office of the privacy commissioner
new south wales

Guidance

The Privacy Commissioner's oversight role in internal reviews of privacy complaints under Part 5 of the Privacy and Personal Information Act 1998

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1. Introduction

This is a guideline under the Privacy Commissioner's general functions in section 36(2)(b) of the *Privacy and Personal Information Protection Act 1998* (PPIP Act).

Part 5 of the PPIP Act contains the provisions to enable an aggrieved person to make a privacy complaint to a respondent public sector agency and the investigation of complaints by agencies. The PPIP Act describes an investigation of a privacy complaint as an "internal review" by the respondent agency. The provisions also describe the role of the Privacy Commissioner in those investigations and the rights of complainants to have their complaints heard and determined by the Tribunal when:

- The respondent agency does not undertake the relevant internal review, or
- The complainant is dissatisfied with the findings of the internal review or any action(s) taken by the agency in relation to their complaint.

The PPIP Act provides the internal review procedures regarding "personal information" under the PPIP Act, and, "health information" under the *Health Records and Information Privacy Act 2002* (HRIP Act). The HRIP Act does not have separate internal review management provisions.

The legislation provides to agencies a first opportunity to deal with privacy complaints, as opposed to a system whereby complainants may start litigation action up front. This enables important public interest outcomes:

- Agencies take responsibility for their governance systems regarding personal and health information.
- They have an opportunity to investigate and respond to apparent shortcomings quickly and efficiently, without the inevitable delays of litigation.
- They have an opportunity to deal directly with complainants and achieve mutually beneficial outcomes, thus avoiding the costs that litigation may impose on agencies themselves, complainants and the public purse to accommodate matters that can be avoided.

2. What internal reviews examine

Internal reviews examine procedural issues in Part 5 of the PPIP Act and then the substance of complaints.

Typically, internal reviewers examine issues such as:

- Whether the complaint was lodged within the time specified by the legislation.
- Whether the complaint clearly identifies conduct that falls within the kinds of conduct that must be investigated under the privacy legislation or is something else.
- What are the relevant investigative activities that enable the reviewer to fully deal with the complaint, such as what searches of records should be undertaken and which people should be asked to provide information.
- What are relevant facts that the enquiries establish and the legal effect of those facts on questions such as whether the agency contravened its privacy obligations.
- What facts the enquiries establish, so as to make findings, as envisaged by sections 54(1)(c) and 55(1)(a).
- What action(s) the agency proposes to take, as envisaged by section 54(1)(c).

Typically, agencies may complete internal reviews in the style of investigation reports that contain an account of the complaint(s), the evidence gathered and considered, an assessment of that evidence, findings of fact, conclusions as to whether or not the agency contravened its privacy obligations and any action(s).

Action(s) may include systems improvements, training for employees or contractors, policy changes, remedial or disciplinary actions regarding specific employees or referrals to licencing bodies regarding employees who require specific licences to practice their profession, removal of approval to access and/or use information systems, referral to police for criminal investigation, apologies to complainants, and, payment of compensation.

The privacy legislation adopted a drafting style that is not over-prescriptive. For this reason it is often described as principles based legislation. This allows room for flexibility.

3. The quality requirement for internal reviews

The quality of internal review reports has been discussed by the Appeal Panel of the Tribunal in *WL v Randwick City Council* [2007] NSWADTAP 58. The Appeal Panel stated at [11]:

> *"A complainant to a public sector agency of breach of privacy standards by an officer employed by the agency is in a difficult position in getting precise evidence of what might have occurred. It is therefore important that the internal review undertaken by the agency in response to the complaint be thorough. This includes obtaining a full statement as to what occurred from any officer with direct knowledge."*

An example of thoroughness in investigative work and presentation is *VA v Director General, Premier's Department* [2006] NSWADT 249. In that matter the reviewer examined an allegation of disclosure to the press.

The reviewer considered thoroughness required that the journalist who had received information possibly from the respondent agency should be contacted.

A relevant objection may have been that an effort to elicit information from a member of the press would more likely than not, one may argue most certainly, fail on grounds that the journalist would assert the privilege of the press not to disclose sources.

The journalist in this case did not respond to a written invitation to provide information. On the one hand, the complainant argued that the reviewer should have made a greater effort to interview the journalist.

On the other hand, the contact the reviewer made could be viewed as an unnecessary endeavour, which unnecessarily disclosed to the journalist the fact that the complainant had complained.

At [19], the Appeal Panel positively commented on the reviewer's effort and the transparency of the report, which included copies of relevant documents.

This example is useful to show that, similarly to other types of investigation, internal reviewers may confront uncertainties regarding choices they make at times when they do not possess all the information and in order to perform their function at a high standard they need to take some risks.

