

Informal Release of Information under Section 8 of the Government Information (Public Access) Act 2009 (NSW)

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Executive Summary

On 30 May 2022, the NSW Information and Privacy Commission ('IPC') announced that research would be undertaken to assess the use of informal release pathways by NSW agencies.¹ This followed the IPC's observations in their 2020/21 Report of an 'unprecedented 30% increase in applications to access government information' during 2020–21, 'representing the largest increase in over a decade of reporting'.² The IPC sought to understand this increase in light of the different information release pathways available to agencies, given that the relevant legislation (*Government Information (Public Access) Act 2009* (NSW) ('GIPA Act')) is meant to operate as a whole. Due to limited reporting requirements, the informal release pathway was the least understood.

The IPC engaged UNSW Sydney ('UNSW') to produce this report into the informal release practices of NSW agencies. IPC also conducted a survey of NSW agencies, providing UNSW with anonymised responses as well as analysis of the responses to each question (see *Informal Release under the Government Information (Public Access) Act 2009: Research Survey Response Review*).

This report, undertaken by UNSW, addresses the following research questions:

Informal release reporting practices

1. What reporting requirements and performance metrics from other jurisdictions (nationally and globally) or proposed by international bodies (eg, OECD, Transparency International, Open Government Partnership, World Justice Project RTI) might form a useful model for the NSW informal release pathway?

Agency Practices

2. How do agencies currently manage informal access requests? In particular, for selected agencies:
 - a) Who in the agency is responsible for managing informal access requests?
 - b) What are current procedures in managing the informal release pathway (if developed) and how are these documented?
 - c) What are the informal request outcomes (if statistics are retained) and how are these documented?
 - d) What other information relating to the informal request pathway is documented?
3. From the documentation available, how well do agency practices align with or adopt:
 - a) Good administrative practices as recommended by the NSW Ombudsman?
 - b) Requirements of the SR Act?
 - c) Requirements under the GIPA Act?
 - d) Reporting under the Information Access National Metrics Dashboard?
4. In what ways (if any) do the informal release outcomes inform the agency's program for proactive release?

¹ 'Research into the Use of the Informal Release Pathway Announced', *Information and Privacy Commission New South Wales* (Web Page, 30 May 2022) <<https://www.ipc.nsw.gov.au/news/research-use-informal-release-pathway-announced>>.

² Information and Privacy Commission New South Wales, *Annual Report 2021/22* (31 October 2022) 55 <https://www.ipc.nsw.gov.au/sites/default/files/2022-11/IPC_Annual_Report_2021-22_Web.PDF>.

Recommendations

5. What improvements could be made to existing practices to better align with the matters identified in question 4?
6. Drawing on best practice elsewhere, what reporting requirements for the informal release of information in NSW would facilitate measurement, assessment and ongoing evolution of this release pathway by the NSW Information Commissioner?

Question 1 is addressed in Part IV. Question 2 was ultimately addressed by the IPC itself in *Informal Release under the Government Information (Public Access) Act 2009: Research Survey Response Review*. Question 3 is addressed in Part III (following a description of the relevant requirements and practices in Part II). Question 4 is addressed in Part IV.

Our ultimate recommendations (Questions 5 and 6) can be summarised as follows (with more detail provided in Part VII):

1. The IPC should prepare guidance on informal release for NSW agencies, similar to what has been done in some other Australian jurisdictions (see Part IV(B)).
2. The summary of best practice principles set out in Part IV could be included in the IPC's guidance. There are particular matters that the survey suggests would be important to emphasise, including:
 - a. Recordkeeping of informal release requests and outcomes should be encouraged and relevant written correspondence filed.
 - b. Reporting of informal release outcomes.
 - c. Guidance on what information should be given and in which format in the context of a decision not to release the requested information in full.
 - d. Guidance on appropriate timeframes for responding to informal release requests, based on other *GIPA Act* timelines.
 - e. The benefits of documenting internal processes for making informal release decisions, with best practice anonymised examples from each sector included.
 - f. The importance of providing information to the public about the informal release pathway and process.
 - g. The NSW Ombudsman guidance on not charging fees should be repeated.
 - h. The range of possible decisions, including release subject to conditions and redaction of information which would otherwise prevent release of the whole document, should be stated.
3. The IPC may consider what they can do to support the informal release pathway amongst NSW agencies, including by providing:
 - a. Templates, flowcharts and checklists for processing and decision-making.
 - b. Information regarding legal issues (copyright, defamation, privacy, confidentiality, application of Schedule 1 of the *GIPA Act*).
4. In the context of releasing guidance, IPC may wish to offer staff training on how to manage an informal release program.

I Introduction: Informal Release in an Open Government

The principle of open government is often described as a ‘hallmark’ of democratic government.³ Access to ‘good information’ by citizens is essential ‘for the working of “good democracy”’.⁴ Notions of ‘transparency’, ‘accountability’, ‘integrity’, and ‘participation’ are often associated with ‘open government’,⁵ but there remains no universally accepted definition of what ‘open government’ is.⁶ In a speech delivered as Governor-General in 1983, Sir Ninian Stephen recognised open government as simply ‘government conducted without secrets’.⁷ Others have described the principle as ‘initiatives of putting documents and government information on the Internet’.⁸ According to the Organisation for Economic Co-operation and Development (‘OECD’), open government is defined as ‘a culture of governance based on innovative and sustainable public policies and practices inspired by the principles of transparency, accountability, and participation that fosters democracy and inclusive growth’.⁹

The principle of open government is paramount to preserving the doctrine of responsible government and to governmental legitimacy.¹⁰ In particular, open government seeks to facilitate public participation in government processes, which enables individuals to hold elected officials accountable.¹¹ In doing so, open government can increase confidence in government institutions,¹² and help to identify and prevent corruption and arbitrary use of power. Each Australian jurisdiction has emphasised the importance of these principles through the enactment of open government mechanisms into statutory frameworks, which have engendered a shift from ‘governmental authoritarianism to liberal-democracy’.¹³ The key statute in NSW that embraces these principles is the *GIPA Act*.

³ See *Osland v Secretary, Department of Justice* (2008) 234 CLR 275, 302 [62] (Kirby J); Jennifer Shkabatur, ‘Transparency With(out) Accountability: Open Government in the United States’ (2012) 31(1) *Yale Law and Policy Review* 79, 82. See generally *Commissioner of Police v District Court of New South Wales* (1993) 31 NSWLR 606, 612 (Kirby P).

⁴ Teresa M Harrison and Djoko Sigit Sayogo, ‘Transparency, Participation, and Accountability Practices in Open Government: A Comparative Study’ (2014) 31(4) *Government Information Quarterly* 513, 513, quoting Brenda Dervin, ‘Information ↔ Democracy: An Examination of Underlying Assumptions’ (1994) 45(6) *Journal of the American Society for Information Science* 369, 369.

⁵ See, eg, ‘Open Government’, *Organisation for Economic Co-operation and Development* (Web Page) <[https://www.oecd.org/gov/open-government/#:~:text=Open%20government%20strategies%20and%20initiatives,integrity%2C%20accountability%20and%20stakeholder%20participation.](https://www.oecd.org/gov/open-government/#:~:text=Open%20government%20strategies%20and%20initiatives,integrity%2C%20accountability%20and%20stakeholder%20participation.;)>; ‘Open Government’, *Observatory of Public Sector Innovation* (Web Page) <<https://oecd-opsi.org/guide/open-government/>>.

⁶ Organisation for Economic Co-operation and Development and United Nations Economic and Social Commission for Western Australia, *The Economic and Social Impact of Open Government: Policy Recommendations for the Arab Countries* (OECD Publishing, 2021) 16.

⁷ Sir Ninian Stephen, ‘Opening Address of the Governor-General’ (1983) 14(1) *Federal Law Review* 1, 2. See also Habib Zafarullah and Noore Alam Siddiquee, ‘Open Government and the Right to Information: Implications for Transparency and Accountability in Asia’ (2021) 41(4) *Public Administration and Development* 157, 158.

⁸ Albert J Meijer, Deirdre Curtin and Maarten Hillebrandt, ‘Open Government: Connecting Vision and Voice’ (2012) 78(1) *International Review of Administrative Sciences* 10, 11.

⁹ Organisation for Economic Co-operation and Development, *Open Government: The Global Context and the Way Forward* (OECD Publishing, 2016) 1.

¹⁰ Meijer, Curtin and Hillebrandt (n 8) 11.

¹¹ ‘Open Governance: Helping Citizens Engage with Government’, *Transparency International* (Web Page) <<https://www.transparency.org/en/projects/open-governance-helping-citizens-engage-with-government>>.

¹² ‘What is Open Government and Why is it Important?’, *OpenDataSoft* (Blog Post, 16 March 2017) <<https://www.opendatasoft.com/en/blog/an-essential-introduction-to-open-government>>.

¹³ Anne Cossins, ‘Revisiting Open Government: Recent Developments in Shifting the Boundaries of Government Secrecy under Public Interest Immunity and Freedom of Information Law’ (1995) 23(2) *Federal Law Review* 226, 228.

Each Australian jurisdiction has enacted freedom of information ('FOI') legislation requiring the release by government of certain information.¹⁴ Each of these FOI laws contain numerous 'pathways' through which information is released, including formal applications for information, proactive release,¹⁵ and 'informal release' of government information.¹⁶

Informal release describes the process by which government agencies are authorised to provide information in response to a request for information without requiring a 'formal access application' to be made under FOI legislation.¹⁷ Examples of informal release include the provision of information (such as government documents) outside of respective FOI statutes, or the delivery of information via electronic correspondence or telephonic communication.¹⁸ Informal release provides an inexpensive, efficient and rudimentary process for citizens to obtain information from government agencies and increases transparency.¹⁹ Importantly, informal release also provides several benefits to government agencies and agency heads. By engaging in informal release, agencies are able to:

- lower administrative costs in order to 'better focus their FOI resources';²⁰
- retain a significant degree of flexibility in responding to requests for information by members of the public;²¹
- facilitate effective ministerial decision-making through an efficient regime of open government and transparency;²²
- obtain the same protections from Pt 6 Div 1 as are available when responding to formal FOI requests.²³

Informal release is not to be confused with proactive release, which describes the process whereby government agencies make information publicly available without a request being made under FOI legislation.²⁴ Under respective FOI legislation, government agencies are required to review the

¹⁴ *Freedom of Information Act 1982* (Cth) ('Cth FOI Act'); *Freedom of Information Act 2016* (ACT) ('ACT FOI Act'); *Government Information (Public Access) Act 2009* (NSW) ('GIPA Act'); *Information Act 2002* (NT) ('NT Information Act'); *Right to Information Act 2009* (Qld) ('Qld RI Act'); *Freedom of Information Act 1991* (SA) ('SA FOI Act'); *Right to Information Act 2009* (Tas) ('Tas RI Act'); *Freedom of Information Act 1982* (Vic) ('Vic FOI Act'); *Freedom of Information Act 1992* (WA) ('WA FOI Act').

¹⁵ Cth FOI Act (n 14) ss 7A, 8, 11C; ACT FOI Act (n 14) s 24; GIPA Act (n 14) ss 6, 7, 18; NT Information Act (n 14) s 11; Qld RI Act (n 14) ss 19–22; SA FOI Act (n 14) ss 9–10; Tas RI Act (n 14) s 49; Vic FOI Act (n 14) ss 7–8, 10–11, 16; WA FOI Act (n 14) ss 3, 94–7.

¹⁶ Cth FOI Act (n 14) s 3A; ACT FOI Act (n 14) s 8; GIPA Act (n 14) s 8; NT Information Act (n 14) s 10; Qld RI Act (n 14) s 19; SA FOI Act (n 14) s 3(3); Tas RI Act (n 14) s 12; Vic FOI Act (n 14) s 16; WA FOI Act (n 14) s 3(3).

¹⁷ See, eg, Information and Privacy Commission New South Wales, 'Informal Release of Information' (Fact Sheet, September 2020) 1 <https://www.ipc.nsw.gov.au/sites/default/files/2020-09/Fact_Sheet_Informal_release_of_information_September_2020.pdf> ('IPC Informal Release').

¹⁸ See, eg, Office of the Victorian Information Commissioner, 'Proactive and Informal Release of Information in the Victorian Public Sector' (Discussion Paper, 16 March 2020) 5 <<https://ovic.vic.gov.au/wp-content/uploads/2020/04/Publications-Proactive-and-informal-release-project-Proactive-and-informal-release-discussion-paper.pdf>> ('Victorian Proactive and Informal Release').

¹⁹ Sven Blummel, 'Government Transparency in Decision Making' (2021) 37(2) *Law in Context* 119, 120.

²⁰ *Ibid.*

²¹ *Ibid.*; 'Victorian Proactive and Informal Release' (n 16) 5.

²² Blummel (n 19) 120–1.

²³ GIPA Act (n 14) ss 113–15.

²⁴ 'Victorian Proactive and Informal Release' (n 16) 4. See Information and Privacy Commission New South Wales, 'Authorised Proactive Release of Government Information' (Fact Sheet, September 2019) 1 <https://www.ipc.nsw.gov.au/sites/default/files/2020-01/Fact_Sheet_Authorised_proactive_release_of_government_information_September_2019.pdf>.

information that they voluntarily publish every twelve months to ensure it remains up to date.²⁵ While the proactive and informal release pathways are different, they interact with and complement each other. For instance, if an agency has a robust proactive release program, this may result in them receiving fewer FOI requests. Another way in which the proactive and informal release pathways may interact is for the latter to inform the former: where the same information is sought by, and informally released to, numerous applicants, an agency should consider proactive release of that information. To this end, informal and proactive release go hand-in-hand in enhancing government efficiency and transparency in decision-making processes. As we explain in Part IV below, some of the principles that apply to proactive release (which has received more attention compared with informal release) are also useful in developing principles to guide best practice in informal release.

II NSW GIPA Framework for Informal Release

Within NSW, access to information is regulated under the *GIPA Act*, which intends to ‘maintain and advance a system of responsible and representative democratic [g]overnment that is open, accountable, fair and effective’.²⁶ The *GIPA Act* goes further to achieve these aims than many other jurisdictions in certain respects, including making publication of certain information mandatory.²⁷ In NSW, formal access applications are considered a ‘last resort’, ensuring that access to government information is primarily facilitated through proactive and informal release.²⁸ Moreover, the *GIPA Act* does not intend ‘to prevent or discourage the publication or giving of access to government information as permitted or required by or under any other Act or law that enables a member of the public to obtain access to government information’.²⁹

Section 8 of the *GIPA Act* provides agencies with an informal pathway to release government information in response to a request that is *not* made through a formal access application.³⁰ Informal release by government agencies remains entirely discretionary,³¹ with an agency able to decide what information they wish to release to the public.³² Nevertheless, all agencies within NSW must adopt an ‘agency information guide’³³ (‘AIG’) that explains how information will be made publicly available³⁴ and outlines what type of information will be disclosed to the public.³⁵ Each agency is required to demonstrate to the IPC that their AIG is updated at least yearly.³⁶

The GIPA framework thus combines flexibility and agency discretion with a broad mandate to be transparent with the public about how information is released and a push to enhance informal and

²⁵ Cth *FOI Act* (n 14) ss 7A, 8, 11C; ACT *FOI Act* (n 14) s 24; *GIPA Act* (n 14) ss 6, 7, 18; NT *Information Act* (n 14) s 11; Qld *RI Act* (n 14) ss 19–22; SA *FOI Act* (n 14) ss 9–10; Tas *RI Act* (n 14) s 49; Vic *FOI Act* (n 14) ss 7–8, 10–11, 16; WA *FOI Act* (n 14) ss 3, 94–7.

²⁶ *GIPA Act* (n 14) s 3. See *Mannix v Department of Education and Communities* [2014] NSWCATAD 35, [5] (Senior Member Walker).

²⁷ *GIPA Act* s 6.

²⁸ Victorian Proactive and Informal Release (n 18) 4. This ‘push’ model of access to information is also enacted in other Australian jurisdictions, such as under the Cth *FOI Act* and the Qld *RI Act*: at 4.

²⁹ *GIPA Act* (n 14) s 10(1). This provision is similarly found in respective federal, state and territory freedom of information statutes: Cth *FOI Act* (n 14) s 3A(2); ACT *FOI Act* (n 14) s 10; NT *Information Act* (n 14) s 3(3); Qld *RI Act* (n 14) s 4; SA *FOI Act* (n 14) s 3(3); Tas *RI Act* (n 14) s 12(1); Vic *FOI Act* (n 14) s 16(2); WA *FOI Act* (n 14) s 3(3).

³⁰ *GIPA Act* (n 14) s 8(1).

³¹ *Ibid* s 8(3)

³² *Ibid* s 8(4); Information and Privacy Commission New South Wales, *Report on the Operation of the Government Information (Public Access) Act 2009 2020–2021: Open Government, Open Access, Open Data* (Report, 2022) (‘2021 *GIPA Act Report*’).

³³ *GIPA Act* (n 14) s 21.

³⁴ *Ibid* s 20(1)(f).

³⁵ *Ibid* s 20(1)(g).

³⁶ See *ibid* s 21.

proactive release pathways in order to minimise the need for formal requests for information. It also seeks to promote the timely release of information as well as ongoing review by agencies of their information release practices. Importantly, agencies' powers of informal release are non-compellable, and a decision of a government agency to not informally disclose information is not a 'reviewable decision' under Part 4 of the *GIPA Act*.³⁷

Below we set out requirements and guidelines relevant to informal release applicable to NSW agencies:

A. Reporting requirements

Section 125 of the *GIPA Act* requires each agency to provide a report to Parliament and the IPC on its obligations under the *GIPA Act*. Clause 8 of the *Government Information (Public Access) Regulation 2018* (NSW) provides that reports must provide details about proactive release and formal access requests. Agencies do not have to report on informal release processes or requests. The lack of reporting requirements regarding informal release processes and decision-making is reflected in the IPC's annual reports, which contain limited data on informal release compared with proactive and formal release pathways.

B. IPC guidelines

Although informal release is discretionary and non-compellable, the IPC has recommended that government agencies should only *refuse* to release information informally if there is an overriding public interest against disclosing the information.³⁸ There will be an overriding public interest against disclosure 'if (and only if) [a government agency is of the opinion that] there are public interest considerations against disclosure and, on balance, those considerations outweigh the public interest considerations in favour of disclosure'.³⁹ While requests for informal release will depend on the agency and the context, the IPC has set out the following questions for agencies as a guide to determining whether or not information should be released informally:⁴⁰

- Does there exist an overriding public interest against the disclosure of the information to the individual or body requesting it?
- If a person is seeking information, are they seeking personal information?
- Can confidential information, including about third parties, be removed in order to allow the remaining information to be released informally?
- Is the information able to be swiftly and efficiently prepared into a summary if it is not possible to release the entirety of the information?
- Is the information easily accessible with requiring a significant diversion of agency resources?
- If the information was to be released conditionally (such as requiring a fee be paid for photocopying or processing), would this still facilitate access?

If there is no overriding public interest against disclosure and the answer to the other relevant questions is 'yes', then the government agency should consider releasing the information informally.

