited and does little to prevent the problems of unreasonable conduct with agencies.

The following table lists eight unidentified applicants who have made 10 or more access requests to the Department since 2003. It shows that the access applications are one component in a series of actions which, when taken in total, impose a substantial and unreasonable demand on the Department's resources.

Applicant reference	First request	Last request	Number of FOI or GIPA applications since 2003	Related actions other than FOI or GIPA applications
A	2003	current	48	Discrimination; privacy; complaints; investigations
B	2009	2013	32	Discrimination disability; complaints; litigation
C	2008	2013	24	Discrimination disability; compensation claims; industrial relations; privacy; litigation
D	2008	2014	21	Complaints; employment issues; investigations
E	2003	2011	19	Privacy; complaints; corruption allegations
F	2005	2010	18	Privacy; litigation; complaints; Ombudsman complaints
G	2006	current	13	Discrimination; privacy; compensation claims; investigations; complaints; Ombudsman complaints
H	2010	current	10	Complaints; corruption allegations; Ombudsman & ICAC complaints

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Proposed change: The Department proposes that the Act be amended to provide for agencies to make a preliminary determination to refuse to deal with an application that is, in all the circumstances, unreasonable.

The agency should be allowed to take into account the totality of unreasonable actions by the applicant and its impact on the agency's resources. The onus of proof would be on the agency and the test would include the history of the applicant's contact with the agency, not limited to information access applications. Refusal on these grounds would provide the applicant an immediate right of review to Information Commissioner or NCAT. If there are multiple such refusals in respect of the same applicant within a prescribed period which are upheld on review, the agency should be permitted to decline to deal with any request for information about the same subject or closely related issues for a period of 12 months.

2. **Inadequate regime for reasonable recovery of agency costs**

Part 4 Division 5 of the Act deals with processing charges and advance deposits.

The rate of $30 per hour for dealing with an access application has not changed since 1989, while fees and charges for other government services are increased regularly in line with inflation and other cost of living increases. The Act provides a right for an applicant to request a reduction in charges and to have an agency's decision to impose charges reviewed.

The NSW Ombudsman's 2008 report, *Review of the Freedom of Information Act 1989*, considered the application of fees and charges to access applications at section 6.3. It canvassed the philosophy and policy issues and recommended maintaining the 1989 rate of charging $30 per hour and allowing discounts for financial hardship and public interest.

The number of access applications made to the Department has decreased under the GIPA Act compared to applications under the *Freedom of Information Act 1989*. Also, technology and record-keeping practices are constantly improving, so that locating and retrieving records is more efficient. However, the number and complexity of access applications has increased and consequently the cost to the Department's budget has also increased.

The Department recovers only about one percent of actual costs by fees and charges collected. It is estimated that actual average cost for the Department to deal with an access application is around $90 per hour and takes around 10 hours to process. In the majority of matters, no charges are imposed because the information is personal to the applicant. It means that the average application costs around $900 for the Department to process while the cost recovery is only $30. Dealing with more complex requests or review applications can cost thousands of dollars in resources and legal costs, of which little is recoverable.

It was never envisaged for the GIPA Act to operate on a cost-recovery basis; however the cost to agencies is substantial and is ultimately borne by the community. It is reasonable for the applicant's contribution to more closely align with the actual cost of processing.

Proposed change: The Department proposes that the rate for dealing with access applications be increased to better reflect the actual cost to agencies.

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3. Inadequate provision for agencies to comply with the statutory timeframes during the annual government Christmas/New Year closedown period

Section 57 of the Act sets out the decision periods within which agencies are required to deal with applications for formal release of information. It is calculated in working days, which excludes weekends and public holidays. If the decision is not made in time, it is a 'deemed refusal' and any fee paid must be refunded (s.63).

Section 57(3) and (4) provides for extension of the decision period by agreement with the applicant or under the regulation. Clause 6 of the *Government Information (Public Access) Regulation* provides for the decision period to be extended for the school holiday period, where the application involves a school.

The NSW Premier requires NSW public sector agencies to close down non-essential services between Christmas Eve and early January, with dates specified in a memorandum issued each year. This is designed to encourage all appropriate areas of public sector agencies not involved in the delivery of front line services to shut down over the Christmas/New Year period.

Currently the Christmas/New Year closedown period, other than the weekends and public holidays, is included in the decision period. However, the business areas that hold information relevant to access applications are usually closed and so it is not possible to process the access application during this period. The Information Commissioner encourages agencies to contact the applicants to seek their agreement to extend the decision date. If not agreed, it places significant pressure on agencies to make the decision in a reduced time period or to avoid refunding the fees and charges paid.

Proposed change: The Department proposes that the regulation be amended to provide an extension of time for the annual Christmas/New Year closedown period.

Submitted by
Department of Education and Communities
August 2014