

Offences under the GIPA Act

The purpose of this fact sheet is to:

- raise awareness of *Government Information (Public Access) Act 2009* (GIPA Act) rights and responsibilities
- highlight the offence provisions and the types of evidence that may be required to prove them
- inform members of the public and agencies of the IPC's role and procedures in dealing with allegations of conduct that could constitute an offence under the GIPA Act.

The object of the *Government Information (Public Access) Act 2009* (GIPA Act) is to open government information to the public to maintain and advance a system of responsible and representative democratic government.

The GIPA Act obliges agencies within NSW to publish certain information that they create and hold. The GIPA Act also creates rights for persons to apply for access to this government information.

The GIPA Act also creates five offences which apply in circumstances where a person takes action to frustrate the objects of the GIPA Act.

Each offence carries a penalty of 100 penalty units, which as at May 2023 is equivalent to \$11,000.

The Information Commissioner may receive allegations that an offence has occurred and may investigate the allegations. If the Information Commissioner is reasonably satisfied (*Briginshaw v Briginshaw* (1938) 60 CLR 336) that an offence may have occurred, she may refer the matter to the Director of Public Prosecutions (DPP) and inform the Attorney General.

Offences are prosecuted in the Local Court and the decision to prosecute is made by either the DPP or the Attorney General.

What are the offences?

The offences as provided by the GIPA Act 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 (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 (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.

What is required to substantiate each offence?

To substantiate an offence it is important to examine the elements of the offence and whether there is evidence available to satisfy each element beyond reasonable doubt.

Some offence elements include terms defined in the GIPA Act. These terms appear in bold in the table below and their full definition is contained in the appendix to this Fact Sheet for ease of reference.

Section 116 offence of acting unlawfully

Elements of the offence	Consideration
Officer of an agency.	Officer of an agency Is the person covered by the definitions?
Makes a reviewable decision.	Reviewable decision is defined in section 80 of the GIPA Act. Is the decision one of those listed in section 80?
In relation to a valid access application.	Access application is defined in section 4 of the GIPA Act. The application must be covered by Part 4 of the GIPA Act and be a valid access application.
Decision is contrary to requirements of GIPA Act.	Need to show that the decision was contrary to the GIPA Act -eg. a decision granting access to material for which there is a conclusive presumption of an overriding public interest against disclosure.
Officer knows the decision is contrary to the requirements of the GIPA Act.	Requires evidence of actual knowledge on the part of the Officer that the decision was contrary to the GIPA Act. That the Officer merely suspects the decision was contrary to the GIPA Act will not be sufficient. A mere suspicion or assertion by a third party that the Officer had the requisite degree of knowledge will not be sufficient to prove this element beyond reasonable doubt.

Section 117 (a) directing unlawful decision

Elements of the offence	Consideration
Officer of an agency required to make a decision in relation to an access application.	Both ' officer ' and ' agency ' are defined in the GIPA Act in section 4 and clause 9 of Schedule 4. Was the person who received the direction an officer of an agency? Was the person who received the direction tasked with making the decision in relation to the access application and did they hold a delegation to make the decision? Access application is defined in section 4 of the GIPA Act - The application must be covered by Part 4 of the GIPA Act and be a valid access application.
The person (the Offender) directs that the officer make a reviewable decision	Reviewable decision is defined in section 80 of the GIPA Act. Is the decision one of those listed in section 80?
The direction is to make a decision not permitted or required to be made by GIPA Act.	Note that no actual decision needs to have been made.
The offender knows that the decision directed is not permitted or required to be made by GIPA Act.	Requires evidence of actual knowledge by the Offender that the decision directed was contrary to the GIPA Act. A mere suspicion or assertion by a third party that the Offender had the requisite degree of knowledge will not be sufficient to prove this element beyond reasonable doubt.

