information Consultants Pty Ltd

Response to NSW OIC Consultation Paper 2 on Fees and Charges

Submission by **Megan Carter**, Director
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As a consultant in the field of information rights, I work with many government agencies and so have chosen to submit my comments on the consultation paper in the framework of the Issues for Agencies. However in many instances it would not be appropriate for me to respond to the exact question asked. Therefore I have made some initial general comments and responded below to a selection of the questions asked.

General comments on Fees and Charges

The aim of having fees and charges in an FOI/GIPA Act is not cost-recovery (which it does very inadequately) or user-pays (as the charges are not reflective of the real costs). It is a means of attaining an appropriate balance of the right of access with allocation of scarce government resources. However, the question of fees and charges in the GIPA Act should not be considered in isolation, but rather seen as one element of what has been called the "administrative defences" in the Act. An appropriate balance of these administrative defences, to protect agencies from abuses of the right of access and as a demand-control mechanism, with the pro-disclosure/ openness and accountability objectives, should be the aim of any reform.

Personal requests

In order to give force to the fundamental privacy principle concerning the right of access to one's own personal information, it is appropriate to have either no fee or a minimal application fee for such requests. However, historically there have been a number of problem areas associated with access to personal information, and these need to be addressed.

One is the disproportionate use of the right to access personal information by current and former public servants, often engaged in protracted disputes with their agencies. As the definition of "personal information" is so broad, workplace information falls into this category. (In some jurisdictions, such as Ireland, and the pre-2009 case law in Queensland, such information about public servants was excluded from the ambit of "personal information". The Commonwealth provision section 15A was another attempt to limit this overuse.)

Another is the question of whether applications made by parents for children's information (or for their own and their children's information) should be treated as

applications for "personal information about the applicant (the applicant being an individual)" (s.67), and therefore be eligible for the 20 hours free processing. Where the parent is acting on behalf of the child (especially where the child is too young to act for themselves), and in the best interests of the child, then it would be appropriate to give the parent the benefit of the 20 hours free processing. (The provision s.50A of the repealed Queensland FOI Act is a useful example of a provision enabling parents to make applications on behalf of their child.) However, where the parent is not acting in the best interests of the child, where for example the parent had been abusing the child, or had lost parental responsibility for the child, then they should not receive this benefit.

Even within the field of the right of access to personal information, there should be some administrative defences available to agencies. These are needed to deal with very large volumes of material, for example, client files in excess of 2000 pages. (I am familiar with many cases in which files were in excess of 5000 pages. Some of these reflected that the client had been in dispute with the agency over a long period of time, and their use of FOI/GIPA to seek access and amendment, sometimes repeatedly, reflect the poor relations between them and the agency. The poor state of relations between the client and the agency reduced the likelihood of reaching negotiated agreements as to reductions in scope or extensions of time frame to enable the agency to meet its responsibilities under the Act.) While GIPA now includes a provision to refuse to deal with repeat applications (s.60(1)(b)), agencies have not been empowered to refuse "vexatious" requests. If agencies had this power, they could then use it to minimise the number and frequency of extraordinarily or excessively large requests. Such refusals would, of course, be subject to review in the normal manner.

Agency Resources

A key element which is almost never addressed in reviews of the legislation is that of adequate levels of resources being provided to agencies to deal with their GIPA workloads in an effective and timely manner. Unlike activities such as public relations, agencies cannot control their GIPA workloads. There are many examples of agencies which are inadequately resourced relative to their GIPA workloads, and for such agencies the existence of a range of administrative defences and demand control mechanisms is essential. In an environment with sufficient staff resources to adequately handle GIPA activities, these protections would be much less significant, indeed perhaps unnecessary.

Where resources are inadequate, it seems needlessly harsh for an agency to have to refund all charges when statutory deadlines are not met. Certain categories of applicants (such as frequent users) now have an incentive not to cooperate with agencies, either in reducing the scope of a request or in agreeing to extensions of time, wherever such lack of cooperation is likely to gain them their requested information for free.

The underlying policy objective for the refund of charges for overdue requests, that is, to act as an incentive to agencies for prompt processing and compliance with statutory timeframes, could still be met by the requirement to refund a proportion of the

charges (e.g. 25%), which would alleviate the problem of discouraging users from negotiating the scope and timeframe.