³⁷ See *ibid* s 80; *Dibb v Transport for New South Wales [No 2]* [2022] NSWCATAP 89, [51] (Senior Members Dubler and Furness) ('*Dibb*').

³⁸ 'IPC Informal Release' (n 17) 1. See *GIPA Act* (n 14) s 8(1).

³⁹ *GIPA Act* (n 14) s 13. See also *Commonwealth v John Fairfax & Sons Ltd* (1980) 147 CLR 39, 51–2 (Mason J).

⁴⁰ 'IPC Informal Release' (n 17) 1–2.

C. NSW Ombudsman guidelines

The NSW Ombudsman has provided guidelines for governmental agencies about their requirements to keep records and provide the public with access to information.⁴¹ These guidelines are general and do not relate specifically to informal access applications. The NSW Ombudsman's guidelines emphasise the duties of public officials to:

- Keep adequate records of their activities, including decisions that are made and the reasons for those decisions.⁴²
- Provide government information to the public 'promptly and at low cost'.⁴³
- When information is not provided, provide a justification as to why it is not in the public interest to disclose that information.⁴⁴
- Give reasons for their decisions, which:⁴⁵
 - identify the decision made;
 - outline the sources of information that was relevant to the making of the decision;
 - subject to overriding public interest considerations, outline the evidence that was relied upon in making the decision;
 - state findings on material questions of fact, including inferences drawn;
 - explain the decision-maker's understanding of the applicable law and whether any issues of law arise and their opinions or views on such issues; and
 - set out the decision-maker's conclusions, derived from the case's circumstances and the applicable law.
- Notify people of their rights to review, appeal or object to a decision that has been made about them.⁴⁶
- Provide for an internal review mechanism, where practicable.⁴⁷

D. State Records Act 1998 (NSW)

Under the *State Records Act*, government agencies must maintain a full and accurate record of their activities,⁴⁸ including the reasons for decisions,⁴⁹ via a 'records management program'.⁵⁰ This ensures that agencies remain accountable and maintain 'good recordkeeping practices'.⁵¹ Moreover, the State Archives and Records Authority of NSW has suggested that, in order to satisfy their statutory obligations under the *State Records Act 1998* (NSW), government agencies must:⁵²

- 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.

⁴¹ New South Wales Ombudsman, *Good Conduct and Administrative Practice: Guidelines for State and Local Government* (3rd ed, 2017) 90–6 ('*Good Conduct*').

⁴² *Ibid* 90–1.

⁴³ *Ibid* 92.

⁴⁴ *Ibid*.

⁴⁵ *Ibid* 94–5.

⁴⁶ *Ibid* 95.

⁴⁷ *Ibid* 96.

⁴⁸ *State Records Act 1998* (NSW) s 12(1) ('*SR Act*').

⁴⁹ See NSW Ombudsman, *Good Conduct* (n 41) 90.

⁵⁰ *SR Act* (n 48) s 12(2).

⁵¹ See *ibid* s 13; NSW Ombudsman, *Good Conduct* (n 41) 90–1.

⁵² See NSW Ombudsman, *Good Conduct* (n 41) 91.

Again, these requirements are general and not specific to informal access requests.

E. Access National Metrics Dashboard

In December 2016, the Australian Government released the inaugural Open Government National Action Plan, emphasising Australia's commitment to developing uniform metrics on the use of FOI access rights to increase and comprehend the public's use of FOI release pathways.⁵³ In November 2017, the Australian Ombudsmen and Information Access Commissioners delivered the first annual 'National Metrics Dashboard',⁵⁴ which provides metric data in six categories, namely:⁵⁵

- Count of formal applications/decisions by the type of applicant (Metric 1);
- Formal applications received per capita (Metric 2);
- Percentage of all decisions made on formal applications/pages where access was granted in full or in part (Metric 3);
- Percentage of all decisions made on formal applications where access was refused in full (Metric 4);
- Percentage of all decisions made within the statutory time frame (Metric 5); and
- Percentage of applications received which are reviewed by the jurisdiction's Information Commissioner/Ombudsman (Metric 6).

Evidently, the National Metrics Dashboard simply provides data in relation to formal access applications under respective FOI statutes (such as the *GIPA Act*) and does not include specific information pertaining to informal release decisions.

III Current Practices of NSW Agencies in Light of Requirements and Guidelines

A survey was conducted between 27 September 2022 and 26 October 2022 of 19 (out of 20 invited) NSW agencies in relation to their practices for the informal release pathway. The agencies were spread across the four relevant sectors covered by the *GIPA Act*: state government (4), local government (10), university (3) and state owned corporation (2). All surveyed agencies have an informal release program. A report, *Informal Release under the Government Information (Public Access) Act 2009: Research Survey Response Review* ('*Survey Review*'), was prepared by the IPC which analysed the results of that survey.⁵⁶ UNSW was provided with anonymised survey responses, which we received in accordance with UNSW Ethics HC No HC220675. This analysis relies on the findings of the IPC's report, with reference to specific survey responses only as required.

Methodologically, the survey was not designed to and does not provide a comprehensive picture of the operation of informal release in NSW. In particular, it is not able to determine compliance with all rules

⁵³ Priyankar Bhunia, 'Inaugural Dashboard of Metrics on Public Use of Freedom of Information Access Rights Released in Australia', *OpenGov Asia* (Web Page, 29 November 2017) <<https://opengovasia.com/inaugural-dashboard-of-metrics-on-public-use-of-freedom-of-information-access-rights-released-in-australia/>>.

⁵⁴ 'Release of Inaugural Dashboard and Metrics on the Public's Use of FOI Laws', *Information and Privacy Commission New South Wales* (Web Page, 28 November 2017) <<https://www.ipc.nsw.gov.au/news/release-inaugural-dashboard-and-metrics-publics-use-foi-laws>>.

⁵⁵ 'Dashboard and Metrics on the Public's Use of FOI Laws', *Information and Privacy Commission New South Wales* (Web Page) <<https://www.ipc.nsw.gov.au/information-access/open-government-open-data/dashboard>>; Bhunia (n 53).

⁵⁶ Information and Privacy Commission NSW, *Informal Release Under the Government Information (Public Access) Act 2009: Research Survey Response* (Review, October 2022).

and guidelines for informal release. For example, the survey cannot confirm that all decisions to release or decline to release are based on appropriate reasons. The focus of the survey was on the overall process within each agency for dealing with informal release, rather than on any particular decision of an agency.

Some responses to the survey indicated that agencies had difficulty responding to certain questions due to a lack of record-keeping. Further, one state agency delegated decisions (as to processes and outcomes) to over 300 business units inside that agency. That agency could not answer all of the questions in the survey as the answer would vary across those business units and no central data was collected.

Below we review current practices of those NSW agencies that responded to the survey against requirements in the *GIPA Act* as well as the requirements and guidelines set out in Part II above. The relevant sections of the *GIPA Act* for the purposes of this report can be found at Appendix A. The particular questions posed to NSW agencies can be located in Appendix B of this report. The analysis conducted by the IPC in their *Survey Review* can be located at Appendix C.

A. Possibility of release subject to reasonable conditions (GIPA Act s 8(2))

Section 8(2) of the *GIPA Act* gives agencies an option to release information subject to reasonable conditions. While this does not set out a requirement that information which *can* (in the public interest) be released subject to conditions *should* be released on those conditions, it is worth considering whether agencies are taking advantage of this option.

Question 27 asked about the top 3 outcomes for informal release requests (see Appendix B). The option to informally release (in part or in full) subject to conditions (see Appendix A) is among the top three outcomes for some agencies. It is not possible to determine the overall rate at which agencies impose reasonable conditions due to the small sample size of agencies and the fact that many agencies declined to answer this question (possibly due to the lack of accessible statistics). While release with reasonable conditions appears to be a recognised possibility across sectors, it is not among the common responses for some agencies.

B. Not required to disclose or consider informal request (GIPA Act s 8(3))

Section 8(3) confirms that there is no obligation on an agency either to disclose information in response to an informal access request or even to consider it (see Appendix A). Nonetheless, the data suggests that this option to avoid disclosure or consideration is rarely exercised. Only one surveyed agency reported that a decision to ‘refuse in full’ was among the top three outcomes for informal release requests (Q27). This suggests that agencies generally *do* choose to consider requests and attempt to release information informally (whether in part or in full). However, the survey alone cannot confirm this, as there might be other reasons for refusal being a less common outcome.

C. Agency to determine means of release (GIPA Act s 8(4))

Section 8(4) of the *GIPA Act* gives agencies the ability to decide by what means information is to be released in response to an informal request (see Appendix A). Agencies adopted a range of processes and methods for releasing information (detailed in Part III(F) below). This suggests that agencies are indeed determining the means through which they release information informally, in accordance with s 8(4) of the *GIPA Act*.

D. Option to delete matter from a copy of a record to be released (GIPA Act s 8(5))

Section 8(5) of the *GIPA Act* provides that agencies may delete or redact certain information from records and release the redacted document, if inclusion of the information would otherwise result in a refusal to release the whole document. The partial release of a record by redacting certain information

(see Appendix A) is only among the top three outcomes for state and local government sector agencies (of those surveyed). The numbers are too small to draw firm conclusions. The fact that it is not in the top three responses of other sectors also does not mean that it is never used. Nevertheless, it could be worthwhile promoting this option further amongst universities and state-owned corporations. In doing so, it is also important to note that the benefits of partial release must be balanced against other factors. As one agency pointed out, redaction can be time consuming, particularly when a record contains a large amount of personal information.

E. Must be exercised by or with authority of principal officer of the agency (GIPA Act s 8(6))

All survey respondents were able to state who had authority to make informal release decisions (see Appendices A and C), suggesting that lines of authorisation are clear.

The breadth of delegation by the principal officer varied by agency – with some delegating solely to an Information Access (or GIPA) Officer, others using a combination of such an officer and other staff categories, a handful using only customer service and/or frontline staff, one agency having an Open Government and Information Access team who were authorised alongside departmental officers, and one agency having a delegation to ‘all Departmental officers’. Some agencies allowed different categories of staff to handle requests (in one case, all staff), but limited those who could make the decision to release (eg, Director level or above; GIPA officer or Manager of Archives and Records Management Services; General Manager; General Manager and Archivist).

F. File all correspondence (State Archives and Records Authority of New South Wales)

The nature of correspondence relating to an informal access request (see Appendix B) varies.

Initiation: The method used to initiate an informal release request varies across sectors. All sectors rely on a combination of a dedicated form, email requests, direct contact and other mechanisms. Only the local government sector consistently (within the sample) offers a dedicated form (Q10).

Acknowledgement: The immediate response also varies, with a majority acknowledging receipt of a request but many not doing so (4/10 local government, 1/3 university). One state government agency could not answer for all of the 300 business units who manage requests.

Outcome: Not all agencies provide an outcome letter in response to an informal release request. This is shown in Diagrams 13 and 14 of the Report. The informal nature of the process explains some of the failure to provide an outcome letter (for example, as one agency notes, a telephone enquiry will generally not receive a written response).

The question of whether such correspondence is filed is linked to the retention of records, discussed in the following Part.

G. Keep records of decisions and reasons (NSW Ombudsman; State Archives and Records Authority of New South Wales) and collect data for metrics (Open Government National Action Plan)

It appears that records, or at least central agency records, are not always kept. This is observable in responses to Q7, which asked about the number of requests received per year. Some agencies had to estimate the number of requests per year. Question 18 asked about record keeping. A substantial minority of surveyed agencies (1/4 state government, 4/10 local government, 1/2 state owned corporation) do not record the decisions they have made.

Where decisions *are* recorded, a variety of mechanisms are used, including records/request management systems (in local and state government), recorded notes or spreadsheet, and retained outcome letters or correspondence (see also Q24).

Just over half of agencies keep statistics on informal release (3/4 state government, 5/10 local government, 2/3 university, 1/2 state owned corporation). These vary in detail (eg, keeping numbers of requests received but not outcomes; see also Q25) and as to whether reporting is purely internal or also external (eg, included in GIPA statistics or in 210port). As one agency noted, keeping proper statistics on informal requests can help agencies understand the time and resources these require.

H. Release promptly (NSW Ombudsman)

Question 20 asked whether agencies have adopted timeframes for responding to informal release requests (see Appendices B and C). The answers to that question demonstrate that the majority of surveyed agencies do *not* have a fixed timeframe for responding to informal access requests (2/4 state government, 5/10 local government, 2/3 university, 2/2 state owned corporations). There is no timeframe for providing informal access in the *GIPA Act*. However, the lack of such a requirement within an agency does not itself indicate that release (where approved) will not be ‘prompt’. Where timeframes do exist, they are either in line with *GIPA* timeframes or range from 10-30 working days.

There are some suggestions from agencies who completed the survey about the ways in which IPC could provide more support for the informal release pathway and help to improve the efficiency of agency decisions. Question 33 asked agencies what the IPC could do to support and assist them in applying the informal release pathway (see Appendices B and C). The suggestions include:

- Developing templates that facilitate informal access requests and flowcharts, checklists and templates for processing and decision-making;
- Providing more information regarding copyright and impact on decisions;
- Providing more information on legal limitations and risks (defamation, privacy, confidentiality);
- Advising on whether information falls under Schedule 1 of the *GIPA Act* where this is unclear, rather than requiring agencies to seek their own legal advice;
- Offering staff training.

I. Release at no cost (NSW Ombudsman)

Responses to Q33 (see Appendix C) indicated that some agencies are interested in charging a fee for informal requests that are time-consuming to manage. The Ombudsman’s guidance suggests this should be discouraged.

J. Provide for internal review where practicable (NSW Ombudsman) and notify people of their rights to review, appeal or object to a decision that has been made about them (NSW Ombudsman)

There is no requirement for internal review of informal release pathways under the *GIPA Act* or any other Act. However, a refusal of an informal release request does not preclude an applicant from undertaking a formal access application. Indeed, some agencies respond to some informal release applications by stating that a formal access application is required (Q27), which is a rough equivalent to providing information about review options in this circumstance.

K. Conclusion

The survey was not structured so as to be able to confirm that agencies in NSW are consistently complying with NSW legislation and guidelines in relation to informal release. However, it did identify some areas in which further investigation may be warranted:

- **Recordkeeping:** Agencies do not uniformly comply with the general requirement that records be kept and data collected with respect to informal release.

- **Prompt decision-making:** The fact that most agencies do not have a fixed timeframe for responding to informal release requests is not in itself evidence of lack of promptness. However, IPC guidance could help agencies understand what timelines might be considered appropriate and IPC could provide agencies with resources to make speedier decisions (some of these are set out in Part III(H) above).

The survey also highlighted areas where agencies may benefit from greater familiarity with NSW legislation and guidelines:

- **Cost:** Since charging a fee would be contrary to NSW Ombudsman guidance, the IPC should emphasise this to agencies that are interested in using fees for cost recovery.
- **Imposition of conditions:** The survey suggests that some agencies may not be using the flexibility accorded to release subject to conditions or to redact certain information from documents in order to release them (or at least that it is not among their common responses). Greater awareness of these possibilities might allow for release in circumstances where some agencies would otherwise refuse the request in part or full.

IV What is Considered ‘Best Practice’ for Informal Release?

As one of four information release pathways under the *GIPA Act*,⁵⁷ informal release plays a fundamental role in facilitating open government by promoting openness and transparency within government processes. However, it is often unclear as to when it is appropriate for a government agency to utilise informal release,⁵⁸ and how it should operate. There has been limited research on, or evaluations of, informal release processes and pathways, and there are no national or international guidelines focussed on best practice for informal release specifically. Nevertheless, general administrative law principles inform best practice for informal release processes, and several Australian jurisdictions have some form of guidelines or evidence-based recommendations in place. These principles and guidelines provide a useful starting point to consider what amounts to best practice in informal release processes in the NSW context.

A. General Administrative Principles

General principles of administrative law and ‘good administration’ should inform best practice for informal release. There is no consensus on precisely how these principles are defined by ombudsmen, international organisations, academics and others,⁵⁹ but there is a great deal of commonality in the substance of the various definitions. Generally, administrative decision-making should be lawful, rational, fair, consistent, efficient, transparent, non-discriminatory and be subject to accessible accountability mechanisms.⁶⁰

⁵⁷ See generally *2021 GIPA Act Report* (n 32) 16–27.

⁵⁸ See above n 12.

⁵⁹ Paul Daly, ‘Administrative Law: A Values-Based Approach’ in John Bell et al (eds), *Public Law Adjudication in Common Law Systems: Process and Substance* (Hart Publishing, 2016) 78.

⁶⁰ Paul Daly has noted the difficulty in defining both the general principles or values of administrative law, and ‘good administration’: (n 59) 78. This list is a synthesis of the principles and values articulated by: Chief Justice RS French AC, ‘Administrative Law in Australia: Themes and Values Revisited’ in Matthew Groves (ed), *Modern Administrative Law in Australia: Concepts and Context* (Cambridge University Press, 2004) 25, 37. See also United Kingdom Parliamentary and Health Services Ombudsman, *Principles of Good Administration* (2009) <<https://www.ombudsman.org.uk/sites/default/files/page/0188-Principles-of-Good-Administration-bookletweb.pdf>>; European Ombudsman, *The European Code of Good Administrative Behaviour* (2013) https://cpvo.europa.eu/sites/default/files/documents/lex/Ombudsman_European_Code_of_Good_Administrative_Behaviour.pdf (<‘EU Code of Good Administrative Behaviour’>).

A decision made by a governmental agency will be lawful or authorised when it is made by an individual or delegate⁶¹ with requisite authority, with such authority exercised within the confines and scope of the relevant legislative framework.⁶²

In order to ensure lawful, fair and rational decision-making, a decision must be made available to the public, or, at a minimum, the individual affected.⁶³ In general administrative practice, reasons for decision are important for transparency and accountability. A decision-maker's failure to provide a transparent decision, such as by providing a statement of reasons,⁶⁴ can diminish public confidence in administrative decision-making. Equally, a decision made by a decision-maker that is not transparent may ultimately be considered unfair, and undermine trust in government.⁶⁵

However, reasons for decision also create a degree of formality around a decision that can run counter to the notion of *informal* release and the administrative law value of efficiency. Informal release is to some extent preliminary to a decision – after all, there is no requirement to even consider a request for informal release (*GIPA Act* s 8(3)). A person who is refused access in response to an informal request for information can then pursue a formal pathway, and that application would require reasons for any rejection in response. One would therefore expect any need to explain a decision on informal release to be significantly less than for a formal information access request. Nevertheless, it is important in the context of good administrative practice (as opposed to legislated requirements) to consider what kinds of reasons ought to be given.

Reasons for decision are not the only element of good administrative practice to consider in the context of informal release.

