Environmental Defender's Office

Fees and Charges under the Government Information (Public Access) Act 2009

17 February 2012

The EDO Mission Statement:

To empower the community to protect the environment through law, recognising:

- the importance of public participation in environmental decision making in achieving environmental protection
- the importance of fostering close links with the community
- the fundamental role of early engagement in achieving good environmental outcomes
- the importance of indigenous involvement in protection of the environment
- the importance of providing equitable access to EDO services around NSW

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Fees and Charges for access to government information

Thank you for the opportunity to forward a response to the survey on fees and charges under the *Government Information (Public Access) Act 2009*.

Introduction

The EDO is a community legal centre with over 25 years' experience specialising in public interest environmental and planning law. We provide a free advice line that covers environmental, planning and local government law. We also provide legal advice and representation services to individuals, groups and organizations that bring public interest environmental matters to our attention.

In that context, the EDO is often approached by groups or individuals who have inquiries about accessing information from local councils or government agencies. Many of our clients are from not-for-profit organisations or otherwise fall within the low income bracket. We do not generally have experience with requests for health information, and only limited experience with regard to requests for personal information.

The EDO has made a number of previous submissions regarding the issue of fees and charges for accessing government information. Those previous submissions and the EDO's more recent experience with the GIPA Act itself inform this response.

Attached to this submission is a completed survey form. This submission expands on a number of the responses to the survey. The EDO's overall position is that fees and charges should not be imposed for accessing government information. Our experience with the GIPA Act has not dissuaded the EDO from that perspective.

Issue 1: Whether government agencies should charge for providing the public with access to government information

The Right to Information has been recognised by the United Nations since 1946 as a fundamental human right. Resolution 59(I), states:

> "*Freedom of information is a fundamental human right and ... the touchstone of all the freedoms to which the United Nations is consecrated.*"

The UN Special Rapporteur on Freedom of Opinion and Expression, elaborated on this in his 1995 Report to the UN Commission on Human Rights, stating:

> *Freedom will be bereft of all effectiveness if the people have no access to information. Access to information is basic to the democratic way of life. The tendency to withhold information from the people at large is therefore to be strongly checked.*[1]

The cost of obtaining that information can prove a means of withholding it and should therefore be, in the words of the Rapporteur, "strongly checked". The importance of access to information in this context is recognised by the objects of the GIPA Act itself, and the emphasis is on the provision of access to information "at the lowest reasonable cost". Further, it is consistent with the significance of this fundamental right that Justice Kirby has stated:

> *It is important for governments, whatever their political complexion, to understand that some basic activities of government simply have to be provided at the general cost of the taxpayer. They represent the price of governing a civilised community. To expect the user to pay fully for basic government services, such as a day in court, is surely wrong. The same, is true of FOI charges.*[2]

Issue 2: Reasonableness of fees and charges

We refer to our previous submission to the Department of Premier and Cabinet, FOI Reform – Open Government Information, 3 June 2009, pp 3-4 and 9-10 – see http://www.edo.org.au/edonsw/site/pdf/subs/090603foi.pdf for our views on this matter.

Issue 3: Expense of information

Since the GIPA Act commenced, there have been a number of occasions where clients have found the charges too expensive and have in some cases been prompted to drop their request or to limit its terms considerably. Examples include:

1. Requests to the Department of Planning (DoP) and the Office of Environment and Heritage (OEH) about documents relating to a decision to rezone land (the Huntlee New Town site) in the Hunter Valley for residential and commercial development, as well as documents relating to the project application for stage one of the development proposal. The original estimate from DoP was $675. After considerable reduction in the scope of documents sought, the final cost was $417 (including $22.50 for a letter received under an informal request) and no discount was given (see below). The OEH charged $420 (including a 50% reduction);

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[1] UN Doc. E/CN.4/1995/32, para. 35

[2] Kirby, M. 1997, *Freedom of Information: The Seven Deadly Sins*, British Section of the International Commission of Jurists, Fortieth Anniversary Lecture Series, London. Available at: http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_justice.htm.

2. A request to the Office of Water for documents about their involvement with a major project application was initially charged at $990 and further estimates increased the price, which was considered to be too expensive by the relevant Association. As a result of continuing negotiations, the time for determining the application passed so that there was a deemed refusal;

3. A request for a single council report that was held in digital form by a community association was charged as being 40 hours work. The association did not proceed with the application, although the document subsequently found its way into the public arena;

4. The Department of Planning required a formal GIPA application and charged a pensioner an extra $37.50 as search fees ($67.50 in total) for a noise audit that was required to be undertaken under a development consent;

5. A request to the OEH for ecological reports relating to logging in compartments of a particular State Forest and documents relating to investigation of illegal logging therein was estimated to cost $690 and the environment centre could not afford this fee. The application was not pursued although similar documents were partly obtained (for free) from the Department of Trade & Investment, Regional Infrastructure & Services (DTIRIS) (see below).

It appears to the EDO on this evidence that at least some agencies and councils have continued to use the fees and charges provisions as a means to dissuade applications for access to information with its ensuing work.

This can be seen in the amounts charged, or an unwillingness to deal with applications on an informal basis. In relation to **survey question 5**, anecdotally we are aware of situations where members of the public are unwilling to pursue a matter with (most often) their local council because they will have to put in an access application to obtain relevant information and perceive that this will be a costly venture.

