



Checklist for reporting a public interest disclosure (PID) alleging a government information contravention

Checklist

April 2016

The checklist below ensures that sufficient information is submitted for the Information Commissioner (IC) to decide on action to take.

Topic	Detail
1. Name and contact details (optional)	Anyone is entitled to make an anonymous complaint but this may affect the effectiveness of any actions. The Information Commissioner may need to verify matters, or obtain further details which can be difficult without contact information. In addition, the Information Commissioner will not be able to advise the complainant of any decisions or action on the matter.
2. Names of NSW, agencies and public sector officials or other persons involved	Provide the names and positions of the officials or other persons involved if known.
3. How you became aware of the matter	Include any relevant dates and the name and position of any person with whom you interacted or observed.
4. A summary of the matter	Include names, any relevant dates, locations and all other relevant information.
5. Other people aware of the matter	Include the names and contact details of other people who may be able to assist the Information Commissioner.
6. Other organisations contacted	Provide the names of any organisations or regulators the matter was reported to, the date of contact and their response.
7. Documentary evidence	Include details on any relevant documents or other information that may help the Information Commissioner in the assessment. This may also include the timing of any access applications made and outcomes and any previous informal requests for information and outcomes. The actual documentation does not need to be included in the report.
8. Consent to disclose identity (optional)	If the Information Commissioner considers it may be necessary to refer the complaint to another agency or decides to investigate, the complainant may need to be identified, or the complainant's identity could reasonably be inferred from the nature of the complaint as the source of information. Please note that while the Information Commissioner will regard any wishes for the identity to be kept confidential, there may be a limit to what the Information Commissioner can consider or investigate whilst preserving confidentiality.

Information for complainants

If you are making a PID to the Information Commissioner what is the provision of the *Public Interest Disclosures Act 1994 (PID Act)* providing protection?

Section 12 D of the PID Act provides protection for a public official making a disclosure to the Information Commissioner that:

- a) is made in accordance with the *Government Information (Information Commissioner) Act 2009* (GIIC Act); and
- b) is a disclosure of information that the person making the disclosure honestly believes, on reasonable grounds, shows or tends to show that a public authority or another public official has engaged, is engaged or proposes to engage in government information contravention.

Note: A decision of an agency that is reviewable under the *Government Information (Public Access) Act 2009* (GIPA Act) cannot be the subject of a complaint to the Commissioner (even if the person is out of time to apply for review of the decision). See section 89 (4) of the GIPA Act

What is a government information contravention?

There is no one easy definition of what is a government information contravention. The PID Act describes it as conduct of a kind that constitutes a failure to exercise functions in accordance with any provision of the GIPA Act.

Examples of what may be a failure to exercise functions include:

- charging a fee for open access information
- imposing conditions on the release of information under a formal access application
- failure to publish an open access policy
- destroying a document.

In making a complaint about a government information contravention, a complainant may identify the complaint under one of the offence provisions in the GIPA Act. It is preferable to describe the issue with as much detail as possible and where appropriate summarise of the conduct or the agency or public official rather than linking it to a specific offence provision.

What is an offence under the GIPA Act?

A person may make an allegation that an individual or individuals has committed one of the offences under

the GIPA Act. There are five offences in sections 116 to 120. These offences have penalties identified in the Act (100 penalty units – \$11,000). The standard of proof for these offences is more than a balance of probabilities – it is a criminal standard, of beyond a reasonable doubt.

The offences are about the behaviour or conduct of persons and public officials, either by way of deliberate conduct or taking action or, alternatively, deliberately or knowingly not taking action.

What is not a government information contravention and therefore not a matter that the Information Commissioner can deal with as a complaint?

- Reviewable decision under the GIPA Act
- Complaint about internal open access policy – for example that an internal policy relating to staff was not published on agency website under section 23 of GIPA Act
- Complaint that searches were not undertaken
- Opinion that an agency is not following policy
- Complaint that recommendations by Information Commissioner in review were not adopted by the agency
- Decision by Tribunal in relation to external review about how the agency searched for the information may not mean that agency was engaged in an information contravention
- If the Tribunal has considered evidence and made a finding in relation to conduct of the agency in the handling of an access matter
- Opinion that a record should have been created does not necessarily mean it was created, and is not evidence that a record was destroyed.

These may go to agency processes or procedures and the Information Commissioner may, in considering the complaint, provide some guidance to the agency in relation to processes, or take other actions to address these issues, including referring to other agencies where appropriate.

How the IPC manages reports or complaints about government information contraventions

The Information Commissioner will apply the following principles in assessing a report or complaint made about government information contraventions:

- Impartiality
- Procedural Fairness
- Confidentiality
- Communication
- Standard of proof

Information for complainants

- Rules of evidence.

The IPC deals with all matters in a professional, objective, unbiased and fair manner.

Protection

Confidentiality is one of the main protections available under the PID Act. A complaint made to the Information Commissioner will be treated confidentially.

If, however the complaint is not appropriate for protective action under the PID Act, we may decline to deal with it and/or refer the complainant to a more appropriate process, complaints agency or investigating authority.

Receiving a report or complaint

All complaints and reports received are carefully considered by the IPC and decisions are made about appropriate action. Following a report or complaint about government information contraventions the IPC will:

- register the matter on a database
- acknowledge receipt of the matter
- ask the complainant for more information if necessary
- if the matter is within the IPC's jurisdiction, conduct an assessment, and then determine the action on the report or complaint.

Action on a report or complaint

Following assessment, further action to address the issues may include:

- investigate, either agency systems policies and practices under section 21 of the Government Information (Information Commissioner) Act 2009 (GIIC Act); or a complaint under section 22 of the GIIC Act
- develop advice for the agency concerned, or all agencies if the matter is about systemic problems and there is a gap in the guidance available to agencies on the systemic problems
- refer the matter to another agency if it is outside the authority of the IPC
- take no action because the matter complained about is a reviewable decision under the GIPA Act.

Importantly, while not all complaints are investigated, all complaints are recorded so further action can be taken if a pattern of complaints or non-compliance emerges in the future in relation to the agency complained about.

Advising the complainant

The IPC aims to notify the individual who submitted the allegations of government information contravention of the planned action and reasons as soon as possible. Wherever possible the person who has made the complaint will be kept informed about how the IPC is dealing with the matter.

Investigate

If an investigation is required under either section 21 or 22 of the GIIC Act the Information Commissioner is required to:

- give notice of the decision to investigate;
- give the complainant and the agency an opportunity to make submissions on the subject matter of the investigation;
- in the case where there may be adverse comments about a person or agency, that person or agency is informed and is also given an opportunity to make submissions;
- prepare a report on the investigation and may provide the report to the Minister responsible for the agency, the principal officer of the agency, and the complainant.

Outcomes

Outcomes of an investigation must be reported in terms of sections 21 and 24.

The IPC may refer the outcome of an investigation into a complaint about conduct that may constitute an offence to the Director of Public Prosecutions. This is because under section 128 of the GIPA Act proceedings for the offences under the GIPA Act may only be brought by or with the authority of the Director of Public Prosecutions or the Attorney General.

For more information

Contact the Information and Privacy Commission NSW (IPC):

Freecall: 1800 472 679
Email: ipcinfo@ipc.nsw.gov.au
Website: www.ipc.nsw.gov.au

NOTE: The information in this fact sheet is to be used as a guide only. Legal advice should be sought in relation to individual circumstances.