The OECD has set out the following principles that governments should adopt towards advancing best practices in administrative decision-making (in general):⁶⁶

- Decision-makers must be impartial and account for all relevant arguments presented by the parties, as well as weigh evidence presented dispassionately;
- Governmental decision-making must be open and transparent, affording individuals and/or bodies the opportunity to comment and provide feedback on its processes;
- Decision-makers should engage in reason-giving to enhance transparency, ameliorate actual or apprehended bias, and promote open government;
- Agencies must ensure their procedural requirements are published and easily accessible to the public;

⁶¹ See *Carltona Ltd v Commissioners of Works* [1943] 2 All ER 560, 563 (Lord Greene MR); *O'Reilly v State Bank of Victoria Commissioners* (1982) 153 CLR 1, 12–13 (Gibbs CJ), 17 (Mason J), 30–1 (Wilson J).

⁶² *Craig v South Australia* (1995) 184 CLR 163, 176–80 (Brennan, Deane, Toohey, Gaudron and McHugh JJ). See generally Katie Miller, 'The Application of Administrative Law Principles to Technology-Assisted Decision-Making' (2016) 86 *Australian Institute of Administrative Law Forum* 20, 22.

⁶³ On the various purposes served by administrative justifications/reasons: see Janina Boughey, 'The Culture of Justification in Administrative Law: Rationales and Consequences' (2021) 54(2) *University of British Columbia Law Review* 403.

⁶⁴ It is important to note, however, that an individual does not have a common law right to reasons for an administrative decision: *Public Service Board (NSW) v Osmond* (1986) 159 CLR 656, 662 (Gibbs CJ). Though, the giving of reasons is considered good administrative practice and intends to act as an accountability mechanism: see *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Palme* (2003) 216 CLR 212, 242 [105] (Kirby J).

⁶⁵ See, eg, Henk Addink, 'The Principle of Transparency' in Henk Addink (ed), *Good Governance: Concept and Context* (Oxford University Press, 2019) 112.

⁶⁶ Cary Coglianese, 'Administrative Law: Governing Economic and Social Governance' in Jonathan H Hamilton et al (eds), *Oxford Research Encyclopedias: Economics and Finance* (Oxford University Press, 2022) 1, 8–10.

- Individuals and/or bodies affected by a decision should be provided with an avenue of review; and
- Governmental rulemaking procedures must be updated regularly.

The *European Code of Good Administrative Behaviour* adds that governments should embrace providing individuals with the right to have their affairs handled impartially, fairly and swiftly. Such a right includes:⁶⁷

- The right to be accorded natural justice and procedural fairness before a decision is made that would adversely affect an individuals' interests;
- The right to have access their file whilst respecting confidentiality;
- The right to receive reasons from a decision made by an administrative body.

The NSW Ombudsman has suggested that for administrative procedures to be considered fair and reasonable, decision-makers must comply with the following five principles:⁶⁸

- Adequate hearing – all individuals likely to be affected by a decision or action should be given an adequate opportunity to respond to it;
- Adequate notice – individuals whose rights or interests are likely to be affected by a decision or action should be informed of the issues they need to respond to;
- Absence of bias – decision-makers must be, and seen to be, impartial;
- Adequate evidence – there must be logically probative evidence to support the conclusions, findings, recommendations and decision made;⁶⁹ and
- Adequate reasons – reasons should be given to explain the decision made to an individual whose rights and interests are affected by it.

It is important to note that procedural fairness is highly context-dependent. As Gageler J has noted:

*Procedural fairness as implied in some contexts can have a flexible, chameleon-like, content capable of varying according to the exigencies of the exercise of power between nothingness at one extreme and a full-blown trial at the other.*⁷⁰

The context of informal release is that it is just one of several mechanisms through which information can be released under the *GIPA Act* and, as its name implies, it is intended to be informal. Clearly a 'full blown trial' would undermine the purpose and benefits of statutes providing for informal release pathways. However, this does not mean that informal release decision-making should not attract some procedural guidelines or structures to ensure that it is fair, transparent and consistent. The NSW Ombudsman's guidelines on good conduct and administrative practice emphasise that the benefits of documentation and transparent reporting of decision-making outcomes go beyond fairness to individuals. Documentation and reporting can also improve the quality of decision-making, 'support the credibility' of decisions and the decision-making process, and assist managers and heads of agencies to verify that decision-making is compliant with legal requirements, policies and procedures.⁷¹

B. Specific guidelines for informal release decision-making

⁶⁷ *EU Code of Good Administrative Behaviour* (n 60) 7.

⁶⁸ NSW Ombudsman, *Good Conduct* (n 41) 67.

⁶⁹ See *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* (2014) 232 FCR 361, 387 [82] (Allsop CJ, Middleton and Foster JJ). See also *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332. It is important to recognise, however, that the purported 'no-evidence rule' is not considered part of the two 'limbs' of procedural fairness (the 'hearing rule' and the 'bias rule') in Australia.

⁷⁰ *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514, 622 (emphasis added).

⁷¹ NSW Ombudsman, *Good Conduct* (n 41) 13–14, 94.

Presently, there are no domestically or internationally accepted guidelines regarding best practice in informal release. Regardless, several Information Commissioners and Ombudsmen in Australia have released statements and guidelines for best practice of informal release under their respective FOI statutes.

Joint Statement by Australian Information Commissioners and Ombudsmen

The *Statement of Principles to Support Proactive Disclosure of Government-held Information – Developed by all Australian Information Commissioners and Ombudsmen*⁷² sets out general principles, the following of which are pertinent to informal release decision-making:

- The general principle that government information is a public resource, the benefits of transparency in building trust and increasing citizens' participation, and the fact that proactive and informal release is less administratively burdensome and improves efficiency all point towards a generous approach to informal release. That is, as wide a range of information as possible should be released informally (or proactively) rather than requiring formal applications. This must be balanced with other factors which may favour formal application processes.
- The recommendation that agencies establish internal frameworks to ensure consistency in approaches to informal release, as it does to proactive release.
- Adopting a customer service mindset in which 'all public sector staff understand they must assist the public to access information' informally where possible, rather than requiring formal applications.
- Recommendations that agencies engage with the community and adopt a 'customer service approach' suggest that informal release pathways should be clear and communicated to the community to ensure that the community is able to take advantage of this pathway.

ACT Ombudsman Guidelines

The ACT Ombudsman has issued guidelines for agencies as a means of handling informal release requests.⁷³ In summary, the guidelines:

- Emphasise the efficiency benefits of streamlined informal release processes, and encourage informal release 'where possible'.⁷⁴
- Information that is most likely **suitable** for informal release includes information, which is:⁷⁵
 - Already public
 - Required or authorises to be released
 - Routinely made available
 - Personal information of the individual making the request
 - Information that would be released in full had a formal request been made
 - 'Information that can be provided in another format, or in summarised version, rather than being heavily redacted through a formal FOI process'.
- Information likely **not suitable** for informal release includes information, which:⁷⁶

⁷² 'Statement of Principles to Support Proactive Disclosure of Government-held Information', *Office of the Australian Information Commissioner* (Web Page, 24 September 2021) <<https://www.oaic.gov.au/freedom-of-information/guidance-and-advice/statement-of-principles-to-support-proactive-disclosure-of-government-held-information>>.

⁷³ ACT Ombudsman, 'Freedom of Information Guidelines: Informal Requests for Government Information' (Guide No 2, October 2019) <https://www.ombudsman.act.gov.au/_data/assets/pdf_file/0023/106736/2.-Ombudsman-Guidelines-Informal-Requests-for-Government-Information-2019.pdf>.

⁷⁴ Ibid 5.

⁷⁵ Ibid 8.

⁷⁶ Ibid 9.

- Includes personal information about a third party
- Is subject to secrecy laws, contractual terms which prevent disclosure, copyright or intellectual property laws
- A third party might object to being released
- Would attract more than minor redactions
- Would be resource intensive and costly to process, or
- The person seeking the information prefers to make a formal application, after having discussed other pathways with the agency.

The guidelines also state that informal release is not appropriate where ‘the applicant may want to apply for external review of the decision’.⁷⁷ It is not logically clear how this justifies a preference for formal, rather than informal, release pathways. Surely a person would only wish to apply for external review if information is not released, or is only partially released. If an informal release request is made, and refused, then a person is able to use a formal pathway and can subsequently seek review if they are dissatisfied with the response. In this situation, the informal release pathway has not been used; not because the person may wish to seek review, but because the relevant agency has refused to release some or all of the information requested.

- ***Dealing with informal release requests.*** The guidelines provide that the person deciding on the informal release request take the following steps:
 1. Clarify the scope of the request
 2. Determine whether informal release is the best option, based on the considerations set out above
 3. If the information is not suitable for release, explain how to make a formal access request to the individual and assist them to do so.
 4. If the information is only partly suitable for release, discuss options with the individual requesting the information (eg, whether they would prefer to receive access in a summarised or different form, or make a formal request etc).
- ***Timeframes*** should be equal to or shorter than those for dealing with formal requests for access.⁷⁸
- ***Need for ‘robust processes’.*** The guidelines note that determining informal release requests involves managing the risks of releasing information which should not be released, for instance due to privacy, secrecy, contractual terms etc. They recommend that processes must be in place to manage this risk, staff deciding informal release requests must be appropriately trained, and quality assurance processes must be in place.⁷⁹
- ***Formal recording.*** The guidelines note that the formal recording of decisions is not required and may add to the administrative burden that informal release aims to avoid. However, the guidelines emphasise that agencies should ‘keep track of the kinds of informal requests they receive to guide their operations’.⁸⁰
- Under the ACT’s *Freedom of Information Act 2016*:
 - Information may be given in any format.
 - No fee can be charged for access via the informal release pathway.
 - Information may be published, unless it is personal information.
 - A person has no right to review a refusal to provide information under the informal release pathway.⁸¹

⁷⁷ Ibid.

⁷⁸ Ibid 16.

⁷⁹ Ibid 18.

⁸⁰ Ibid 19.

⁸¹ Ibid 17–18. See also *Dibb* (n 37) [51] (Senior Members Dubler and Furness).

WA Information Commissioner Guidelines

The Information Commissioner of WA has also released a guide covering informal release.⁸² The guide notes that informal release processes ‘may be particularly relevant in relation to requests from individuals to access their own personal information’.⁸³ To the situations listed in the ACT Ombudsman’s guidelines as to when informal release is likely appropriate, the WA guide adds ‘statistics and data relating to the agency’s key functions and activities’.⁸⁴ The WA guide sets out the following ‘good practice’ principles for informal release:⁸⁵

- A policy should be developed and regularly reviewed to assist officers to identify types of documents routinely released informally.
- Personal and secret information must be protected.
- When an individual requests their own information, a process must be in place to verify their identity.
- Agencies should ‘consider keeping a record’ of informal release decisions.
- Clear authority should be given to officers to release information informally.
- Where information is not informally released, agencies should advise the person of the formal application process.

In addition to these ‘good practice’ principles, the WA guide compares formal and informal release processes, and outlines the following relevant points:⁸⁶

- There are no specific requirements for an informal release application, but agencies may choose to establish such a process (eg, via a website portal).
- If an informal release request cannot be decided ‘within a reasonable period’, a person should be referred to the formal access process.
- Processes for informal release are at the discretion of the agency. Written decisions are not required.
- Informal release decisions are not subject to review.
- Special conditions can be placed on informally released information, but not on information released under the formal pathway.
- Agencies may create a document to satisfy an informal release request, but not a formal access application.
- Agencies are not required to report on informal release but maintaining records ‘may assist agencies to both understand the demand for, and nature of, information release within their agency and monitor its effectiveness’.

Office of the Victorian Information Commissioner Research and Guidelines

The Office of the Victorian Information Commissioner (‘OVIC’) conducted research and released a report in 2021 aimed at increasing proactive and informal release.⁸⁷ While the research was focussed

⁸² Western Australia Office of the Information Commissioner, ‘Open By Design – FOI and Informal Release in WA’ (Guide, September 2022) <https://www.oic.wa.gov.au/Portals/0/Open%20by%20Design%20-%20FOI%20and%20Information%20Release%20in%20WA%20v1_0.pdf> (‘Open By Design’).

⁸³ Ibid 9.

⁸⁴ Ibid.

⁸⁵ Ibid 10.

⁸⁶ Ibid 12–13.

⁸⁷ Office of the Victorian Information Commissioner, *Proactive and Informal Release Behaviour Change: Practical Recommendations to Increase Proactive and Informal Release* (Final Report, 30 June 2021) <<https://ovic.vic.gov.au/wp-content/uploads/2021/09/Proactive-and-Informal-Release-Behavioural-Change-Report-Decision-Design-.pdf>>.

on identifying barriers to proactive and informal release and the practical steps to change agency behaviour, it is possible to extrapolate several best practice principles from the report. In particular:

- Applicants must be aware of informal release pathways and educated about what information agencies hold to maximise the benefits of informal release pathways. OVIC recommended making this information clear on agency websites and presenting information in a way which responds to applicants' needs.⁸⁸
- A 'customer service mindset' which aims to understand what the applicant wants and inform them through the process maximises the efficiency of informal release pathways.⁸⁹
- Training for agency officers was found to be important in maximising use and efficiency of the informal release pathway.⁹⁰

The OVIC report includes detailed examples of practical processes and tools that agencies may find helpful in achieving these good practice goals.

OVIC also has a practice note, which sets out when it is appropriate to release information via informal release and considerations for decision-makers.⁹¹ The situations in which informal release is said to be appropriate are similar to those set out in the ACT and WA guidelines. The practice note also states that:

- No specific format is required for informally released information.
- There is no time limit for deciding informal release requests, but if informal release will take a 'substantial amount of time', a formal access request may be appropriate.
- Generally access should be given for free, but nothing prevents agencies from charging a fee for the 'reasonable costs associated with providing access informally'.
- Officers should ensure they have authority to release information.
- There is no right to review of informal release decisions.
- Officers must consider privacy obligations when deciding informal release requests.
- Agencies should keep a record of informal release decisions to aid consistency in decision-making and for reporting purposes.
- Policies on informal release are helpful to guide decision-making. It may be helpful for agencies to publish their informal release policies to aid public awareness of the pathway.
- Agencies should provide clear, up-to-date information on their websites about the various pathways through which the public can access information.
- Agencies should explore technology to aid in informal release decision-making, such as technology to flag documents not suitable for release without review.
- Documents should be created with public access in mind.
- A 'customer focussed approach' should be taken to access processes and decision-making.
- Staff should be trained on information release processes and pathways.

C. Summary of best practice principles

It is possible to identify four common themes amongst these sources for what constitutes best practice in informal release policies and procedures.

Authority

⁸⁸ Ibid 5–6, 9.

⁸⁹ Ibid 7.

⁹⁰ Ibid 10, 12.

⁹¹ Office of the Victorian Information Commissioner, 'Informal Release of Information' (Agency Practice Note No 6) <<https://ovic.vic.gov.au/freedom-of-information/resources-for-agencies/practice-notes/informal-release-of-information/>>.

1. It must be clear within agencies who has authority to release information informally. Officers working in front line roles, who are most likely to have contact with people requesting information from the agency, must know who to direct requests to (if they do not themselves have authority to informally release information).

Transparency

2. Information about the option of informal release must be publicly available, if possible on an agency's website.
3. Any person seeking information from an agency (including via the formal pathway) should be told about the option to request information informally, unless it is clear that none of the information sought would be available via the informal release pathway.

Fairness

4. Fairness must be balanced against administrative efficiency. Informal release is intended to be just that – an informal, efficient, easy way to obtain and release government information. No specific form should be required. Administrative burdens on decision-makers should be minimised. Nevertheless, where informal release is requested and refused in whole or in part, the decision-maker should provide a brief explanation of their decision to the person who requested the information and facilitate the making of a formal request.

Consistency

5. Agencies should keep records of informal release decisions for internal purposes to ensure consistency. The method of doing so should be as minimally burdensome as possible.
6. Agencies should adopt guidelines setting out considerations for informal release decision-making, and the process for deciding and recording informal release decisions. These guidelines should be underpinned by the guiding principles of the *GIPA Act*: to facilitate access to information through proactive and informal means where possible, with formal requests being a 'last resort'.
7. Informal release decisions should not be reviewable either internally or externally. A formal review process would undermine the very purpose of informal release pathways. However, records should be kept, and informal release processes and decision-making should be subject to routine audit.

These principles not only benefit the public, they also benefit agencies. Agency heads benefit from assurance that decisions on informal release are made efficiently and appropriately by those with authority in line with agreed processes that conform to legislative requirements and best practice. The public benefits from clear understanding of their right to request information informally and be treated fairly.

V How does NSW Practice Fare?

In this Part, we compare the practice of NSW agencies to the seven best practice principles identified above, and make recommendations for improving informal release policies and procedures.

A. Authority

Although agencies differ as to how many and which roles have authority to release information via informal release (see Appendix C), those responding to the survey were all able to identify officers with

that authority. The survey did not test the knowledge of all front line staff, although in some agencies, front line enquiry staff and/or customer service staff have authority to deal with informal access requests.

B. Transparency

All agencies surveyed provide information to applicants about the informal release option (Q8). Generally, this information is provided through an AIG (for all but one local government agency) as well as potentially on websites or in other places (Q9). However, the level of information provided by agencies to the public about informal release is limited. The IPC followed up on its survey and reviewed public facing and internal agency documents explaining informal release processes (see Appendix C, Part III). The IPC found that public-facing documents contained limited information about informal release, beyond noting its availability. Some agencies had internal policies with more information (discussed in Part V(D) below). It is important to ensure that a publicly available document (eg, in an AIG) not only identifies internal release as a possibility, but also sets out: (1) the ways in which people can make informal access requests; and (2) any policies guiding decision-making on informal release requests. Sharing ‘best practice’ examples for each sector could assist agencies in developing their own public statements about informal release pathways.

C. Fairness

The survey indicated that not all agencies provide an outcome letter (see Appendix C). However, given the informality, best practice suggests that a written ‘outcome letter’ may not always be required. For example, as one agency noted, telephone enquiries that do not lead to any further action are unlikely to receive a written response. In that context, provided the person is informed (say, over the telephone or at the counter) what the outcome is, is provided an explanation as to why access is refused in whole or in part, and is told how to make a formal request if they wish to pursue the matter, procedural fairness requirements would be met. The survey does not provide information on whether this is done in circumstances where, as with a telephone enquiry, a written letter response is not feasible. Agencies that mentioned information being provided in other formats (such as via email) would, by doing so, be meeting fairness standards.

Going forward, it could be worth the IPC providing guidance on the options available to agencies to respond to and explain informal release decisions. The legislation does not *require* reasons for decisions to be given, so this would be more in the nature of providing examples of good administrative practice.

D. Consistency

The majority of agencies surveyed indicated in Q11 that they had documented procedures in place for management of informal access requests, although some do not (1/4 state government, 3/10 local government, 1/3 university) (see Appendix C).

Questions around the existence and nature of documented procedures for managing informal access requests led to some confused responses. Although 14/19 agencies said they had documented procedures in place (Q11), when asked to provide a link to such policies in Q12, only five agencies were able to do so: two provided links to policies, two provided links to their AIG, and one provided links to both. Other agencies either did not respond to the question or stated that the information was in draft, could only be internally accessed, or embedded in their internal applications software. Further, in Q16, agencies were asked directly whether their policy included processes for staff to follow as to how to make decisions regarding informal access requests (see Appendix B). Nine agencies (including all state government agencies) answered this question affirmatively, and two additional agencies indicated that there are in one case procedures and training material and a limited checklist for certain types of

information in the other (see Appendix C). Eight agencies answered this question in the negative (5/10 local government, 2/3 universities, 1/2 state owned corporation) (see Appendix C).