When confronted with uncertainties it is necessary to identify them and record the reasons for the decisions internal reviewers make.

4. Public sector agency responsibilities

The responses of an agency when they receive an internal review application are in the scheme of sections 53 and 54:

The agency does not have a discretionary power to decline to conduct the internal review. Such discretion would undermine the public interest outcomes that the Parliament intended when it provided for agencies to have the first opportunity to take responsibility and deal with privacy complaints before the commencement of litigation. Section 53(2) states:

> *"The review **is** to be undertaken by the public sector agency concerned."*

In order to provide for integrity in the manner of undertaking internal reviews and avoid conflicts of interest, section 53 relevantly provides:

> *"… the application **must** be dealt with by an individual within the public sector agency who as far as is practicable, a person … not substantially involved in any matter relating to the conduct the subject of the application."*

Whilst the scheme envisages that internal reviews should be completed within 60 days, an applicant does not have an express right to take action to force the agency to complete the review.

When an agency does not complete the review, the legislation envisages other processes may result in the agency conducting the requested review. For example if the Privacy Commissioner considers that there is a "privacy related matter" involved in the way agencies handle requests for internal reviews, the Privacy Commissioner may exercise functions under Part 4 of the PPIP Act. These may be assistance functions to assist agencies to put in place a system to ensure they meet the expectations of the scheme, or, to conduct enquiries to ascertain reasons why agencies do not meet those expectations and make recommendations for systems improvements.

One of the circumstances under section 55 that give an applicant a right to apply for Tribunal review of the alleged conduct is where the respondent agency has not completed the requested internal review within the envisaged 60 day period. The Tribunal has noted that the 60 day period is not "strict" and that it is only a trigger to seek Tribunal review. (*BKM v Sydney Local Health District* [2015] NSWCATAD 87, at [18 – 20])

In some cases when complaints have reached the Tribunal and the agency had not completed the internal review, the Tribunal returned the matter to the agency in order to undertake the review before a next listing date.

5. The role of the Privacy Commissioner

As the scheme includes the oversight functions of the Privacy Commissioner, agencies have certain obligations during the course of conducting internal reviews.

Under section 54(1)(a) agencies **must** notify the Privacy Commissioner as soon as practicable after they receive the application.

Under section 54(1)(b) agencies **must** *"keep the Privacy Commissioner informed of the progress of the internal review."* The system envisages that the Privacy Commissioner will receive progress information from agencies in a variety of circumstances.

For example:

- When agencies clarify the particulars of complaints and need to send the Privacy Commissioner updated terms of allegations to be investigated.
- When alternative decisions may need to be made on the question of whether or not an application for internal review was made within the six (6) months' time stated in section 53(3)(d).
- When agencies resolve questions as to when an internal review was actually lodged with the agency.
- When agencies confront delays in completing internal reviews.
- Importantly, when agencies complete their fact-finding work and have draft findings of fact and proposed actions.

Section 54(1)(c) states that agencies **must** *"inform the Privacy Commissioner of the findings of the review and of the action* ***proposed to be taken*** *by the agency in relation to the subject matter of the application."*

This envisages that the Privacy Commissioner is to receive information from agencies before the internal review is formally completed and the relevant report has been sent to the complainant.

In order for any improvements to the work of internal reviewers to be possible the Privacy Commissioner is able to contribute submissions regarding what agencies propose to include in final reports. Submissions after the final internal review reports have already been sent to complainants lack that capacity.

The language of section 54(1)(c) should be contrasted with that of section 55(1)(b), which provides for an applicant's right to seek Tribunal review. Section 55(1)(c) speaks of **the action taken** by the public sector agency.

The use of the past tense entails that the internal review has reached its conclusion and a final decision has been sent to the complainant.

The Privacy Commissioner has a statutory function of contributing to the internal review. Section 54(2) states:

> *"The Privacy Commissioner is entitled to make submissions to the agency in relation to the* ***subject matter of the application****."*

The corresponding obligation of the reviewing agency is in section 53(5), which relevantly states:

> *"****In reviewing*** *the conduct the subject of the application, the individual dealing with the application* ***must*** *consider any relevant material submitted by … the Privacy Commissioner."*

This is not equal to adopting the Privacy Commissioner's views. It is an obligation to take the Privacy Commissioner's submissions into account.

In using the continuous present tense (in reviewing), the Parliament has intended that agencies will potentially have the benefit of the Privacy Commissioner's views at various times during the course of conducting internal reviews and before they are completed and reports are sent to complainants. This enables the Privacy Commissioner to perform the oversight functions that the Parliament intended the Privacy Commissioner to have.

