

What is serious wrongdoing? Government Information Contravention

Who is this information for?

This fact sheet is for public officials reporting serious wrongdoing.

Why is this information important?

To ensure that agencies identify when they have received a voluntary public interest disclosure (PID), it is important to understand serious wrongdoing.

This fact sheet provides a framework for public officials to report serious wrongdoing and for those reports to be properly dealt with is vital for maintaining the integrity of the public service.

To ensure that agencies identify when they have received a voluntary public interest disclosure (PID), it is important to understand serious wrongdoing. A key feature of a voluntary PID is that the public official making the report must honestly believe on reasonable grounds that the information shows or tends to show serious wrongdoing.

Under section 13 of the *Public Interest Disclosures Act 2022* (PID Act), there are 6 categories of serious wrongdoing:

1. corrupt conduct
2. serious maladministration
- 3. a government information contravention**
4. a privacy contravention
5. a serious and substantial waste of public money
6. a local government pecuniary interest contravention.

There is no further assessment that needs to be made as to the seriousness of the reported wrongdoing. If it is serious wrongdoing, as defined under section 13 of the PID Act, it meets the test under the PID Act and is 'serious' enough to be a voluntary PID.

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, other than a trivial failure, to exercise functions in accordance with any provision of the *Government Information (Public Access) Act 2009* (GIPA Act), the *Government Information (Information Commissioner) Act 2009* (GIIC Act), or the *State Records Act 1998* (SR Act)¹.

In determining whether the failure is trivial or not, agencies should consider the nature of the failure and its likely consequences, including but not limited to the following:

- the duration, frequency or history of the action or inaction
- the degree of intent or improper purpose involved
- whether the conduct was 'deliberate' (as opposed to accidental, negligent, or reckless)
- whether the conduct is of sufficient gravity that it would warrant the person being dismissed, removed, disciplined, or punished
- as well as the extent to which the action or inaction may undermine public confidence or trust in the relevant public authority or in public administration generally.

For further information on how to assess whether or not a failure to exercise functions in accordance with the GIPA Act, GIIC Act, or SR Act is a PID, please see the NSW Ombudsman's [website](https://www.ombudsman.nsw.gov.au) for PID resources and guidance.

The creation and preservation of state records is recognised under the SR Act and as state records the right to access that government information is created under the GIPA Act and preserved under the GIIC Act with the creation of offences.

¹ PID Act 2022, Schedule 2

It is likely that any voluntary PIDs received about contraventions of the SR Act would be referred to the State Records Authority NSW and/or Museums of History NSW.

However, offences under the GIPA Act will generally be investigated by the Information Commissioner under the GIIC Act. In assessing the seriousness of complaints about a government information contravention the exercise of functions under the GIPA Act together with the offences under the GIPA Act must be considered.

Examples of what may be a failure to exercise functions in accordance with the GIPA Act include:

- charging a fee for open access information, which should be free of charge.
- imposing conditions on the release of information under a formal access application.
- failure to publish an open access policy.
- intentionally omitting documents that are clearly covered by an access application.
- destroying, concealing, or altering records to prevent them from being released.
- knowingly making decisions that are contrary to the GIPA Act.
- directing a person to make a decision that is contrary to the GIPA Act.

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 provide summaries of the conduct of 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 have committed one of the offences under the GIPA Act. There are five offences in sections 116 to 120 of the GIPA Act. These offences have penalties identified in the Act (100 penalty units – \$11,000).

The standard of proof for these offences to be applied by the Information Commissioner in considering if referral to the Director of Public Prosecutions is the test of reasonable satisfaction. The Information Commissioner must also consider the: “seriousness of an allegation made; the inherent unlikelihood of an occurrence of a given description; and the gravity of the consequences flowing from a particular finding”.

The criminal standard, of beyond a reasonable doubt will then apply in any criminal proceedings that may arise.

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.

In summary they are:

- Section 116 – offence of acting unlawfully. An officer of an agency must not make a reviewable decision in relation to an access application that the officer knows to be contrary to the requirements of the GIPA Act.
- Section 117 – offence of directing unlawful action. A person (known as the offender) must not:
 - Direct an officer of an agency who is required to make a decision in relation to an access application to make a reviewable decision that the offender knows is not a decision permitted or required to be made by the GIPA Act (section 117(a)).
 - Direct a person who is an officer of an agency involved in an access application to act in a manner that the offender knows is otherwise contrary to the requirements of the GIPA Act (section 117(b)).
- Section 118 – offence of improperly influencing decision on an access application. A person (known as the offender) who influences the making of a decision by an officer of an agency for the purpose of causing the officer to make a reviewable decision that the offender knows is not the decision permitted or required to be made by the GIPA Act is guilty of an offence.
- Section 119 – offence of unlawful access. A person who in connection with an access application knowingly misleads or deceives an officer of an agency for the purpose of obtaining access to government information is guilty of an offence.
- Section 120 – offence of concealing or destroying government information. A person who destroys, conceals, or alters any record of government information for the purpose of preventing the disclosure of the information as authorised or required by or under the GIPA Act is guilty of an offence.

The [IPC Fact Sheet on offences under the GIPA Act](#) sets out the elements of each offence and what is required to substantiate each offence. Additional information can be found in the [IPC Fact Sheet on safeguards to address misuse of the GIPA Act](#).

What is not a government information contravention?

- A reviewable decision under the GIPA Act. A reviewable decision cannot be a complaint under the *Government Information (Information Commissioner) Act 2009* (GIIC Act).
- A complaint that searches were not undertaken -because this is a reviewable decision that information is not held by the agency.
- An opinion that an agency is not following their own policy or procedures. This may be a matter that is determined by the Agency and the Information Commissioner may not have any jurisdiction to entertain the complaint.
- A decision by Tribunal in relation to external review about how the agency searched for the information.
- An opinion that a record should have been created does not necessarily mean it was created and is not evidence that a record was destroyed to satisfy the offence provisions.

These examples 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. However, they are not contraventions that enliven the offence provisions under the GIPA Act.

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.