As noted in Section 3 of Appendix C, follow-up questions and further research by the IPC revealed differences in the level of specificity with which the process for managing informal release requests was documented (where it was documented at all). The IPC's analysis of the limited policies and procedures that were available found that AIGs generally 'contained generic information regarding informal access requests and no prescriptive information on decision making'. Where agencies have policies and procedures, they tend to be internal documents only, and vary in their level of detail.

However, it is worth noting that many of the agencies that did not have documented procedures were able to provide statements as to how decisions were made (eg, that they act in line with legislation or that there is a particular decision-making hierarchy). Agencies that rely on a limited number of people to respond to informal access requests (eg, a GIPA officer) may have an undocumented process familiar to those people. The primary advantage of documentation is not that there otherwise is *no* process but that setting out that process helps ensure that it is followed in every case, promoting consistency. This is particularly important where the number of staff authorised to respond to informal access requests is large (such as all customer service staff).

All of this suggests that the IPC could encourage agencies to set out clear processes to staff for making decisions under informal release. Examples of information that can be included in documents and checklists for staff managing informal access requests that assist the goal of consistency include:

- Basic information on what an informal access request is (many agencies include this in their AIG);
- A description of who is authorised to deal with such requests, and mechanisms for confirming authorisation;
- A description of the process to be undertaken, including collecting, reviewing, assessing for relevance, and (where applicable) redacting documents;
- High level guidance for those authorised on how to apply the public interest test;
- Guidance or checklists on what to consider when responding to an informal access request;
- Contact information for staff (such as a GIPA officer) who can answer questions;
- Links to relevant guidelines and information.

Sharing 'best practice' examples for each sector could assist agencies in developing their own documented internal guidelines. That would also allow IPC to promote processes such as acknowledging receipt of a request (noting this is not currently being done consistently in most sectors). This is likely easiest for state government agencies, where some agencies are already documenting their processes, so that might be a useful place to start.

VI. The relationship between informal and proactive release

As noted in Part I, the relationship between informal and proactive release has the potential to create a virtuous circle, enhancing government transparency. On the one hand, if agencies observe a high number of requests for particular information, they can enhance transparency and save costs associated with managing requests for information by proactively releasing it. On the other hand, proactive release of popular information can reduce requests for information (that must be manually processed) thus focussing resources on requests for information that cannot be generally released (eg, personal information related to an applicant). Further, more disclosure in the context of informal and proactive release has the potential to reduce formal requests for information, which are more time-intensive for agencies and less efficient for the public.

The survey dealt with this in Q30 and Q31 (see Appendix C). Only 15 agencies answered the question on whether decisions about informal release influence decisions to release data proactively. A majority of these agencies (9/15) indicated that they monitor trends in informal access requests to identify what could be released proactively. This majority is attributable to local government agencies, with all other sectors being evenly split. This provides a useful example of the benefits of both the requirements and guidelines (Part II) and ‘best practice’ elements drawn from other jurisdictions (Part IV). The virtuous circle requires that records be kept of informal access requests (in order to identify trends and leverage those in making decisions about proactive release). 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).

VII. Recommendations

1. The IPC should prepare guidance on informal release for NSW agencies, similar to what has been done in some other Australian jurisdictions (see Part IV(B)).
2. The content of this guidance should be consistent with legal requirements, relevant applicable guidelines and good administrative practice. They should also be consistent with the goals of *informal* access, recognising the particular advantages of retaining flexibility in the context of that pathway. Existing IPC guidance, such as the circumstances in which informal release requests should be refused, should be included.
3. The summary of best practice principles set out in Part IV above could be included in the IPC’s guidance. There are particular matters that the survey suggests would be important to emphasise, including:
 - a. Recordkeeping of informal release requests and outcomes should be encouraged and relevant written correspondence filed. The benefits of this for agencies themselves can be highlighted. For example, by monitoring common informal access requests, agencies might see the benefits of proactive release in some contexts. The guidance could also provide examples drawn from Q19 and Q24 of the survey of the different ways in which this can be efficiently done.
 - b. Whether informal release outcomes should be reported for internal governance or externally (eg, annual reports, to the IPC) is a question that the IPC may wish to consider. The NSW Ombudsman’s guidelines note the many benefits to government of documenting and reporting on decision-making outcomes. Therefore reporting of data that records were released in full, released in part or withheld may be an approach that could be practically implemented without disproportionately adding to agencies’ administrative burden.
 - c. Guidance on what explanation or reasons should be given and in which format in the context of a decision not to release the information in full. In such situations, those making the request should be told: (1) the decision itself (eg, released in part, refused in full); (2) brief reasons for any decision not to release in full, and; (3) what options (such as a formal request) are available to those to whom information is not released in full should they wish to persist in the request. The format can depend on the context, but written requests should receive written replies. It should be emphasised that this goes beyond legal requirements, but is an aspect of good administrative practice.

- d. Guidance on appropriate timeframes in the context of informal release can be given to encourage prompt decision-making. These timeframes should be based on other *GIPA Act* timelines.
 - e. The benefits of documenting internal processes for making informal release decisions can be emphasised, with best practice anonymised examples from each sector included. Process documents should include clear statements as to who has authority to make decisions with respect to informal access requests.
 - f. The importance of including information to the public about informal release pathways should be emphasised, with examples of best practice from AIGs for each sector included. The publicly available information about informal release should include: (1) information about how to make an informal access request; and (2) any policies that guide the agencies' decision-making in relation to informal release requests.
 - g. The NSW Ombudsman's guidance on not charging fees should be repeated. While this reduces cost recovery, the IPC could explain how informal release and proactive release (especially working together) ultimately *save costs*.
 - h. The range of possible decisions, including release subject to conditions and the redaction of information that would otherwise result in refusal to release an entire document, can be stated, possibly including examples of when these might be used.
4. Data collected through better recordkeeping should be de-identified and aggregated both within agencies and centrally. This would enable the identification of trends (for example, whether an increase in informal release of information decreases costs associated with the formal release pathway) and identify documents that might be released proactively in order to reduce the number of informal (and potentially formal) requests. Across agencies, it would also help the IPC to measure the impact of the informal release pathway over time, as well as its interaction with other pathways.
 5. There were matters raised in Q33 and elsewhere in the survey around what the IPC could do to support the informal release pathway. Some of these could be included in the guidance, in particular:
 - a. Templates, flowcharts and checklists for processing and decision-making (this is also mentioned above in the context of best practice examples).
 - b. Information regarding legal issues (copyright, defamation, privacy, confidentiality, application of Schedule 1 of the *GIPA Act*). While the IPC cannot give legal advice, it might help to point to where this information is available.
 6. In the context of releasing guidance, IPC may wish to offer staff training on how to manage an informal release program, depending on capacity.

APPENDIX A

Government Information (Public Access) Act 2009 (NSW)

3 Object of Act

- (1) In order to maintain and advance a system of responsible and representative democratic Government that is open, accountable, fair and effective, the object of this Act is to open government information to the public by—
 - (a) authorising and encouraging the proactive public release of government information by agencies, and
 - (b) giving members of the public an enforceable right to access government information, and
 - (c) providing that access to government information is restricted only when there is an overriding public interest against disclosure.
- (2) It is the intention of Parliament—
 - (a) that this Act be interpreted and applied so as to further the object of this Act, and
 - (b) 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.

6 Mandatory proactive release of certain government information

- (1) An agency must make the government information that is its *open access information* publicly available unless there is an overriding public interest against disclosure of the information.
- (2) Open access information is to be made publicly available free of charge on a website maintained by the agency (unless to do so would impose unreasonable additional costs on the agency) and can be made publicly available in any other way that the agency considers appropriate.
- (3) At least one of the ways in which an agency makes open access information publicly available must be free of charge. Access provided in any other way can be charged for.
- (4) An agency must facilitate public access to open access information contained in a record by deleting matter from a copy of the record to be made publicly available if inclusion of the matter would otherwise result in there being an overriding public interest against disclosure of the record and it is practicable to delete the matter.
- (5) An agency must keep a record of the open access information (if any) that it does not make publicly available on the basis of an overriding public interest against disclosure. The record is to indicate only the general nature of the information concerned.
- (6) Nothing in this section or the regulations requires or permits an agency to make open access information available in any way that would constitute an infringement of copyright.

7 Authorised proactive release of government information

- (1) An agency is authorised to make any government information held by the agency publicly available unless there is an overriding public interest against disclosure of the information.
- (2) The information that an agency decides to make publicly available is to be made publicly available in any manner that the agency considers appropriate, either free of charge or at the lowest reasonable cost to the agency.
- (3) An agency must, at intervals of not more than 12 months, review its program for the release of government information under this section to identify the kinds of government information held by the agency that should in the public interest be made publicly available and that can be made publicly available without imposing unreasonable additional costs on the agency.
- (4) An agency can facilitate public access to government information contained in a record by deleting matter from a copy of the record to be made publicly available if inclusion of the matter would otherwise result in there being an overriding public interest against disclosure of the record.
- (5) The functions of an agency under this section may only be exercised by or with the authority (given either generally or in a particular case) of the principal officer of the agency.

8 Informal release of government information

- (1) An agency is authorised to release government information held by it to a person in response to an informal request by the person (that is, a request that is not an access application) unless there is an overriding public interest against disclosure of the information.
- (2) An agency can release government information in response to an informal request subject to any reasonable conditions that the agency thinks fit to impose.
- (3) An agency cannot be required to disclose government information pursuant to an informal request and cannot be required to consider an informal request for government information.
- (4) An agency can decide by what means information is to be released in response to an informal request.
- (5) An agency can facilitate public access to government information contained in a record by deleting matter from a copy of the record to be released in response to an informal request if inclusion of the matter would otherwise result in there being an overriding public interest against disclosure of the record.
- (6) The functions of an agency under this section may only be exercised by or with the authority (given either generally or in a particular case) of the principal officer of the agency.

10 Disclosure and access under other laws

- (1) This Act is not intended to prevent or discourage the publication or giving of access to government information as permitted or required by or under any other Act or law that enables a member of the public to obtain access to government information.
- (2) This Act does not affect the operation of any other Act or law that requires government information to be made available to the public or that enables a member of the public to obtain access to government information.

13 Public interest test

There is an *overriding public interest against disclosure* of government information for the purposes of this Act if (and only if) there are public interest considerations against disclosure and, on balance, those considerations outweigh the public interest considerations in favour of disclosure.

18 What constitutes open access information

The following government information held by an agency is the agency's *open access information* that is required to be made publicly available by the agency under section 6 (Mandatory proactive release of certain government information)—

- (a) the agency's current agency information guide (see Division 2),
- (b) information about the agency contained in any document tabled in Parliament by or on behalf of the agency, other than any document tabled by order of either House of Parliament,
- (c) the agency's policy documents (see Division 3),
- (d) the agency's disclosure log of access applications (see Division 4),
- (e) the agency's register of government contracts (see Division 5),
- (f) the agency's record (kept under section 6) of the open access information (if any) that it does not make publicly available on the basis of an overriding public interest against disclosure,
- (g) such other government information as may be prescribed by the regulations as open access information.

21 Adoption and review of agency information guide

An agency must adopt its first agency information guide within 6 months after the commencement of this section and must review its agency information guide and adopt a new agency information guide at intervals of not more than 12 months. An agency may update and amend its agency information guide at any time.

125 Reports to Parliament

- (1) Each agency (other than a Minister) must, within 4 months after the end of each reporting year, prepare an annual report on the agency's obligations under this Act for submission to the Minister responsible for the agency. A copy of the report is to be provided to the Information Commissioner after the report has been tabled in each House of Parliament.
- (2) Each Minister must, on or before 31 August each year, furnish the Minister administering this Act with such information concerning the Minister's obligations as an agency under this Act as the Minister administering this Act may require.
- (3) The Minister administering this Act must, on or before 31 December each year, prepare an annual report on the obligations of each Minister as an agency under this Act. A copy of the

report is to be provided to the Information Commissioner after the report has been tabled in each House of Parliament.

- (4) An annual report under this section must be tabled in each House of Parliament by the relevant Minister as soon as practicable after it is prepared unless it is included in an annual report prepared for the purposes of the *Annual Reports (Departments) Act 1985* or the *Annual Reports (Statutory Bodies) Act 1984*.
- (5) The annual report referred to in subsection (3) may be included in the annual report for the Department of Attorney General and Justice prepared for the purposes of the *Annual Reports (Departments) Act 1985*.
- (6) The regulations may make provision for—
 - (a) the information to be included in annual reports, and
 - (b) the form in which annual reports are to be prepared.
- (7) In this section, a reference to the reporting year of an agency is a reference to—
 - (a) the financial year of the agency for the purposes of the *Annual Reports (Departments) Act 1985* or the *Annual Reports (Statutory Bodies) Act 1984*, or
 - (b) if the agency does not have a financial year for the purposes of either of those Acts, the year ending 30 June.

APPENDIX B

Informal Release under the *Government Information (Public Access)* Act 2009 Research Survey

The IPC in conjunction with the University of New South Wales is conducting research on informal release practices under freedom of information laws. This survey is being undertaken as part of that research to understand agency practices in relation to the informal release pathway in NSW under the *Government Information (Public Access) Act 2009*.

By completing this survey I acknowledge and consent to the collection and use of the information provided in response to this survey for this purpose. I also consent to the disclosure of the information collected in response to this survey to the University of NSW Wales in deidentified form for the purposes of informing the research being undertaken.

Any personal information collection will be used for this purposes and stored in accordance with the *Privacy and Personal Information Protection Act 1998 (NSW)*. Further information about how the IPC manages personal information is available in the IPC Privacy Management Plan available at <https://www.ipc.nsw.gov.au/privacy-management-plans> (<https://www.ipc.nsw.gov.au/privacy-management-plans>).

The survey will take approximately no more than 30 minutes to complete. Thank you for taking the time to complete this survey.

* Required

1. What is the name of your agency? *

2. Which sector is your agency part of? *

- State Government
- Local Government
- University Sector
- State Owned Corporation

3. In your Agency who is responsible for the receipt and management of informal access requests? *

- Information Access Officer/GIPA Officer
 - Customer Service Staff
 - Front Line Enquiry Staff
 -
- Other

4. If you responded OTHER to QUESTION 3, please outline below which position that is.

5. Does the position identified at QUESTION 3 above, decide whether to release information in response to an informal access request? *

- Yes
- No

6. If you answered NO at QUESTION 5 above, please set out below the position that decides the informal access request? *

7. How many informal access requests does your agency receive per annum? *

8. Does your Agency inform applicants seeking information about informal release options? *

Yes

No

9. If you answered YES to QUESTION 8 above, please select any and all of the options listed that the Agency uses. *

- Website
 - Email response to an enquiry
 - Telephone response in response to an enquiry
 - Agency Information Guide
 -
- Other

10. In what way can an informal access request be made to your agency? *

- Dedicated Informal Request Form
 - Email request
 - Direct contact to the Agency
 -
- Other

11. Does your agency have documented procedures in place for the management of informal access requests? *

- Yes
- No

12. If you responded YES to QUESTION 11, please provide a copy (link or other) of the relevant policy and/or procedure.

13. If you answered NO to QUESTION 11 and do not have a documented procedure then please describe below how decisions are made?

14. Does the Agency include an acknowledgement of the receipt of an informal request to access information? *

Yes

No

Other

15. Does the Agency include an outcome letter for each informal access request received? *

Yes

No

Sometimes

Other

16. If your Agency has a documented policy/procedure for dealing with informal access requests, does it include processes for staff to follow about how to make decisions in relation to informal access requests? *

Yes

No

Other

17. If your Agency, does not have documented policies/procedures for dealing with informal access requests, please describe below how informal access applications are decided. *

18. Does your agency record in any way the reasons for the decision that it has made on the informal request? *

Yes

No

19. If your agency answered YES to QUESTION 18 above, please outline how the Agency records the reasons for the decision it made. *

20. Does the Agency have any timeframes it has adopted for the processing and deciding of an informal access request? *

Yes

No

21. If you answered YES to QUESTION 20 above, please detail the timeframe adopted by your agency.

22. Does the Agency keep statistics and/or other records which facilitate reporting on outcomes of informal release decisions? *

Yes

No

23. If you answered YES to question 22, can you please provide specific details and/or an example of statistics/reports (link or other) of how the outcomes are recorded?

24. How are the informal request outcomes in your agency documented? For example in case management system tool or dashboard.

25. Does your agency report on the outcomes of informal access requests received? *

Yes

No

26. If you answered YES to QUESTION 25, to who and how often does your agency report?

27. If you answered YES to QUESTION 23 what have been the top 3 outcomes applied by your agency on the informal access requests?

- Refused in full
- Released in full with conditions
- Released in full without conditions
- Partial Release with conditions
- Partial Release without conditions
- Required a formal access application

28. What are the top 3 categories/types of information that informal access requests are typically made for in your agency? *

29. Does your Agency have a proactive release program in place? *

- Yes
- No

30. If you answered YES to QUESTION 29, do decisions about informal release influence the Agency's decisions to release data under the agency's proactive release program?

- Yes
- No

31. If you answered YES to QUESTION 30 please provide details, example or reports (link or other)?

32. Please set out below any other information that the agency adopts in making decisions on the informal request pathway that is not captured earlier.

33. What factors, assistance, or support would assist your Agency in applying the informal release pathway under the GIPA Act? *

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APPENDIX C



information
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new south wales

INFORMAL RELEASE UNDER THE *GOVERNMENT INFORMATION (PUBLIC ACCESS) ACT 2009*

Research Survey Response Review

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Background

In October 2021 the Information Commissioner released the eleventh annual [‘Report on the Operation of Government Information \(Public Access\) Act 2009 \(GIPA Act\): 2020/21’](#) (the Report). The Report outlined that in NSW there had been an unprecedented 30% increase in the number of information access applications made, representing the largest increase in over a decade of reporting on the operation of the GIPA Act. The Report recognised that the increase in applications was largely driven by members of the public and in two categories of information type: personal information and other than personal information.

The intention of Parliament through the GIPA Act was, to facilitate and encourage, promptly and at the lowest reasonable cost, access to government information. Under the GIPA Act the informal release pathway is a quicker and cheaper access option for both the applicant and the agency. Agencies have flexibility in deciding the means by which information is to be informally released.

Significantly the GIPA Act requires the authorisation of the principal officer of the agency (agency head) to permit officers to deal with informal access requests.¹

By highlighting the role of the informal release pathway, agencies can create opportunities to streamline the handling of common requests for information and ensure that citizens are able to avoid the cost, time and effort required to prepare and lodge a formal access application.