The Parliament chose the term *"subject matter of the application"* for its particularly wide meaning. Dictionary definitions include:

- Whatever is in dispute; the actual cause of the law suit; the issue about which a right or obligation has been asserted or denied.
- Subject matter is what something is about.

- Matter under consideration in a written work or speech; a theme.
- Content, message, substance.

Similarly, the Tribunal has taken a wide approach to the Privacy Commissioner's oversight role. In discussing the Privacy Commissioner's statutory enablement to appear in the Tribunal, the Appeal Panel stated:

> *"Section 55(7) should be given a construction which is consistent with the beneficial objects of this landmark piece of human rights legislation and the central role given to the Privacy Commissioner in the legislation to make it work. The Privacy Commissioner has an oversight role in relation* ***to the way agencies handle complaints.*** *There are many other powers and responsibilities given to the Privacy Commissioner by other parts of the Privacy Act of similar significance. It would make a mockery of these arrangements for the Privacy Commissioner to be cut out of the appeals environment of the Tribunal, where quite possibly some of the most significant questions touching on the scope and operation of the legislation might arise." (Vice Chancellor, Macquarie University v FM [2003] NSWADTAP 43, at [41])*

The Tribunal also commented on the ability of the oversight function in correcting errors. It said:

> *"It is appropriate to read section 54(1)(d) as requiring the decision-maker to update the Commissioner as to the progress of the review in fact being conducted, as this allows the Commissioner to effectively exercise the oversight function – including that of advising the agency that a review has exceeded its appropriate scope, where necessary."* (ALZ v Safework (No 2) [2016] NSWCATAD 121, [70])

A significant aspect of the capacity of the Privacy Commissioner's role is to review draft findings and proposed actions. There is a long established practice of agencies sending the Privacy Commissioner draft internal review reports that typically contain:

- An explanation of the applicant's privacy allegations under investigation.
- An account of which possible privacy principles the complaint engages.
- A statement of independence of the reviewer. The legislation includes a conflicts of interest avoidance mechanism and requires agencies to appoint reviewers and decision makers who had not been proximate to the facts or issues that gave rise to the complaint they are tasked to investigate.
- The fact finding endeavours of the reviewer, including records searches and interviews or more informal discussions with other persons, including the applicant.
- An account of the evidence gathered and evaluation of facts accepted as proved to make findings as to any contraventions of relevant privacy principles by the agency.
- An account of any proposed actions and/or reasons for not taking action.

On occasion draft reports allow specific space to fill later in order to discuss whether or not the Privacy Commissioner made comment on the draft. It is a matter for agencies to decide whether or not it is appropriate to do this in each case.

The Privacy Commissioner does not take sides in internal reviews of complaints and is not a party in proceedings in the Tribunal. The oversight function aims at encouraging investigations to produce quality outcomes, adequately deal with privacy issues and lead to better compliance with the legislation.

In litigated matters when investigation reports are comprehensive the risk that the Tribunal may return a matter back to the agency for re-consideration is alleviated.

The legislation does not envisage an engagement of the Privacy Commissioner with applicants. For this reason the Privacy Commissioner declines to offer opinions to applicants regarding the merits of their complaints or the correctness of internal review findings. Nevertheless, many complainants lack specialised knowledge of their privacy rights and/or how to articulate their grievances. In many instances persons who feel aggrieved at the conduct of agencies contact the Privacy Commissioner by telephone or correspondence requesting assistance regarding their rights.

The Privacy Commissioner's assistance to aggrieved persons has the potential to remove the anxiety that complainants may experience when dealing with agencies, especially when unrepresented by a legal practitioner. It also has the potential to alleviate errors that may result in unnecessary workload burdens upon the privacy complaints scheme.

6. Areas where the Privacy Commissioner typically assists

Agencies, especially those without specially dedicated staff to deal with privacy matters as their main duty, seek the Privacy Commissioner's assistance at various stages of the internal review process.

This may involve issues such as:

- Interpretation of the law regarding the time limit within which to lodge a valid internal review application.
- How best to analyse information complainants submitted in order to best decide what makes allegations capable of investigation under the statutory scheme.
- Interpretation of information from complainants regarding which privacy principles may be engaged for examination.
- Interpretation of provisions in the privacy legislation or other laws that provide for exemptions from compliance with privacy principles.
- Guidance as to what kind of enquiries may tend to assist in resolving apparent factual disputes.
- Complainant requests for outcomes and how to ensure that adequate discussion of those requests is included in internal review findings. For example, when and how to deal with requests for compensation and what engagement with the complainant such a request may require, in order for a final report to be as a complete treatment of the complaint as possible.
- Guidance as to what attachments may be necessary to make a final report adequately transparent without unnecessarily undermining other interests, such as the privacy of others or other parties' commercial interests.