The EDO acknowledges that this is balanced by situations where councils and other agencies have been happy to respond to formal applications by providing information without charge. For example:

1. Information from Ballina Shire Council comprising technical reports has been sought on a number of occasions and it has always been provided free of charge;

2. DTIRIS provided all ecological reports relating to logging in a State Forest;

3. DTIRIS returned a cheque for $60 search fees after initially seeking that amount for information from Forests NSW.

Issue 4: Types of information for which charges have been made

Other types of information for which processing charges have been imposed included:

1. Documents relating to arrangements between gas companies and Forests NSW for use of State Forests ($360);

2. A licence agreement for occupation of council land for community markets ($30);

3. A range of documents relating to the hardwood timber supply by Forests NSW, including contracts, yield reviews, plantation plans and forward planning documents. This application was one where the scope of the application was considerably reduced due to an estimate of 600 hours work. ($360).

Issue 6: changes to the fees and charges provisions in the GIPA Act

In the EDO's opinion, application and processing fees should be removed for the same reasons as set out in our previous submission (see issue 2 above).

There is already an exemption from having to provide information if it amounts to a substantial and unreasonable diversion of resources. This provides a legitimate means by which agencies can negotiate with persons seeking large volumes of information, and is a process regularly used by some agencies (such as DTIRIS). The effective use of substantial charges as another means to dissuade members of the public from seeking information needs to be removed.

While we acknowledge that there is a discretion within agencies as to whether they should waive or reduce fees, this type of decision simply reflects the agency's culture and does not lead to a consistency of approach, which can be confusing for the community (see issue 3 above).

To the extent that the Commissioner considers that application fees should be obtained, we consider that it would be appropriate to include a provision for the discounting of the application fee itself in cases of financial hardship or otherwise in the discretion of the agency.

Issues 7 & 8: Reasonableness of current application and processing charges

As noted, the EDO does not agree that application and processing fees should be charged. Our reasoning relates partly to the obstacle that such fees can be to exercising the fundamental right to information; and partly to the fact that the current processing fee (which is a continuation of that set under the Freedom of Information Act) does not take into account the existence of more efficient records management systems.

While the EDO can often seek and obtain a reduction of fees for its clients on the basis of the special public benefit due to the type of matters that we advise on, this does not mean that all members of the community have the capacity to verbalise the special public benefit in what they are seeking. The EDO itself spends significant time in preparing substantial arguments as to why a reduction of fees should be granted, which the agencies must then read and consider. In general, we consider that the basis for cost recovery by agencies is outweighed by the benefit to the community of obtaining important information to exercise their democratic rights.

Given the perspective of the UN member nations as to the fundamental right to information, however, the EDO submits that any request for information must be seen as having a sufficient public benefit to warrant the removal of application and processing charges. The EDO notes in this regard that the Commonwealth has removed application fees at least, and has generally reduced other charges.

Issue 9: On what basis should agencies be able to charge?

As explained, the EDO does not generally support the argument that agencies should be able to charge for providing access to information. It may be reasonable for a production charge to be imposed where the information is available free of charge in another format, as is the situation for open access information. However, even this needs to be subject to exceptions where financial hardship would be caused. For example, for a pensioner who does not have access to a computer, a charge should not be made even though there digital access would generally be available.

The EDO recognises that agencies are sometime concerned about the diversion of resources and cost to the agency of dealing with access applications. The tension has been present in the context of councils having an obligation to provide free access to their documents under the previous system.[3] However, the issue of right to information is too significant for these economic matters to outweigh the fundamental right to information. This issue therefore needs to be dealt with by way of investment in better records management systems.

Additionally, in our experience many clients prefer to receive information by digital means which further limits the processing and production costs associated with this activity

[3] See eg Circular 02/54 Charging of a Retrieval Charge for providing public access to council documents, at http://www.dlg.nsw.gov.au/dlg/dlghome/documents/Circulars/02-54.pdf

Issue 13: Asking agencies for discounts

In general, the EDO has been successful in arguing on behalf of its clients that fees should be discounted because of special public benefit. Examples of the types of documents requested include:

1. Documents relating to the hardwood timber production and supply by Forests NSW;

2. Ecological reports, harvest agreements and harvest plans (provided free of charge);

3. Applications and approvals for coal seam gas exploration licences;

4. Documents relating to the rezoning of land and a significant major project application.

Refusals of discounts have included:

1. A situation where an agency decided by looking at an environment centre's website that it was not convinced that it was 'not-for-profit'. This was without reference back to the EDO;

2. A refusal of a request for a discount where the search fell within the time permitted under the application fee;

3. A refusal of a discount for a not-for–profit resident's group which sought access to documents relating to the significant rezoning of land for residential and commercial development in an environmentally sensitive area. The agency decided that the 'documents' were not of special public benefit even though the subject matter was; and rejected an application on financial hardship grounds because the EDO did not proffer the required evidence of the financial means of the group.

Conclusion

In conclusion, the EDO has experienced a mixed approach to the use of fees and charges since introduction of the GIPA Act. While some agencies have taken an approach that seeks to limit the fees charged in line with the object of the GIPA Act, this is by no means a universal experience.

The EDO continues to submit that it would be appropriate for fees and charges to be removed from the GIPA Act, given the fundamental importance of the right to information system.

For further information about this submission, please contact Ian Ratcliff on 02 6621 1112 or by email to ian.ratcliff@edo.org.au.

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