However, there is limited data available to draw conclusions on the volume and frequency of access requests made by via the informal access pathway or the outcomes are limited. Therefore, the Information Commissioner requested the participation of a number of agencies in a survey to understand agency practices in relation to the informal release pathway in NSW under the *Government Information (Public Access) Act 2009* (GIPA Act).

The aim of this research is to make recommendations to facilitate the effective use, establish a base-line measurement and consider ongoing and proportionate reporting of this pathway by NSW Government Agencies that facilitates the agency’s exercise of functions under section 8.

1. Scope of survey

On 27 September 2022 the Information Commissioner invited twenty (20) agencies to participate in the survey. The survey contained a total of 33 questions relating to the informal access pathway. A cross section of public sector agencies were selected in order to obtain a better understanding of the use of the informal access pathway by different sectors.

As of 26 October 2022, a total of 19 agencies had provided a response to the survey. For the purposes of this report, the agencies have been deidentified, with the analysis focusing on the four different agency sectors of State Government, Local Government, University Sector and State-Owned Corporations (SOCs).

There was a 95% response rate to the survey, with all but one state government agency engaging with the survey. The high response rate demonstrates the effective and positive relationship the Information and Privacy Commission (IPC) has as a regulator with its stakeholders. This positive engagement will facilitate a better understanding of the context; aid formulation of implementable recommendations, as well as promoting the appropriate use of the informal access pathway. Ultimately, that promotion may provide ease of access to citizens and reduce the volume of access requests made in under the formal pathway.

Diagram 1 outlines the cross section of agencies that provided a response to the survey. The local government sector represented 44% of the total responders.

¹ Section 8(6) GIPA Act

Diagram 1 – Agency response to survey

● State Government	4
● Local Government	10
● University Sector	3
● State Owned Corporation	2



2. Survey responses

2.1 Question 1

Question 1 contains responses that identify the agencies who provided a response to the survey. As the agencies have been deidentified for the purposes of this review, no further comment is made with respect to question 1.

2.2 Question 2

Question 2 relates to the cross section of agencies that provided a response to the survey. This has been outlined above at diagram 1 when addressing the scope of the survey.

2.3 Question 3

Question 3 requested further details from the agency regarding who held responsibility for the receipt and management of informal access requests.

Diagram 2 outlines the survey responses to question 3.

Diagram 2 – Survey response to question 3

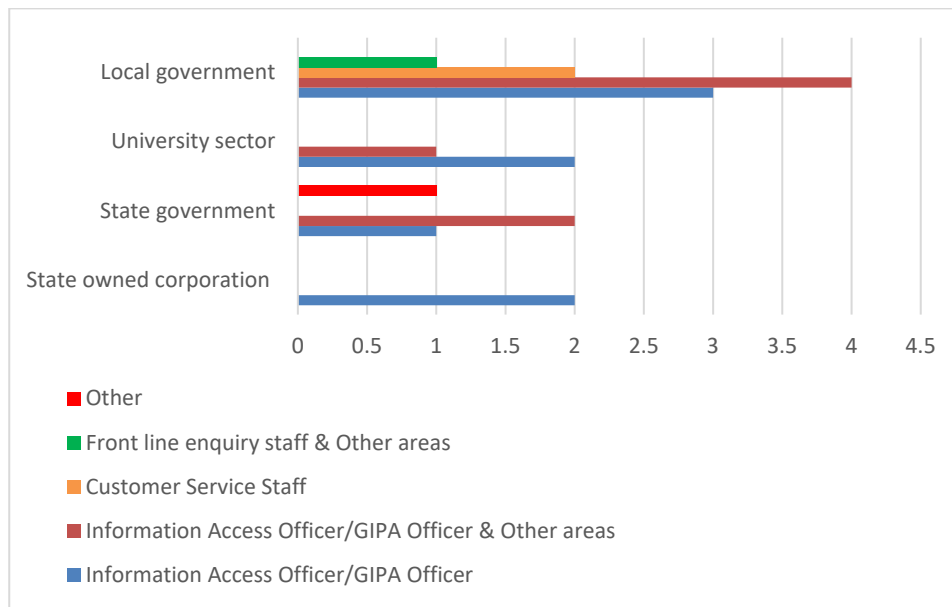
● Information Access Officer/Gl...	15
● Customer Service Staff	7
● Front Line Enquiry Staff	3
● Other	6



On review of the data, all 19 agencies selected at least one of the options provided at question 3.

Diagram 3 provides a breakdown of the response for each of the sectors.

Diagram 3 – Sector breakdown of question 3



A total of 31 responses were noted to question 3 across the range of options. An entity could select more than one role as applicable. On review of the responses, the following was noted:

- 8 agencies used only an Information Access Officer/GIPA Officer. When reviewing the breakdown, this mainly consisted of local government (38%), followed by SOCs (25%), university sector (25%) and state government (13%).
- 7 agencies used a combination of an Information Access Officer/GIPA Officer and other areas. These other areas included customer service staff, front line enquiry staff, governance team, records staff, administration staff and all agency staff. This combination was mainly used by local government (57%), state government (29%) and university sector (14%).
- 2 local government agencies stated they only used customer service staff.
- 1 local government agency used both front line staff and customer service staff.
- 1 state government agency solely selected other areas, outlining receipt and management was by all Open Government and Information Access team members as well all Departmental Officers.

The data indicates that a majority of the agencies (47%) use a combination of agency staffing resources when managing informal access requests. The local council sector appeared to have the greatest spread of roles within the agencies surveyed that receipt and manage informal access requests. Based on the results it appears that the decision for informal release does tend to remain within the Information Access Officer/GIPA Officer.

The responses also confirmed that in 84% of cases these roles were able to decide the informal request. This would tend to indicate that the agency has in place the requisite authorisations to permit release consistent with the requirements of section 8(6) of the GIPA Act.

2.4 Question 4

Question 4 requested further information from the agencies that selected “Other” at question 3. A total of 5 responses were received for the question, related to the following:

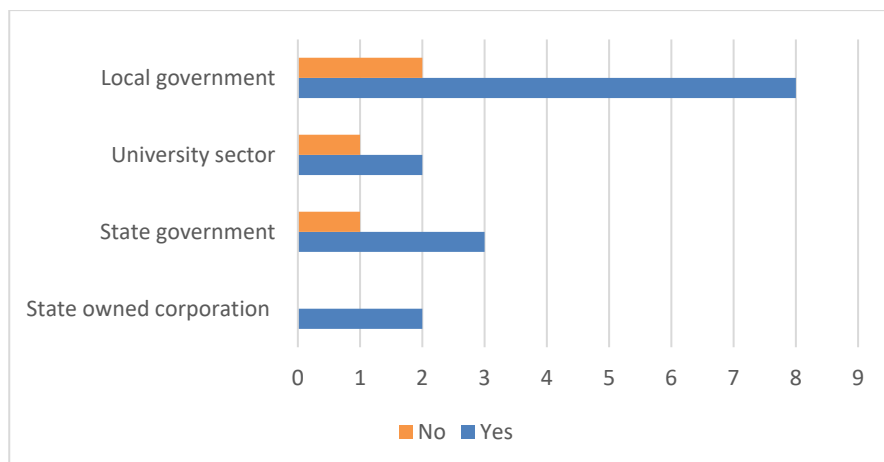
- Release of the information depended on delegation. One agency noted all departmental staff were delegated to release information informally where there were no public interest considerations against disclosure.
- Receipt and management could occur by any staff in some agencies. In another agency receipt could occur by customer service and administrative staff but only GIPA officers managed and decided the request.
- Any position across the agency may receive and manage the request but the decision to release information was delegated to the Director.
- One agency noted their records staff could also release information informally. It was not possible to ascertain whether this was enabled by a specific delegation either given generally or in particular.

2.5 Question 5

Question 5 asked agencies whether the areas identified at question 3 could decide to release information in response to an informal access request.

Diagram 4 outlined a majority of the agencies stated the areas identified in question 3 could make a decision regarding informal release of information equating to 84%.

Diagram 4 – Survey response to question 5



2.6 Question 6

Question 6 asked agencies to outline the area that could decide release for information if they answered “No” at question 5. While only 4 agencies answered “No” at question 5, 19 responses were received for question 6.

The responses outlined the following:

- A majority of the agencies stated “N/A”, “-”, “answered yes” and “not relevant”. This response corresponds to question 5.

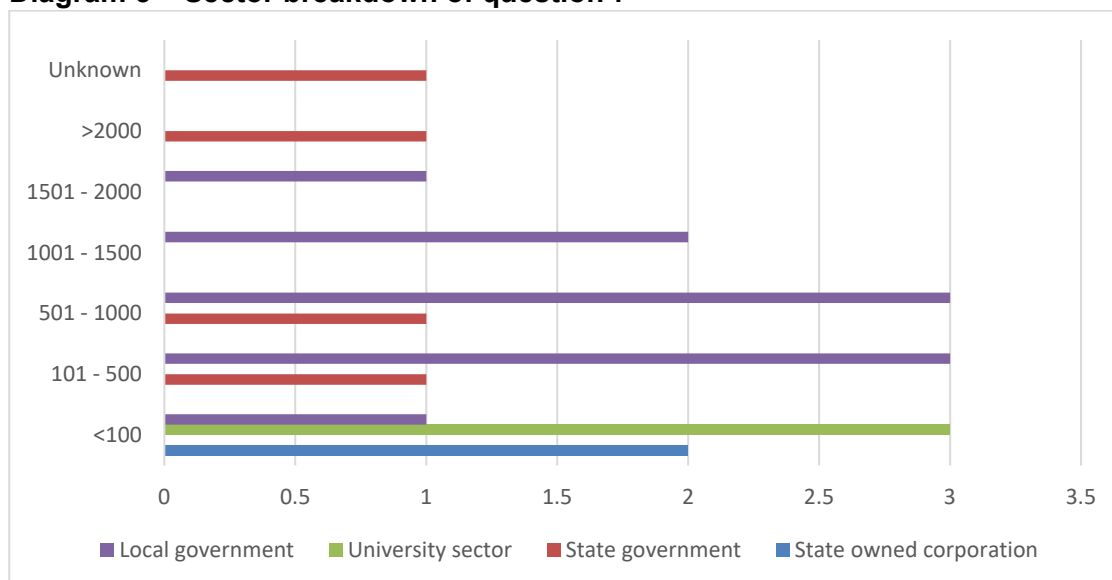
- The local government sector identified the General Manager and Archivist could decide on release. One local government agency also highlighted that their Governance team provided a 'guide' to the Customer Services team to enable them to understand what can and cannot be released informally. While such guidance can be helpful to support staff and facilitate the process, it can have the potential to fetter decision making processes if the guidance is adopted in a prescriptive way and solely relied upon as the basis to determine whether release is or is not to occur.
- A university sector agency outlined informal access is granted across the University within specific areas of authority but stated such requests are not usually documented but are regarded as business-as-usual practice. In particular, the agency stated any officer can release information informally where a request is not received by the GIPA team. The sector also noted Manager, Archives and Records Management Services has authorisation from the Vice-Chancellor to make section 8 decisions, as well as Director level or above can decide on release.

2.7 Question 7

Question 7 asked the agencies to outline the requests received per annum.

Diagram 5 provides an overview of the responses.

Diagram 5 – Sector breakdown of question 7



The following was also noted from the agency responses:

- The estimates provided ranged from different financial years (2021 and 2022) or did not specify the date range the data was based on.
- Some agencies commented that informal request data across the organisation is not captured and could amount to thousands of requests but provided an estimate from the GIPA team.
- One state government agency stated that it was not practical to track all informal requests as they had over 300 business units dealing with informal requests for information.

Nonetheless, the data available indicates that one state government agency deals with over 2000 requests but as a sector, local government receives the highest volume of informal requests.

2.8 Question 8

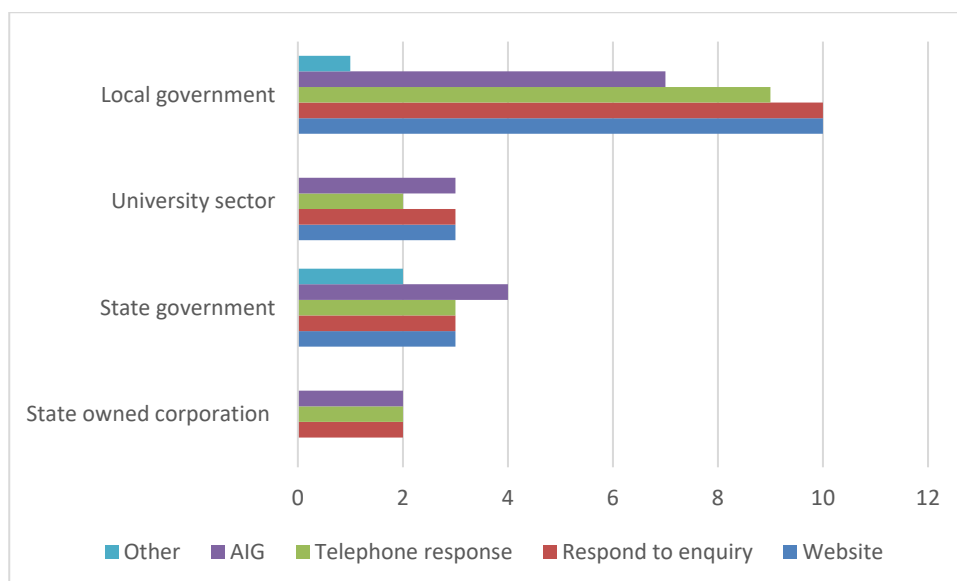
Question 8 sought a response from agencies on whether they provided information to applicants seeking information about informal release options. All agencies stated they provided information to applicants in this regard, demonstrating positive engagement regarding informal access pathways.

2.9 Question 9

Question 9 requested agencies to outline how they provide information regarding informal release to applicants. A total of 71 responses were provided in the survey.

Diagram 6 outlines the manner in which agencies provide information to applicants seeking information.

Diagram 6 – Sector breakdown of question 9



The data identified the positive impact an Agency Information Guide (AIG)² had on informing individuals about informal release of information. AIGs are a significant portal to government information. They allow the public to identify and access government information held by an agency Under the GIPA Act, at AIG is required to include:

- (a) describes the structure and functions of the agency, and
- (b) describes the ways in which the functions (including, in particular, the decision-making functions) of the agency affect members of the public, and
- (c) specifies any arrangements that exist to enable members of the public to participate in the formulation of the agency’s policy and the exercise of the agency’s functions, and
- (d) identifies the various kinds of government information held by the agency, and
- (e) identifies the kinds of government information held by the agency that the agency makes (or will make) publicly available, and
- (f) specifies the manner in which the agency makes (or will make) government information publicly available, and
- (g) identifies the kinds of information that are (or will be) made publicly available free of charge and those kinds for which a charge is (or will be) imposed.

² Section 20 GIPA Act

An agency must make government information publicly available as provided by its agency information guide.

The AIG was the popular option across all sectors, but it was noted that 30% of the local government sector did not select it as an option. As an AIG is an open access document which is meant to be made publicly available on the agency website, the websites of the local government agencies that did not select the AIG as an option was reviewed. It was noted that two of these local government agencies had an AIG published on their website which provided some information regarding informal release. However, the AIG of one the local government agencies could not be located.

A majority of state government agencies and all of the local government as well as university sector agencies utilised their website to provide information or stated responded to the enquiries. Overall, the agencies demonstrated a high commitment to providing information regarding informal access to individuals.

2.10 Question 10

Question 10 asked the agencies to provide further details on the way an informal request could be made to them. The survey provided four options for the agencies to select from, which included:

1. Dedicated informal request form
2. Email request
3. Direct contact to the Agency
4. Other

Diagram 7 outlines the response to the survey. A total of 51 responses were noted for question 10, indicating agencies were willing to accept informal requests in different formats.

Diagram 7 – Survey response to question 10

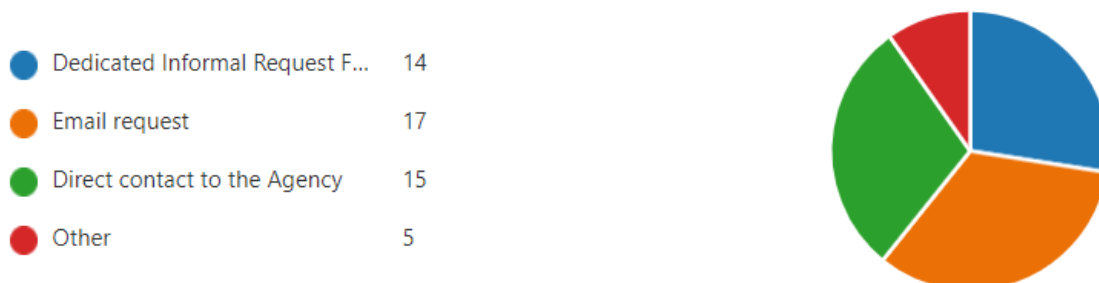
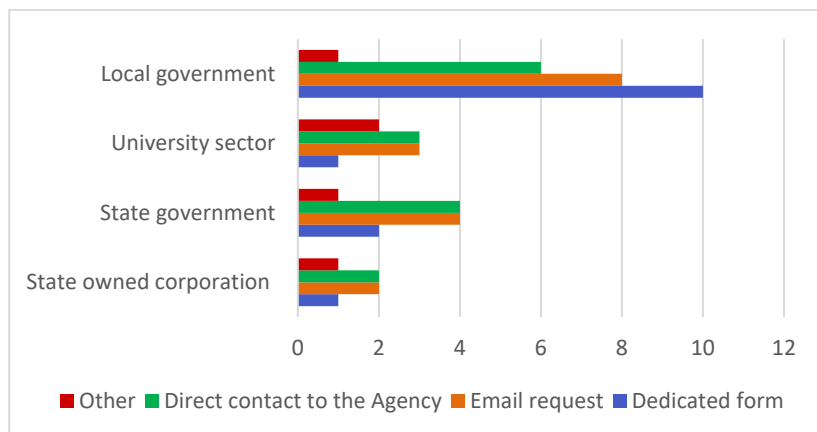


Diagram 8 contains the breakdown of the response to question 10.

Diagram 8 – Sector breakdown of question 10



The responses outlined that the most popular ways to receive an informal request across the sectors, with the exception of local government, was via email (100%) or direct contact (100%). Whereas the local government sector demonstrated a commitment to provide a dedicated form for informal access requests (100%).

2.11 Question 11

Question 11 asked agencies whether they had any documented procedures in place for the management of informal access requests.

Diagram 9 contains the survey responses to question 11.