Processing Charges

Processing very small amounts of money, whether in the form of application fees or charges, is uneconomical for most agencies, as the cost of processing such payments through their finance systems is greater than the revenue gained. Many agencies are disinclined to pursue charges, advance deposits, etc., as the cost of the paperwork would often exceed the charges. Historically only a very small proportion of the charges notified are actually collected, and while this is for a variety of reasons, the net outcome is that agencies do not see the effort as worth the result. Any fees or charges regime should have provision for waiver on the ground that processing or collecting the charges would be uneconomical, although it could be left to each agency to determine the precise level, based on the relative efficiency of its own finance system.

Under the reformed federal FOI Act, the provision to not charge an applicant for the first five (5) hours' work to some extent (amongst other benefits) has addressed the issue of having to notify uneconomical charges. However, in practice, the next two or three hours' work then become uneconomical to notify, as they are amounts totalling no more than $60 or so. In practice this extends the "free area" to more like eight (8) hours.

In Queensland (*RTI* Regulation 5), while there is no charge for processing time less than 5 hours, once it exceeds that amount the entire period is chargeable.

> **"5 Amount of processing charge: Act, s 56**
> (1) The processing charge under section 56 of the Act for an access application for a document is:
>
> (a) if the agency or Minister spends no more than 5 hours processing the application: nil; or
>
> (b) if the agency or Minister spends more than 5 hours processing the application: $6.00 for each 15 minutes or part of 15 minutes spent processing the application.
>
> *Example:*
> *If the agency or Minister spends 3 hours processing an access application for a document there is no processing charge.*
> *If the agency or Minister spends 6 hours processing an access application for a document the processing charge is: 6 hours x 60 (to convert to minutes) / 15 (to determine the number of 15 minute blocks) x $6.00."*

[This Regulation has been incorrectly interpreted in the OIC Consultation Paper on page 20 as if the first five hours is always free.]

In either model, the fact that there is no charge for less than 5 hours can be an incentive to applicants to narrow their requests to a more manageable size in order to avoid paying charges. This should assist agencies to manage their GIPA workloads. However there should be consideration given to enacting provisions which prevent abuse of the "5 hours free" exception, such as applicants who split what would otherwise be a very large request (incurring not only charges, but potentially

attracting the "substantial and unreasonable diversion of resources" refusal) into many smaller requests designed to fall below 5 hours each. The provision in s.60(3) which allows 2 or more requests relating to the same subject matter to be aggregated to assess the workload, should also be applicable when assessing the charges in relation to the five hours being free. Many of the submissions made by Commonwealth agencies to the Australian Information Commissioner's Consultation on Fees and Charges note that they have already experienced applicants lodging multiple smaller requests designed to each fall below the 5 hour threshold.

Where applicants agree to pay charges but lose interest or fail to pay final charges, agencies are left with few options, as it is usually uneconomical to pursue such matters as debts. The Irish FOI Act includes a provision in s.10(1)(f) in which monies due from previous FOI applications have to be paid before processing of a subsequent application is undertaken:

> "10(1) A head …. may refuse to grant the request if …
> (f) a fee or deposit payable under section 47 in respect of the request concerned or in respect of a previous request by the same requester has not been paid."

General

1. Do you think the fees and charges provisions in the GIPA Act are easy to interpret and apply?

The NSW system of fees and charges is fairly easy to interpret and is simpler than some in other jurisdictions. However there are areas of ambiguity and difficulty, such as:

- what activities can be included in the chargeable time for processing an application
- definitions of hardship for individuals and non-profit organisations

6. Would the ability for applicants to pay electronically be beneficial? What obstacles might there be?

The ability to pay electronically should speed up handling and reduce costs of processing small amounts of money by way of cheque or money order. It would also facilitate refunds as applicable. It should also reduce problems such as agencies discovering that a cheque has not cleared only after they have completed processing and sent the relevant documents.

However some applicants may not have credit card or access to electronic banking, although I would imagine this option would be in addition to the manual payment methods already existing.

Formal access applications

9. Should application fees be abolished in NSW as they have been in other jurisdictions? If they were abolished, what would be the impact on your agency?

Many of the submissions made by Commonwealth agencies to the Australian Information Commissioner's Consultation on Fees and Charges note that they have already experienced significant increases in the number of their requests since the

abolition of application fees, some in the vicinity of double or treble the previous annual volume of requests lodged.[1] Examples were given in these agencies' submissions such as one applicant who submitted over 700 separate applications in less than five months, and another who submitted 440 FOI applications in a single email. I would imagine the impact on NSW agencies would be similar and undoubtedly result in an increase in workload.