The Privacy Commissioner has available published resources, especially Tribunal decisions, which may guide reviewers as to the correct approach to various issues. Early consideration of resources assists reviewers to take the correct approach to the subject matter of the review, thus avoiding errors and the possibility of receiving corrective comment from the Privacy Commissioner when they submit their draft reports.

Similarly, the possibility of the Tribunal taking a different approach is avoided.

7. The Privacy Commissioner's main focus in reviewing draft findings

At the stage of reviewing draft reports the Privacy Commissioner's oversight function typically engages the following aspects of the work done by reviewers. Whether the draft:

- Correctly identified all of the privacy complaints.
- Correctly identified all of the privacy principles that need to be considered.
- Examined all of the relevant records information and/or engaged all of the persons who could assist the enquiries.
- Discussed the available information and whether the findings of fact reasonably follow from that discussion.
- Discussed appropriate findings of law reasonably following from findings of fact. For example, whether or not the facts as found should result in findings of contraventions of agency privacy obligations.
- Discussed proposed actions that appear to be a necessary response to findings of contravention of privacy principles, whether they are actions personally beneficial to the applicant or systems issues.

Making submissions to agencies at a time before receipt of draft reports does not enable the Privacy Commissioner to make a contribution to quality outcomes in the public interest. This is because at that early stage the Privacy Commissioner lacks necessary information and is unable to make submissions in a vacuum.

When agencies omit to send drafts to the Privacy Commissioner the opportunity for any improvements in the quality of reports sent to applicants and ultimately placed before the Tribunal is lost.

Such omission results in the Privacy Commissioner's inability to contribute to the overall aims that the oversight scheme in sections 53 to 54 intends to achieve in the public interest.

If complainants receive findings reports that do not show a sufficient treatment of the issues that the complaint generates, the risk is that they may do not feel the agency took their matter seriously and they may embark on Tribunal litigation.

This creates an unnecessary burden upon the privacy complaints resolution scheme that the legislation aims at avoiding.

For more information

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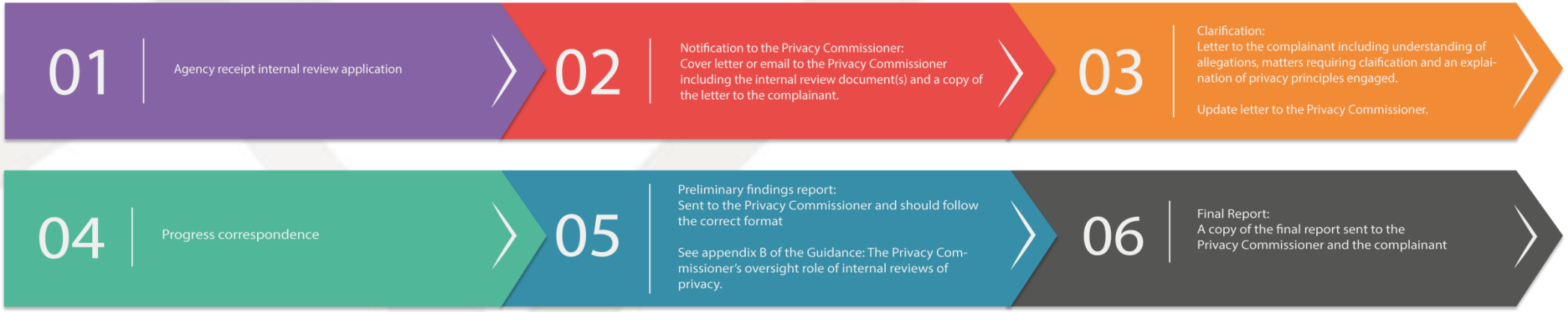
8. Appendices

Appendix A: Process workflow



Appendix B: Preliminary findings report

The preliminary findings report to the NSW Privacy Commissioner should include the following sections:

Introduction:	Description of the jurisdiction and outline of complaint
Complaint information:	Explanation of when and how the complaint was made
	Statement of reviewer's independence
	Comments about where and/or how the matter arose
	How persons may be situated in context of complaint (ie what role they had in the agency)
	Factual allegations
	Privacy principles engaged
Process of investigation:	Sources of information (records, persons)
	Discussion of any exemptions from compliance with privacy principles provided in the privacy legislation or other laws
	Discussion of any contraventions of privacy principles
Outcomes:	Planned systems improvements Apology Compensation Other pertinent information
Additional Information:	Space for any Privacy Commissioner's comments (to be completed in final findings)
Tribunal review rights:	Information on how to contact the NSW Civil and Administrative Tribunal should the complainant dispute the outcome of the investigation