Diagram 9 – Survey response to question 11

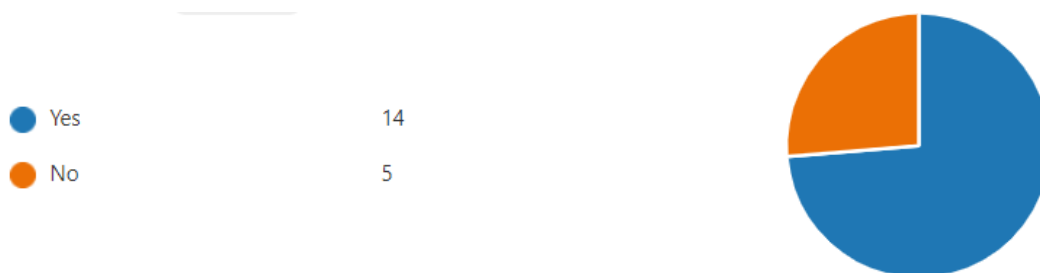
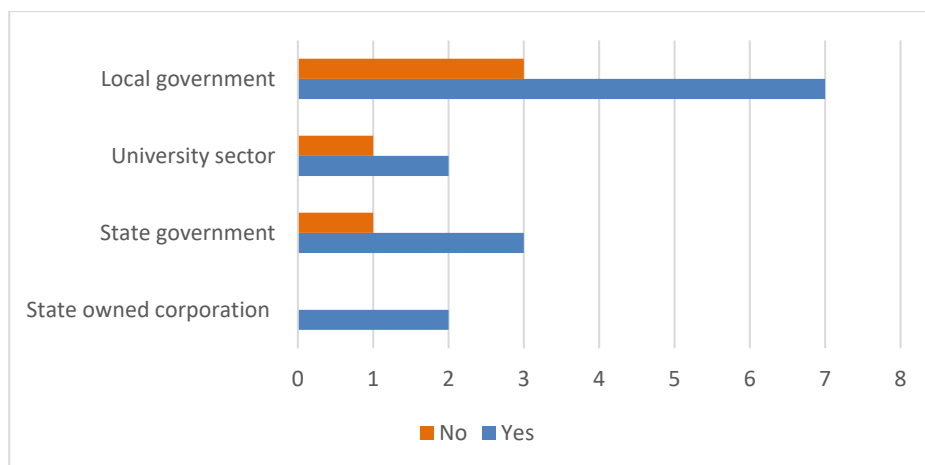


Diagram 10 contains the breakdown of the response across the sectors.

Diagram 10 – Sector breakdown of question 11



The results indicate that a majority of the agencies have documented procedures in place, demonstrating a commitment to the informal access pathway to facilitate access to information. In circumstances where an express authorisation is required to deal with informal access requests good practice requires procedures to inject certainty of administrative processes and decision making. The local government sector contained the highest number of agencies without a documented procedure but factoring into the total number of agencies in the sector, only 30% did not have one. Whereas 33% in the university sector and 25% in the state government sector did not have a documented procedure.

2.12 Question 12

Question 12 asked the agencies to provide a link to the relevant policy and/or procedure referred to in Question 11. A total of 13 responses were received for question 12, not aligning with the responses noted in question 11.

On review of the data, the IPC observed in review of the responses the following:

- Two agencies that responded “yes” to question 11 did not provide a link. This included an agency from the university sector and local government sector.
- One agency that responded “no” to question 11 stated that it did not have a public facing document.
- The other agencies that responded “yes” to question 11 indicated that the relevant policy/procedure was:
 - an internal document – in this regard, some agencies noted that the document could be provided on request by the IPC or that the survey contained limitations to attaching information.
 - on the internal intranet.
 - internal fact sheets.
 - in draft mode.
 - managed by Applications software where each step was triggered by an event.
- The responses also included links to the policies/procedures. In this regard, one SOC provided a link to their AIG and one University sector agency provided a link to their access to information page. The local government agencies provided links to:
 - Access to information policy – one policy did not contain any detail on management of informal access requests but rather an overview of the agency’s commitment to facilitate access to information to the public. Another policy contained limited detail about how informal access forms will be assessed.
 - An AIG.

Further discussion in relation to the consideration of the policies and procedures is captured in Section 3 of this paper.

2.13 Question 13

Question 13 requested the agencies that answered “No” to question 11 to provide further details on how decisions were made. A total of 7 responses were received from agencies that described their approach to decisions on informal release, which included:

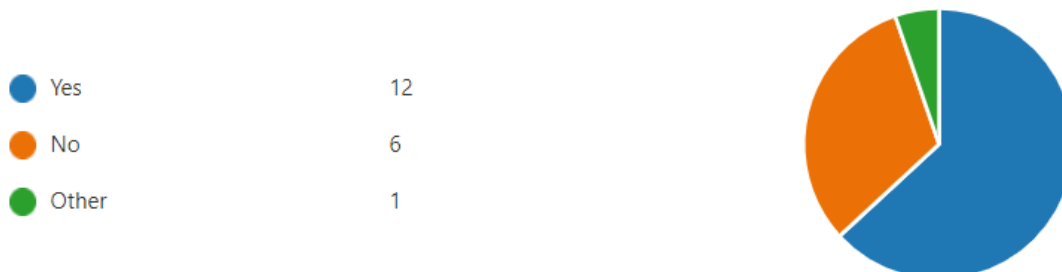
- Three agencies that answered “yes” to question 11 stated either “N/A” and one explained that the information is part of their large GIPA procedure document so a copy would not be provided but explained information can be released under section 8 is referenced through document.
- Four agencies that responded “no” to question 11 outlined that:
 - Internal discussions occur between the Customer Service team and the General Manager.
 - There is no procedure but a 'Guide to Informal Requests for Information' and processes on correct redacting as well as processes on certain enquiries.
 - Decisions are made on the basis of processes and procedures of relevant business units and where applicable, the judgment of the GIPA Officer taking into account the nature of the request and the nature of the information requested.
 - Actions were consistent with legislative requirements.
- One agency that responded “no” to question 11 provided no response to question 13.

2.14 Question 14

Question 14 asked agencies whether they acknowledged receipt of informal requests to access information.

Diagram 11 outlines the responses received to question 14.

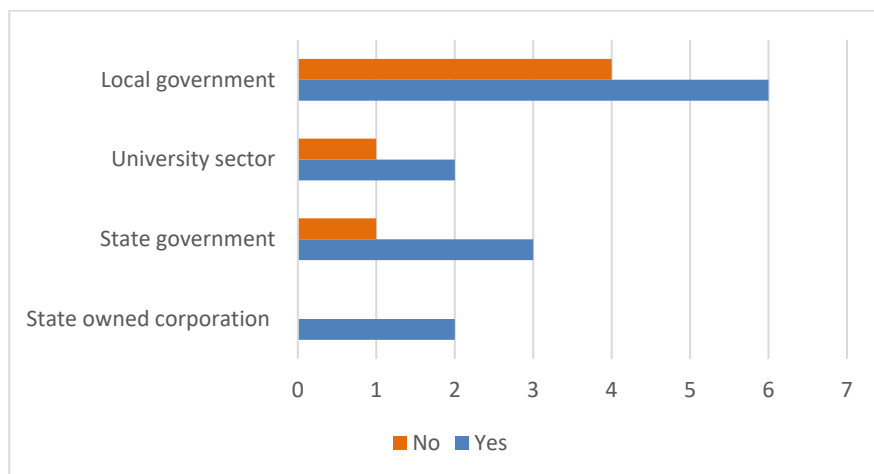
Diagram 11 – Survey responses to question 14



The one “other” response stated that there was a standard acknowledgement of receipt sent without reference to GIPA Act. This response has been taken as a “yes” when further reviewing the breakdown of the response to question 14.

Diagram 12 contains a breakdown of the response to question 14.

Diagram 12 – Sector breakdown of question 14



The responses indicated that a majority of agencies across all sectors acknowledged receipt of an informal request to information. However, the local government sector had the highest percentage when it came to **not** acknowledging receipt (40%). This is concerning considering the level of access applications received by the local government sector (refer Diagram 5), a huge number may not be acknowledged, therefore diminishing the impact of the promotion of the informal access pathway in accessing information in comparison to the formal pathway.

It was also noted the state government agency that answered “no” outlined at question 7 that it was not practical to track the informal requests as they had over 300 business units all handling their own informal requests. Therefore, whilst the agency deals with informal requests, it was unclear the processes each business unit employed.

2.15 Question 15

Question 15 asked agencies whether they include an outcome letter for each informal access request received.

Diagram 13 outlines the responses received to question 15.

Diagram 13 – Survey responses to question 15

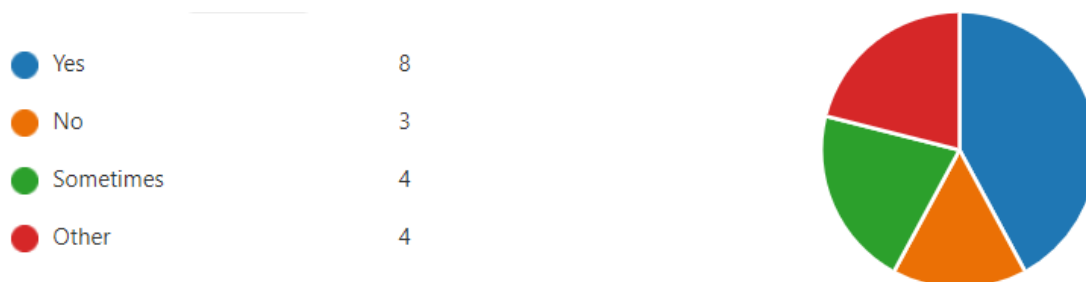
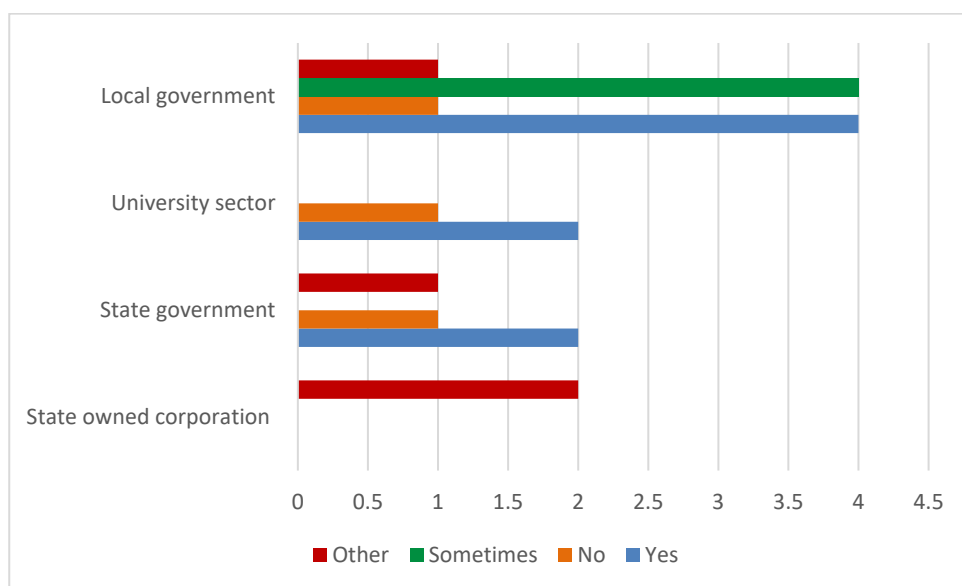


Diagram 14 contains a breakdown of the response to question 15.

Diagram 14 – Sector breakdown of question 15



The responses captured by “other” outlined:

- N/A - no requirement for an outcome letter under the legislation; the relevant information is provided.
- An outcome letter is always provided with an email response.
- An outcome email is provided with a notice of decision structure.
- Telephone enquiries that do not lead to any further action are unlikely to receive a written response.

On review of the responses to question 15, 42% of the agencies provide an outcome letter in response to the informal access request. However, the agencies that answered “no” consisted of one local government, one state government and one university sector agency. These agencies did not provide an outcome letter and it was noted that the local government agency stated they received over 1600 informal requests a year. Whereas the state government agency stated that it was not practical to track all informal requests due to the size of the organisation.

With respect to the state government agency, the process employed by each business unit when responding to the informal access request was unclear. However, the lack of outcome letter may appear to create a barrier in promoting the informal access pathway if individuals are unable to understand why their request was or was not facilitated. The absence of a communicated outcome is relevant to being able to understand how the agency exercised its administrative decision making on the informal request.

2.16 Question 16

Question 16 asked agencies whether the agency has a documented policy/procedure for dealing with informal access requests and if so, whether it included processes for staff to follow about the decision-making process in relation to informal access requests. This data reflects the agency view of their policies/procedures.

Diagram 15 outlines the responses received to question 16.

Diagram 15 – Survey responses to question 16

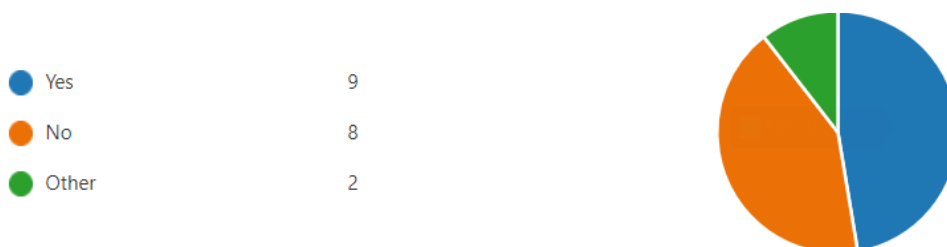
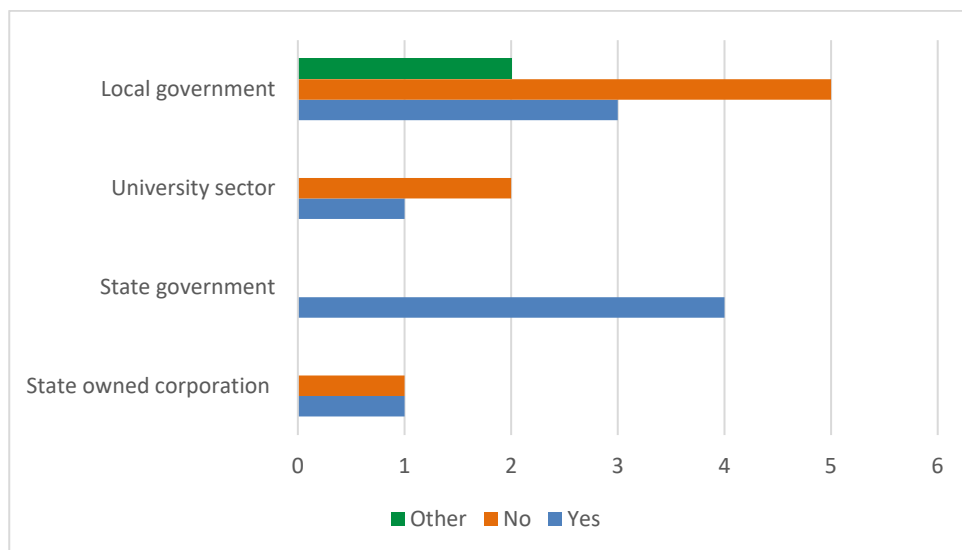


Diagram 16 contains a breakdown of the response to question 16.

Diagram 16 – Sector breakdown of question 16



The “other” responses to question 16 outline:

- Access to Information staff have set procedures and training material for decision making.
- Limited checklist for certain types of information.

On review of the data, a majority of the agencies had no policy/procedure to guide staff in making decisions in relation to informal access requests. The local government sector contained the highest percentage (50%) that had no policy/procedure despite being the sector that deals with the

most requests for informal access. The state government sector demonstrated a positive commitment to the informal access pathway by being able to guide staff with policies/procedures.

2.17 Question 17

Question 17 asked agencies to provide further information regarding informal access application decision-making where there is no documented policy/procedure in place.

A total of 18 responses were received. This means that even those agencies with a policy provided a response to this question. A number of agencies confirmed there was a procedure in place or stated “N/A”. The number of N/A or nil responses equated to 44% and when considered in the context of those that replied that they did not have a policy. Whereas the responses from other agencies, predominantly within the local government sector, outlined:

- Informal requests are decided in accordance with relevant legislation.
- Informal requests were decided by Right to Information officer and endorsed by the business unit that owns the information.
- They proactively release information, whereby a customer request is raised and actioned.
- They decided informal requests in the same manner as formal applications.
- They provided staff training, the Privacy & Information team are available to provide advice and action, and that there was a limited checklist for certain types of information.
- The General Manager makes decision based on advice from legal and consultation on Act.
- There were processes in place, but individuals needed to look at each circumstance.
- A guide has been provided to Customer Services, providing information on what can or cannot be released. If a request is unusual, then the request is to be sent to the Governance team.

Whilst there was no documented policy/procedure in place for a significant number of local government agencies, these agencies did provide information that indicated that there was an informal procedure on how to manage and decide informal access requests.

2.18 Question 18

Question 18 asked agencies whether they record the decision made for the informal request. This question was focused on data capture not on reasons for decision.

Diagram 17 outlines the responses received to question 18.

Diagram 17 – Survey responses to question 18

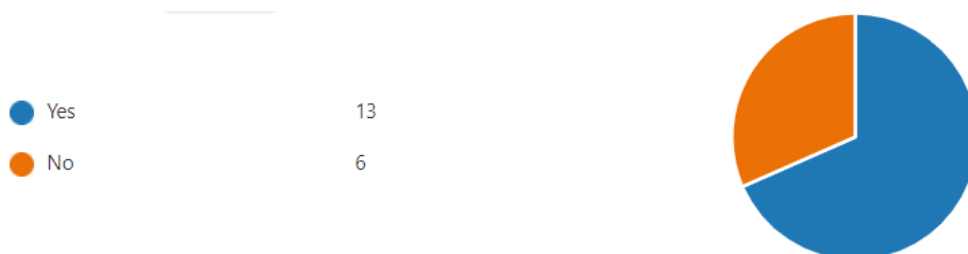
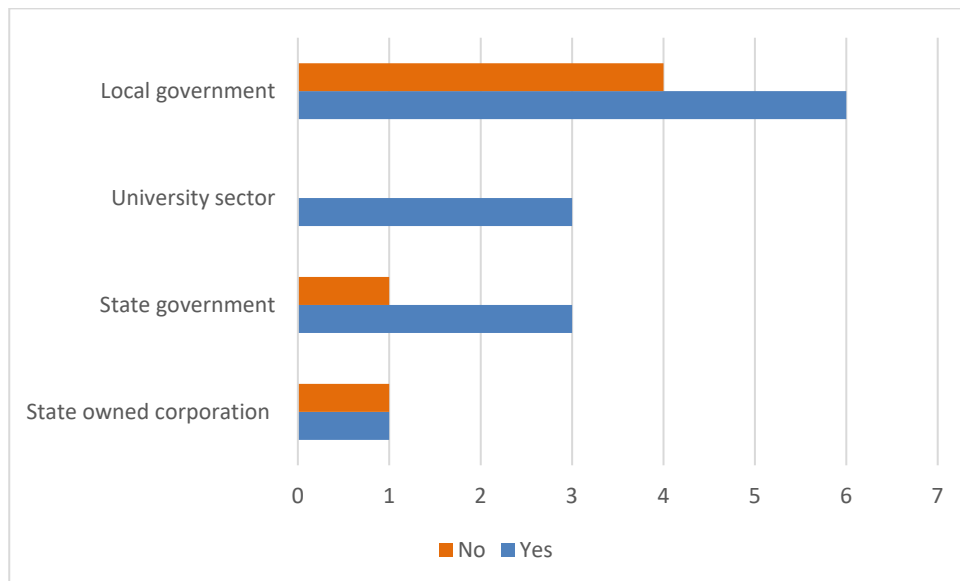


Diagram 18 contains a breakdown of the response to question 18.