10. Should processing charges be abolished? If they were abolished, what would be the impact on your agency?

Similar to my comment above, I think it is inevitable that abolition of processing charges would result in increased workloads for agencies. Even with the abolition of charges in the federal FOI Act for processing charges of less than 5 hours, agencies report an increase in separate requests to take advantage of the free hours.[2] To completely abolish processing charges would almost eliminate the ability of agencies to negotiate with applicants to reduce the size and scope of requests.

15. Should the GIPA Regulation be more prescriptive about the levels of fees and charges and the circumstances in which they should be applied? If so, how?

An increasing expense to agencies arises from the need to use off-site storage, frequently through private sector contractors, to store their records. In Queensland the access charges specified in the RTI Regulations permit agencies to recover such out-of-pocket costs from the applicant. The Queensland Regulations also provide for the recovery of any licensing fees (payable to third party vendors) for software that must sometimes be provided (along with the actual materials requested) in order for recipients to view or read or otherwise access information on certain media (e.g. X-rays on discs).

Internal reviews

18. Should the internal review fee be abolished? If it were abolished, what impact would this have on your agency?

Abolition of the internal review fee would almost certainly increase the number of requests for internal review; at the same time it is likely to reduce the number of appeals directly to the OIC (where there is no fee). As the OIC has experienced very high volumes of appeals, resulting in backlogs, placing internal and OIC review on the same footing (ie: no fee) would probably reduce the backlog for the OIC. As I believe internal review plays a valuable role in an agency, having a more senior officer take a second look at a matter, I see it as a positive thing to return to more internal reviews rather than matters going directly to the OIC.

[1] Ten (10) of the sixteen (16) submissions from federal agencies noted a marked increase in requests; several noted increases of 60-75%; one (DOHA) noted a doubling of requests, and two (PM&C and DFAT) noted an increase of 300%.

[2] DoHA reported that one applicant made 34 requests for similar documents (including 22 requests made on one day); DCCEE reported that one applicant submitted over 700 separate applications in less than five months, in their view, to capitalise on the 5 free hours of decision making time.

Other comments

Although it is not specifically addressed in the Consultation Paper, I am aware from my work with numerous NSW local councils that they have experienced adverse effects from the changes brought by GIPA to their ability to charge for informal requests or open access information. The most notable example is in relation to development applications.

Schedule 1, Clause 3 of the GIPA Regulations states:

> *"(1) Information contained in the following records (whenever created) is prescribed as open access information:*
> *(a) development applications (within the meaning of the Environmental Planning and Assessment Act 1979) and any associated documents received in relation to a proposed development including the following …"*

For many councils, the introduction of GIPA has meant that they have received an increased number of requests for DA-related information, but notably, many of the requests have been seeking all such information historically, often dating back over 50 years. I am aware of cases where the work involved in retrieving this historical information is in excess of 40 hours per request. As it falls within the Open Access information, provisions such as charging, or invoking the substantial and unreasonable diversion of resources refusal are not available to reduce the work involved.

It is arguable that the open access provision was intended to apply to current ("proposed") development applications, rather than all such applications ever determined. If this were made clearer, then the problem of the voluminous historical searches would be solved. A legislative amendment may be required to achieve this.

Many agencies have also had difficulty caused by the lack of a clear legislative basis to levy charges for informal requests. As a result, they have tended to restrict the informal request process to very small requests (involving less than one hour's work), as there is no incentive to treat larger requests as informal where there is no ability to charge. This does not assist in facilitating prompt, easy access for the public and undermines the value of the informal access provisions.

Note about the author:
I have been working in the field of FOI since late 1981. Initially I was involved in the implementation of FOI in the Commonwealth government, then in NSW, Queensland, and the Northern Territory; I have also worked on implementing FOI in Ireland, the United Kingdom and China. Much of this time has been as an FOI practitioner, consultant and trainer. I worked on the initial implementation of FOI into NSW in 1989 and since that time have provided training and advice to decision-makers in NSW. I have worked with dozens of NSW agencies on the implementation of GIPA. I have been the Director of Information Consultants Pty Ltd since 1998. I was appointed an Honorary Senior Research Fellow with the Constitution Unit at University College London in 2003. In 2006 I coauthored a book on "FOI: Balancing the Public Interest" (2nd edition, published by UCL London).