Diagram 18 – Sector breakdown of question 18



On review of the responses to question 18, a majority of the agencies stated they do record the reasons for the decision. The local government sector indicated 40% did not record the decision in any way. For university sector 100% responded that decision outcomes were not captured, and 75% of the government sector capturing data outcomes for informal release.

2.19 Question 19

Question 19 asked agencies to provide further information on how they record the reasons for the decisions made. A total of 18 responses were received which outlined:

- The reasons are recorded in agency internal systems such as Electronic Records Document Management System, Customer Request Management System or a case management tool. These responses were all from either local government or state government agencies.
- A note made by GIPA officer if they made the decision.
- Recorded in outcome letter/email.
- A GIPA spreadsheet is maintained.
- Internal correspondence signed off is relied upon.
- Information released under section 8 of the GIPA Act is not redacted, so minimal reasons are required.

On review, the two sectors that receive the highest number of informal access requests have implemented systems which enable them to record reasons for the decision made. Whilst not all agencies within these two sectors have demonstrated this commitment, the use of system can prove to be a useful tool to be able to manage a high volume of informal access requests.

2.20 Question 20

Question 20 asked agencies whether they have adopted timeframes for processing and deciding an informal access request.

Diagram 19 outlines the responses received to question 20.

Diagram 19 – Survey responses to question 20

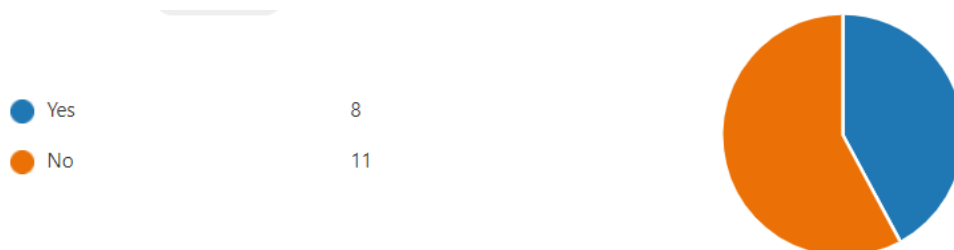
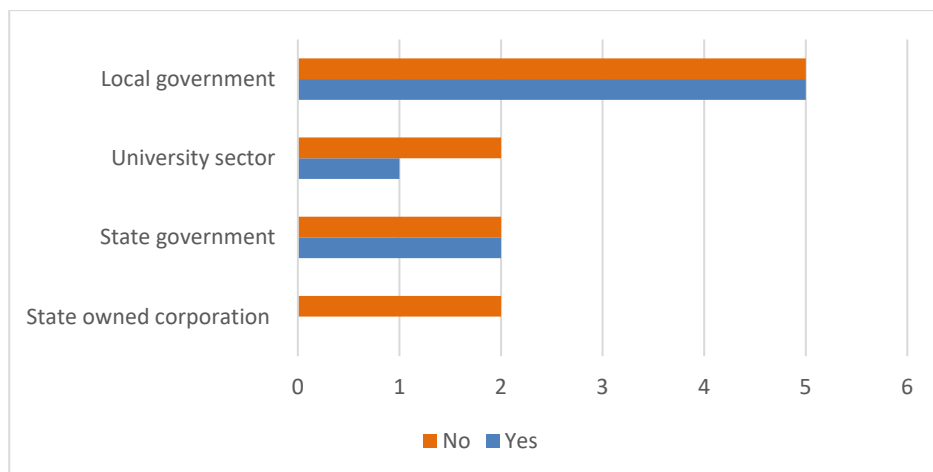


Diagram 20 contains a breakdown of the response to question 20.

Diagram 20 – Sector breakdown of question 20



On review of the responses to question 20, 58% of the agencies stated they do not have a recorded a timeframe to respond to informal requests for information. Importantly, the GIPA Act does not stipulate a timeframe to respond to informal requests for information. The responses to question 20 appear to reflect the absence of a statutory timeframe.

2.21 Question 21

Question 21 asked agencies to provide further detail if a timeframe was adopted to respond to informal requests for information. The commitment to a timeframe was mainly demonstrated within the local government (60%) and state government (50%), stating there was some form of a timeframe.

A total of 11 responses were received which outlined the timeframe:

- Was in line or tried to align with standard GIPA timelines.
- No formal timeframes but the aim is to complete decision within a timeframe. This timeframe ranged between 10 – 30 working days to complete a decision across different agencies.

2.22 Question 22

Question 22 asked agencies whether they keep statistics and/or records which facilitate reporting on outcomes of informal release decisions. Diagram 21 outlines the responses received to question 22.

Diagram 21 – Survey responses to question 22

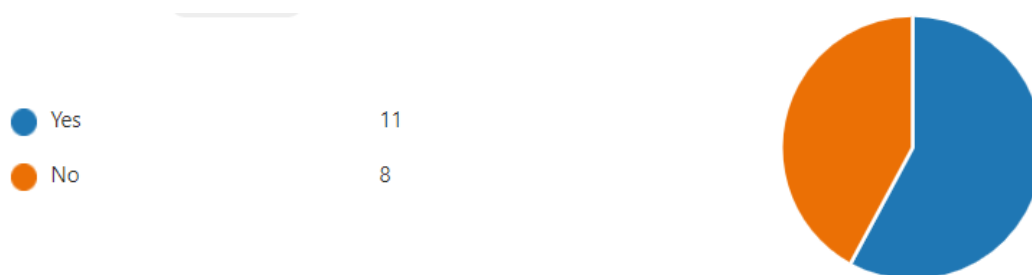
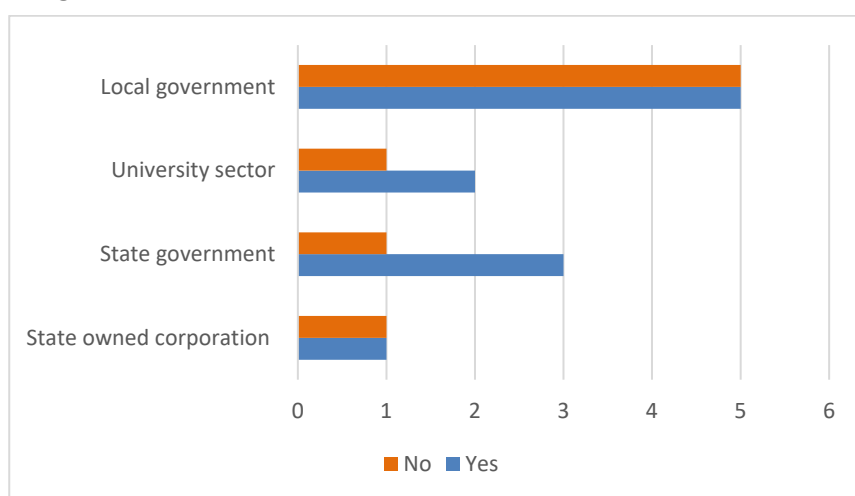


Diagram 22 contains a breakdown of the response to question 22.

Diagram 22 – Sector breakdown of question 22



On review of the responses to question 22, a majority, 58% of the agencies keep statistics. Although only 58% responded in the affirmative, it is to be noted that in the following question (which is related to question 23), more agencies responded which would mean that actually 63% of agencies are capturing and recording statistics in some manner based on the responses provided at question 23.

However, the even split within the local government sector outlines limitations to reporting outcomes of informal release decisions. As the sector with the highest number of informal requests, a true representation of the types of informal requests and decisions made in the local government sector may not be recognised due to the limitations in statistics.

2.23 Question 23

Question 23 asked agencies to provide further details of how statistics of outcomes are recorded. This question was designed to seek further information from those that responded positively to Question 22. A total of 12 responses equating to 63% were received. This is slightly higher than the number of responses to question 22. The responses outlined:

- The outcomes were recorded as part of the agencies standard GIPA statistics.
- The number of informal requests received each financial year are recorded but not the outcome.
- Statistics are reported internally.
- Agency releases everything with the exception of material that is subject to a claim of copyright ownership of another party (view only option offered) and personal and information.

- Internal activity register on excel spreadsheet is kept.
- Agency systems record outcomes, such as application management system and records management system.
- The agency had statistics available but generally informal release will not be reported on.
- Outcomes are recorded in the same manner as formal access applications.
- Contained in the annual report.

A majority of the responses were received from the local government and state government sector. There were no links provided from any of the agencies to any example of how statistics are reported.

2.24 Question 24

Question 24 asked agencies how informal request outcomes were documented. A total of 17 responses equating to 89% were received, which outlined agencies had:

- A corporate record system.
- GIPA case management tool.
- Electronic records document management system.
- An information management system.
- An activity register or excel spreadsheet.
- Customer request management system.
- No system to record.

On review of the data, two agencies (one state government and one local government) did not respond to the question, indicating they also had no system in place to record the outcome. Overall, a majority of agencies listed their electronic records document management system or case management tool as systems that recorded the outcome.

2.25 Question 25

Question 25 asked agencies whether they report on the outcome of the informal access request received.

Diagram 23 outlines the responses received to question 25.

Diagram 23 – Responses to question 25

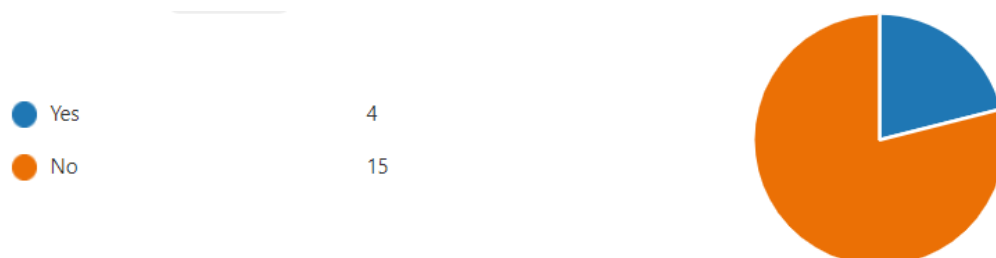
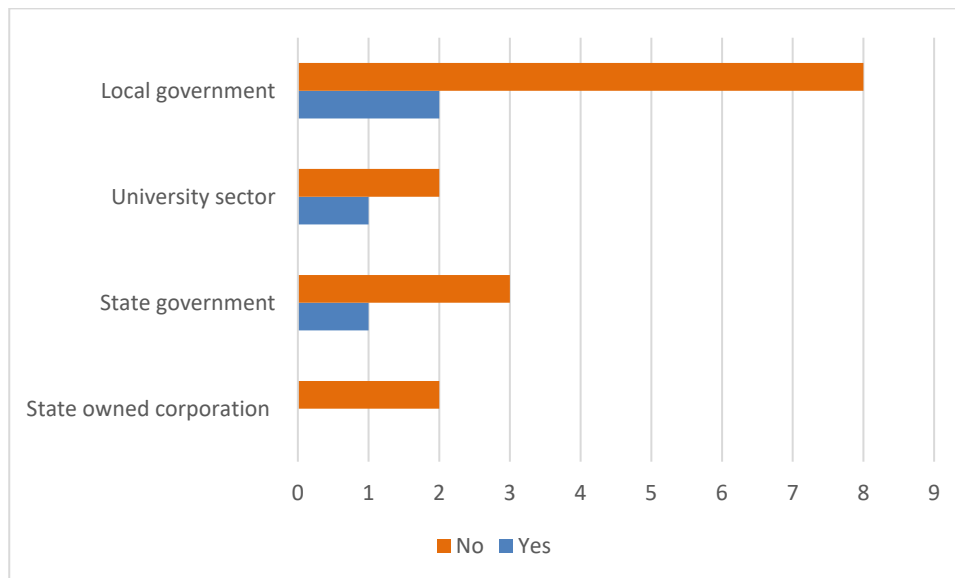


Diagram 24 contains a breakdown of the response to question 25.

Diagram 24 – Sector breakdown of question 25



On review of the responses to question 25, an overwhelming majority of the agencies do not report on the outcome of the informal access request. The low level of response indicates reporting informal access outcomes may have minimal importance to the agencies. It is noted there are no legislative requirements to report on informal access requests, thus this may likely be a significant factor contributing to agencies being less likely to report on these requests as well. It also further inhibits the ability of an agency to review the types of request and outcomes and utilise this to inform their proactive release program.

2.26 Question 26

Question 26 asked agencies that selected “yes” to question 25 how often they reported on the informal access outcomes. A total of 7 responses were received, majority from the local government sector, which outlined agencies reported:

- business as usual to the Chief Governance officer.
- on a monthly basis to General Counsel.
- Informal access request outcomes in their annual report was the most common with 3 responses identifying this option.
- to the IPC.

The range of responses indicates when reporting occurs, it supplements existing reporting processes.

2.27 Question 27

Question 27 asked agencies what the top 3 outcomes were in response to informal access requests.

Diagram 25 outlines the responses received to question 27.

Diagram 25 – Survey responses to question 27

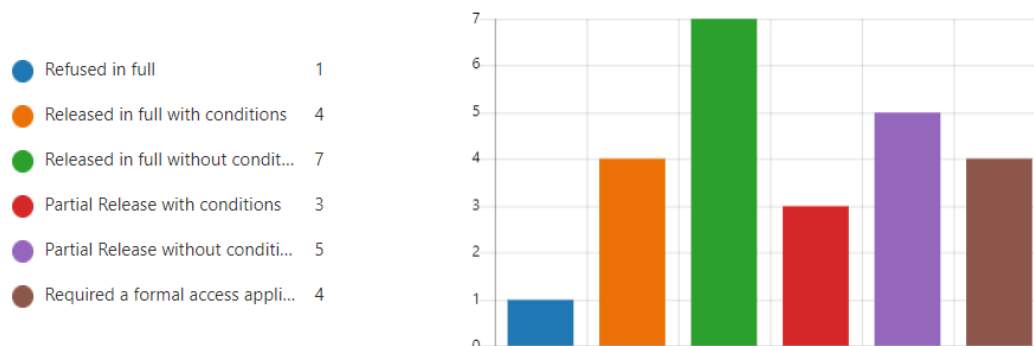
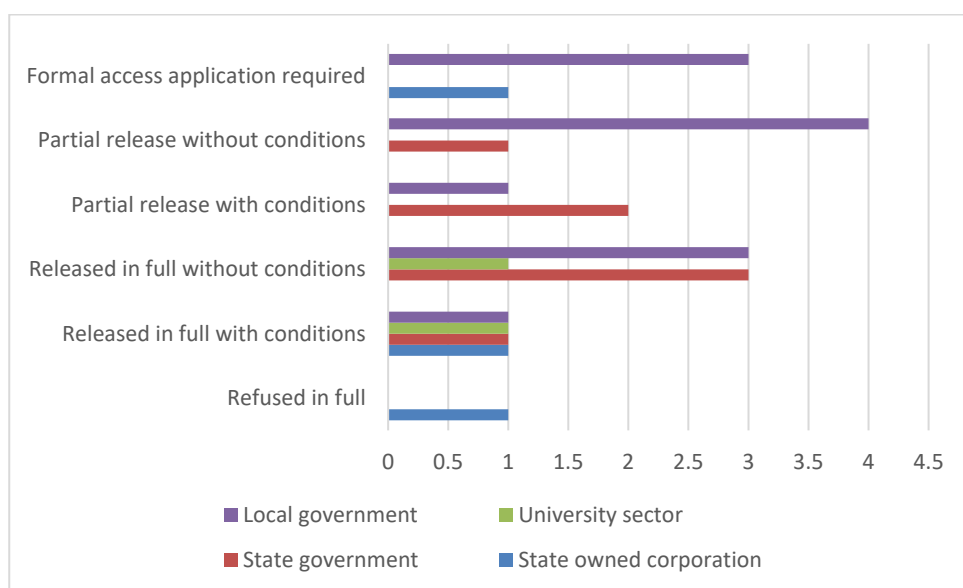


Diagram 26 outlines the sector breakdown of the responses to question 27.

Diagram 26 – Sector breakdown of question 27



A review of the results indicates that the local government, state government and university sector were willing to release information in some form. Formal access applications were only required by the local government sector and SOC, indicating other sectors were willing to address the informal access request without proceeding to a formal access request, thus promoting the pathway and enabling efficient access to information held by the agency. The results indicate that the use of conditions is actively applied to facilitate informal release. An observation from the responses to question 27 indicate that the referral to formal access application appears to only be identified as occurring in the local government sector.

2.28 Question 28

Question 28 asked agencies to identify the top 3 categories/types of information that are informal access requests are made for. A total of 14 responses (74%) were received which outlined:

- Local government sector information requested related to plans, documents related to development applications, property information including owner contact information, certificates, development consent and planning decisions. Of noting is that the nature of the information described as the basis for informal access requests is of a kind that would constitute mandatory open access information³.

³ Section 6 GIPA Act

- University sector information requested related to personal information, research data, archival information, organisation information, statistics.
- State government sector information related to personal information, workplace incidents, statistics, CCTV footage and information from the agency disclosure log.
- SOC information related to personal information, reports and information on work carried out on properties.

A majority of the 14 responses was provided from the local government sector (64%). A common category of information requested across the local government agencies was development application information. It was noted from data at question 27, one of the top 3 outcomes for the local government sector was requiring a formal access application. Schedule 1 of the GIPA Regulation prescribes certain information about development applications are open access information. It may be that the request for a formal access application by the local government sector, arises because the information may be subject to an overriding public interest against disclosure as provided by clause 6(1) of the GIPA Act. Under the GIPA Act the mandatory open access information in relation to development applications applies to applications on and from 1 July 2010.⁴

2.29 Question 29

Question 29 asked agencies whether they had a proactive release program in place.

Diagram 27 outlines the responses received to question 29.

Diagram 27 – Responses to question 29

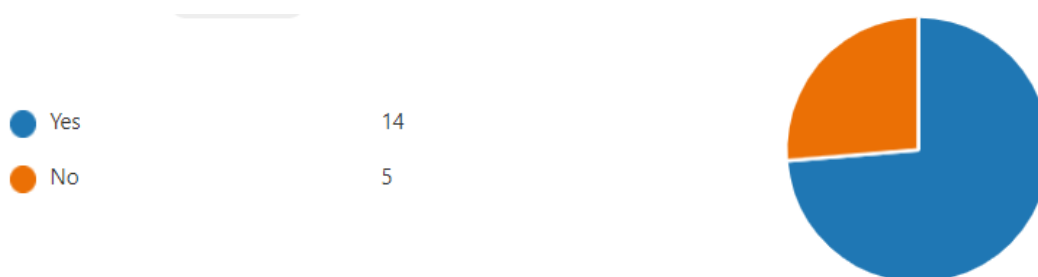
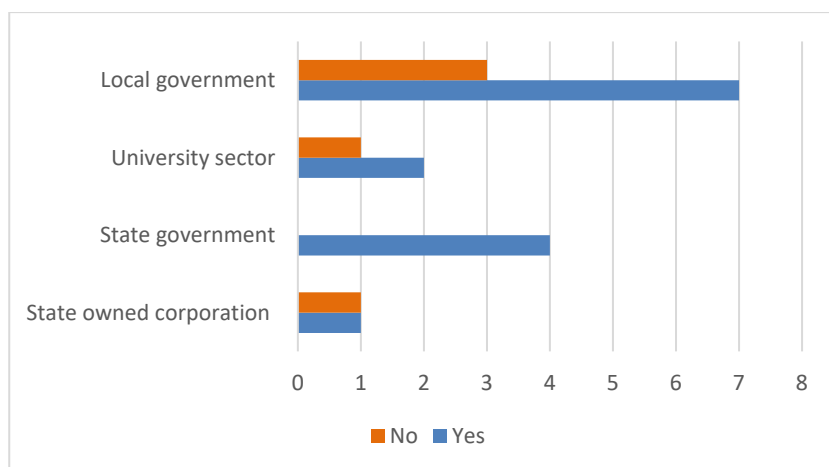


Diagram 28 outlines the sector breakdown of the responses to question 29.

Diagram 28 – Sector breakdown of question 29



⁴ Schedule 1, Clause 3 (2) (c) Government Information (Public Access) Regulation 2018

A review of the results indicates a majority of the agencies have a proactive release program in place. The IPC encourages all agencies to have a proactive release program in place and to outline such details in their AIG. The state government sector demonstrates a positive commitment to implementing a proactive release program, with 100% of all state government responses having a program in place. Given the volume of informal release requests to the local government sector, the absence of a proactive release program in 30% of local council responses may be a relevant consideration as part of the strategy in responding to the increase in the number of requests. An area for improvement has been identified with respect to agencies within the other sectors. The proactive release program is one of the vital means to achieve success in promoting the informal access pathway, reducing the number of informal access requests and achieving efficiency with information sharing.

2.30 Question 30

Question 30 asked agencies to confirm whether decisions about informal release influence their decision to release data under the proactive release program.

Diagram 29 outlines the responses received to question 30.

Diagram 29 – Survey responses to question 30

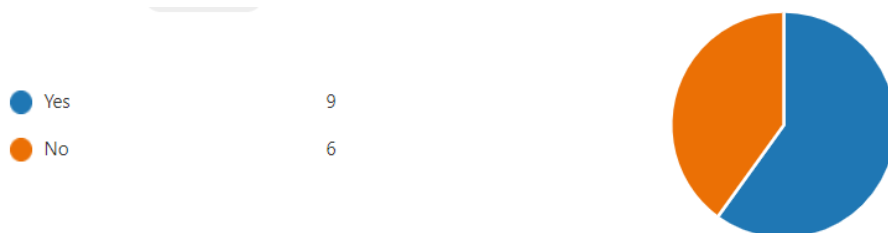
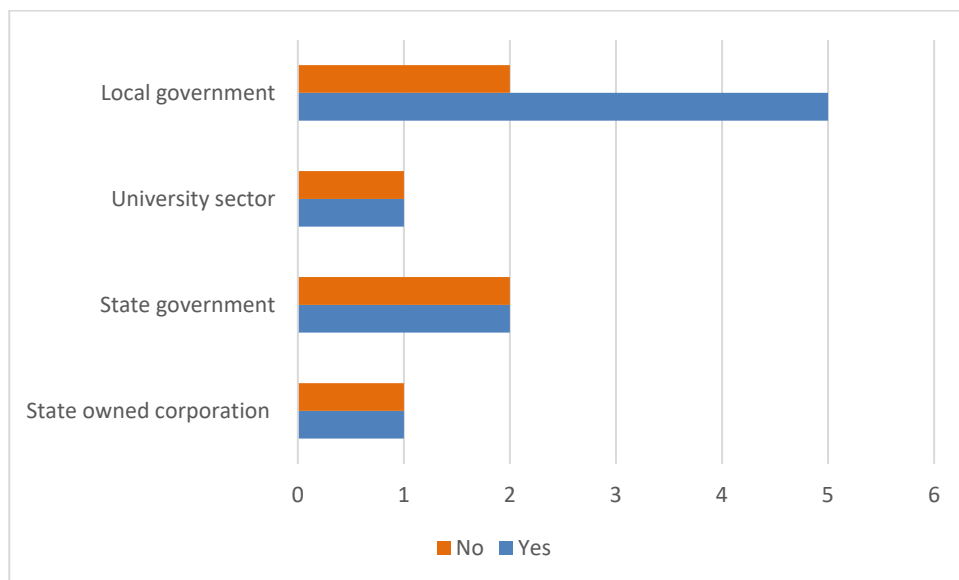


Diagram 30 outlines the sector breakdown of the responses to question 30.

Diagram 30 – Sector breakdown of question 30



A total of 15 responses were noted and the local government sector was the only one where a majority of the agencies stated that informal release decisions influenced their decision to release information under their proactive release program. The agencies within other areas were divided, with some stating that it did influence their decision and others stating that it didn't. The ability to review the outcomes of informal release requests and the types of information that the request relates to, presents a real and tangible opportunity for agencies to understand the information holdings that citizens are interested to know more about which in turn can constructively inform the agency's program for proactive release⁵ and impact the number of requests being made. The absence of such a review is a missed opportunity to promote and open government information for the public.⁶

2.31 Question 31

Question 31 asked agencies to provide details if they answered "yes" to question 30. A total of 10 responses were received which outlined:

- Local government sector – provided links to DA tracker information, encourage business units to release information, review information requested in previous financial year and encourage release of areas of interest.
- University sector – types of requests made formally and informally are monitored to identify possible open access information.
- State government sector - identify trends of information requested and consider/encourage proactive release
- SOC – conduct regular review of information to consider whether in public interest, review information on website to ensure currency as well as take customer and member feedback into consideration.

A majority of the responses noted that data from previous years would be reviewed to determine potential release under the proactive release program. The Information Commissioner promotes the review of past data about informal release applications as a meaningful and effective good practice for enabling agencies in fulfilling their proactive release obligations under the GIPA Act.

2.32 Question 32

Question 32 asked agencies to provide details on information they adopt when making decision on the informal request pathway not captured in earlier questions. A total of 10 responses were received which outlined:

- Decisions on informal requests are made on a case-by-case scenario.
- The endorsement of the relevant Business Unit holding the information is required.
- Information access teams support the Business Unit to make a decision where required.
- Informal requests are encouraged by the agency at times as applicants are unaware they can obtain information without a formal access application.
- IPC fact sheet on informal release is relied upon.
- Legislation, codes and other agreements are relied on when making a decision.
- Where third party consultation is required, then a formal application is triggered and the agency will refuse informally and advise to lodge a formal application.

⁵ Section 7 GIPA Act

⁶ Section 3 GIPA Act

- Where the information is subject to copyright, then they cannot provide information via the informal access pathway.
- Where legal consultation is required.
- The volume and detail of information requested, sometimes the request should be an enquiry and not a GIPA application.
- Solicitors try and use the GIPA process for insurance claims rather than the appropriate path.
- Applicants are encouraged to complete the informal application form. Where an applicant refuses, information is still provided under the GIPA Act but identity documents are requested to ensure information is being released to the correct person.

The IPC observes that additionally, an agency AIG, its prior release and mandatory proactive release decisions are also a relevant and important reference point.

The information provides further insight as to why certain agencies recommend the formal access pathway, this includes where there is an overriding public interest against disclosure, if consultation is required or another appropriate path for claims.

It was also noted one SOC stated “there is no set criteria for checking validity of applications under the GIPA Act or IPC factsheets.” It is unclear whether the SOC is referring to the formal access pathway or informal access pathway. In this regard, it is important to note that the IPC Fact Sheet: Your right to access government information does address the procedure for making a formal application. Furthermore, there are no specific requirements in making an informal access request.

2.33 Question 33

The final question in the survey asked agencies to provide information on what factors, assistance, or support would assist them in applying the informal release pathway under the GIPA Act.

A total of 18 responses were provided, some agencies did not specify any resources that would be of assistance. The common themes other agencies outlined included:

- The ability to charge a fee for informal requests as they could be an administrative burden, such as when retrieving archived files, dealing with time consuming requests and reducing the number of requests from frequent applicants.
- Introduce a requirement to report on informal requests, to truly reflect the time and resources used to respond to these requests.
 - More information regarding copyright as well as providing an exemption to copyright for local government agencies. providing training for staff.
- Guidance through fact sheets and templates on matters such as proactive release program, when to advise applicants on informal and formal pathway, how informal access requests should be documented.
- Agency specific advice including flowcharts, checklists and templates.
- Better/more assistance from the IPC in the form of:
 - detailed and direct advice with respect to information falls under Schedule 1 of the GIPA Act, instead of advising Council they need to seek their own legal advice.
 - Information about legal protections from claims for defamation, breach of privacy and breach of confidentiality information to the public which informs potential applicants that provision of information is subject to resources and other obligations.
 - develop templates that facilitate informal request applications and decision making.

- Guidance on the clash of privacy and information access legislation. The agency states that it is expensive to have staff assess all information and redact all possible personal information to support a release program that manages risk in this regard. The local government agency further explains calling information open access when it is related to Planning is completely at odds with the sheer volume of personal information the documents contain.

The responses from the agencies indicate willingness to promote the informal access pathway and have identified a number of resources they believe will assist. A number of recommendations have been directed at the IPC, from guidance through fact sheet and templates to specific guidance on areas of concern to the Agency.

Arising from the information provided in response to the survey, the IPC will take the opportunity to identify and develop further resources and guidance that are responsive to the needs identified and summarised above.

3. Agency policies and procedures

The survey sought further information from agencies regarding the management and decision making of informal release requests at questions 11 to 13 and 16-17. The responses from the agencies presented various information with respect to the informal access policies and procedures the agencies have in place. A review of the responses was undertaken by the IPC to determine whether the information provided by the agencies could be reconciled with decision making processes. This involved undertaking a further review of the responses to question 12, reviewing the website links provided by the agencies, as well as contacting agencies that were willing to provide further information responsive to the question.

Overall, it appears that from the responses received, the state government sector was more likely to have specific policies and procedures regarding management and decision making of informal access requests in place, whereas in the local government sector reliance appeared to be placed on the AIG. All four state government agencies referred to information contained in the form of work instructions, on the internal intranet, internal fact sheets or other internal document.

The sector analysis follows below.

State government agencies

Further information was requested from two state government agencies who indicated they would be willing to provide further information. A response was received from both agencies; one agency provided information available on their intranet (Agency 1) and the other provided work instructions available internally (Agency 2).

Agency 1

A review of the information provided outlined:

- What an informal access request is and advising only people authorised to release information can make decisions on informal requests. If unsure, the staff member is advised to contact the GIPA unit to determine whether they are authorised to make decisions.
- High level guidance on the public interest test with links to the relevant sections in the legislation.
- High level guidance on what to consider when deciding the information to release. This section addressed checking whether there were third parties involved as well as conclusive overriding presumptions against disclosure, such as legal professional privilege and cabinet information.
- Where to get support if unsure how to proceed with an informal access application, advising the staff member to contact the GIPA team by email.

The state government agency 2 also indicated they were currently in the process of writing a new policy for informal release, as well as proactive release, with some supporting documents such as a checklist, in order to better assist staff to be more proactive about releasing information.

Agency 2

This agency provided their informal GIPA application work instructions which contained information regarding:

- What an informal request is and the team responsible within the agency to deal with such requests.
- Work instructions to manage the informal access application that outlined the steps from receipt of an informal request to finalisation of the request, including matters such as ensuring information is requested from relevant business unit/s, reviewing documents to ensure they are relevant as well as issuing the informal decision template.

On review of the work instructions provided, Agency 2 appears to have more prescriptive details about the specific steps and processes for the actual receipt and management of an informal request to assist a decision maker to manage an informal request, linking relevant guides and templates where necessary.

The information available for the remaining two state government agencies outlined:

- It was not a public facing document, indicating there were internal processes in place for the agency to follow when managing informal access requests.
- There is an internal fact sheet and an internal procedure for legal firms seeking access to records informally. This indicates the agency has generic guidance as well as a specific procedure for legal firms, therefore there may be additional conditions to deal with a request from a law firm.

Overall, the response from the state government agencies indicates they do have some policies and procedures for the management and decision making of informal access requests.

State owned corporations

The survey responses concerned two state owned corporations, one which stated that procedures were in draft mode. The other state-owned corporation provided a link to their AIG. However, on review of the AIG there was no prescriptive information regarding the management and decision making of informal access requests. Rather, the AIG contained generic information on informal release, that an information can be requested informally and to contact the Right to Information Officer.

Universities

A total of three agencies in the university sector participated in the survey. On review of the responses, only one agency responded to questions 11 to 13. This agency provided a link at question 12 to their website, this link took the user to the types of access requests that can be made, which included an informal request for information. The information on the webpage was generic and not specific to the management or decision-making processes and procedures in relation to informal access requests. At question 13 the agency explains they have no procedures but rather a 'Guide to Informal Requests for Information', processes on correct redacting and processes on requests. The policies webpage of the agency was reviewed to determine whether these were public facing documents, but none of the guides or processes could be located. On the basis of the information available, it was inferred the agency has guidance available internally to assist in the handling of informal requests. However, the level of guidance and the effectiveness of the information in assisting in decision making could not be assessed.

Local government

The local government agencies that answered "yes" to whether they had documented procedures in place for the management of informal access requests provided either a link to the access to information policy and/or AIG, noted that the procedure was an internal document, stated that the procedure was not available externally or outlined that their application software managed the informal requests.

A further analysis of the access to information policies and AIGs provided was undertaken. On review of the access to information policies provided for two agencies, it was noted that one did not contain any information regarding informal access requests. Whereas the other access to information policy contained generic information about informal release and those reasonable conditions could be imposed. The AIGs provided by two of the agencies was also reviewed and it was noted that they contained generic information about informal release as a way to access information. On the IPC's assessment, the AIGs did not contain any prescriptive information on management and decision making of informal requests.

Finally, the local government agencies that answered "no" to whether they had a documented procedure in place outlined that the information is discussed between the customer service team and General Manager or that decisions are made on the basis of processes and procedures of relevant business units and where applicable, the judgment of the GIPA Officer. Thus, indicating there was some procedure, (albeit not formalised) in place to manage informal access requests.

On review of the documents available, it was noted there was limited policy and procedures for informal access to information requests that could be reviewed as part of the survey analysis. A number of agencies, predominantly within the local government sector, identified AIGs and access to information policies were responsive to the question. However, on review of these AIGs and access to information policies, they contained generic information regarding informal access requests and no prescriptive information on decision making. Responses from a number of local government agencies indicated that there are internal documents which are not available externally. The extent to which these may address the procedure for informal access requests in more detail was unable to be assessed.

4. Case study

As part of the response to the informal release pathway agency survey, one state government agency (the Agency) provided additional information regarding the impact of informal requests on them. The Agency provided additional information about the agencies within their cluster and how requests are responded to under a range of legislation, linking it to informal release and obligations under the GIPA Act.

The Agency sought to compare the total access applications received from the commencement of the GIPA Act over 10 years ago. Table 1 outlines the comparison of access applications received by the largest agencies within the cluster in the 2021 financial year as well as 10 years prior.

Table 1 – Access application over a decade

Financial Year	Total Applications
2011	3,057
2021	1,780
Difference	1,277

The decrease in numbers is contributing to routine applications decreasing, such as requests for a single item for information. However, they note the number of complicated applications has also increased. The Agency also acknowledged the impact of COVID-19 and change in the use of agency resources also result in a decrease in the number of total applications.

Each year the Information Commissioner publishes the *Section 37 Report on the Operation of the GIPA Act* and in the IPC Agency Dashboard⁷. In the report year ending 2021 the number of access

⁷ <https://www.ipc.nsw.gov.au/information-access/agency-gipa-dashboard/gipa-dashboard>

applications reported by the case study agency are consistent with that report and does show a significant increase in the number of access applications reported by it from 2019 to 2021 and from 2020 to 2021. This increase accords with the observations made by the Information Commissioner concerning a significant rise in applications overall. While it is acknowledged that the increase may be also affected by Machinery of Government changes for an individual agency, such changes will not alter the overall outcome which reflects an increase in the number of applications in this period. This is also true for the case study agency between 2020 and 2021.

In addition, the Agency outlines the general decrease in applications over the decade is also credited to specific programs and initiatives designed to appropriately channel enquiries outside the operation of the GIPA Act, be they either access applications or informal release. This approach is consistent with the GIPA Act, which does not intend to prevent or discourage the publication or giving of access to government information as may be permitted or required by or under any other Act or law that enables a member of the public to obtain access.⁸

In this regard, the Agency has seen considerable success in reducing overall formal access applications, especially with respect to information contained in registers as well as the positive impact of digitisation, such as the ease of access to personal information the Agency holds digitally.

In their response, the Agency also addressed why they may have less informal access requests than formal access applications, this included:

- Business areas are generally advised by the Information Access Unit to release information if requested directly from members of the public (subject to their approval processes) unless there is a reason why they do not wish to do so (i.e., third party involvement, or there may be a public interest against disclosure). Where the business unit is reluctant to release information, they would direct the requester to the information through the Information Access Unit.
- Informal release is only authorised if there is not an overriding public interest against disclosure. The Agency notes most requests received are for information including personal or business information that requires consultation and the application of the public interest test.
- Decisions about informal release cannot be reviewed. Therefore, the formal pathway may be viewed as favourable as there are review rights and the request can be easily submitted online.
- The lack of any review rights makes a preliminary response accepting an informal application difficult, as a refusal to provide the requested information might be construed as an attempt by the agency to delay or obfuscate access to information.
- There are a range of ways that individuals can seek access to information about themselves and their interests outside GIPA, and, as such, any such requests may be quickly diverted through these other processes if applicable, such as resources available digitally.

The use of technology has made the management and facilitation of information access requests considerably easier in the past 10 years. In this regard, the Agency provided a snapshot of the impact programs and initiatives can have on the number of access applications received. Overall, the implementation of effective programs and proactive release has a positive impact on reducing application numbers as the Agency has seen a decline in the number of access requests, both formal and informal.

The Agency has also identified the main barriers to promoting informal access to information. This revolves around the information being subject to an overriding public interest disclosure as well as third party consultation. This also necessitates consideration of review rights, an important mechanism for individuals seeking access to information that is being refused. These barriers will always remain for informal access requests but nonetheless, the Agency is an example of the

⁸ Section 10 GIPA Act

positive impact promoting the informal access pathway can have on information access obligations.

5. Abbreviations

The following table lists the commonly used abbreviations within this report.

Acronyms or abbreviation	Explanation
AIG	Agency Information Guide
GIIC Act	<i>Government Information (Information Commissioner) Act 2009</i>
GIPA Act	<i>Government Information (Public Access) Act 2009</i>
PPIP Act	<i>Privacy and Personal Information Protection Act 1998</i>
IPC	Information and Privacy Commission NSW
SOC	State Owned Corporation
MOG	Machinery of Government
OPIAD	Overriding public interest against disclosure