Section 117 (b) directing officer of agency involved in an access application in unlawful action

Elements of the offence	Consideration
The Offender issues a direction	What evidence is there that a direction was issued by the alleged Offender?
Officer of an agency	Was the person who received the direction an officer of an agency? Both ' officer ' and ' agency ' are defined in the GIPA Act in section 4 and clause 9 of Schedule 4.
Involved in an access application.	Was the person who received the direction involved in an access application? Access application is defined in section 4 of the GIPA Act - The application must be covered by Part 4 of the GIPA Act and be a valid access application.
To act in manner otherwise contrary to the requirements of GIPA Act.	The direction is to act in a manner that is otherwise contrary to the requirements of the GIPA Act.
Offender knows the conduct to be contrary to requirements of GIPA Act.	Requires evidence of actual knowledge that the directed action was otherwise contrary to the requirements of the GIPA Act.

Section 118 improperly influencing a decision on an access application

Elements of the offence	Consideration
A person influences the making of a decision.	What inducements were offered or threats made? What evidence is there that inducements were offered or threats made? The alleged conduct must <i>in fact</i> influence the decision made.
The decision was made by an officer of an agency.	Was the person who made the decision an officer of an agency? Both ' officer ' and ' agency ' are defined in the GIPA Act in section 4 and clause 9 of Schedule 4.
For the purposes of causing the officer to make a reviewable decision.	Was a decision made? Reviewable decision is defined in section 80 of the GIPA Act. Is the decision one of those listed in section 80?
Decision is not permitted or required to be made by GIPA Act.	Need to show that the decision was contrary to the GIPA Act.
Offender knows decision is contrary to the requirements of the GIPA Act.	Requires evidence of actual knowledge that the decision was contrary to the GIPA Act.

Section 119 offence of unlawful access

Elements of the offence	Consideration
A person knowingly misleads or deceives.	The deception must be intentional and not inadvertent or reckless.
An Officer of an agency.	Officer of an agency: both officer and agency are defined in the GIPA Act in section 4 and clause 9 of Schedule 4. Is the person covered by the definitions?

Elements of the offence	Consideration
In connection with a valid access application.	Access application is defined in section 4 of the GIPA Act - The application must be covered by Part 4 of the GIPA Act and be a valid access application.
For purpose of obtaining access to government information.	Government information is defined in section 4 of the GIPA Act.

Section 120 offence of concealing or destroying government information

Elements of the offence	Consideration
A person destroys conceals or alters any record of government information.	Record is defined in clause 10 of Schedule 4 of the GIPA Act. Government information is defined in section 4 of the GIPA Act
For the purpose of preventing disclosure of the information.	Disclose is defined in clause 1 of Schedule 4 of the GIPA Act. Need to show purpose was to prevent disclosure.
As authorised or required by GIPA Act.	Need to show government information was authorised or required to be disclosed under the GIPA Act. This might include for example open access information .

The IPC's role if a person alleges an offence occurred?

A person who alleges an offence has occurred may make a complaint to the Information Commissioner.

The Information Commissioner has, under the *Government Information (Information Commissioner) Act 2009* (GIIC Act), a distinct role when receiving complaints about the conduct of an agency in the exercise of functions under the GIPA Act.

The Information Commissioner may make preliminary inquiries including seeking further information from the complainant for the purposes of deciding how to deal with the complaint.

These inquiries may provide further evidence in relation to the allegation that an offence has occurred.

Dealing with a complaint

Under section 22 of the GIIC Act, the Information Commissioner has the discretion to decline to deal with a complaint and may undertake preliminary enquiries before making this decision.

Where the Commissioner decides to deal with the complaint, the Commissioner will take measures to assist in its resolution. These measures might include:

- providing information to the parties to the complaint
- undertaking discussions with the parties to facilitate a resolution, including by conciliation.

If the complaint is not amendable to resolution, or if the resolution measures are not appropriate for the complaint, the Information Commissioner may investigate.

IPC investigating

If the Information Commissioner decides to investigate the complaint under section 22 of the GIIC Act, both the complainant and the agency will be formally notified.

The Information Commissioner, in conducting the investigation, will give the parties an opportunity to make submissions on the subject matter of the investigation and may interview the complainant and any other persons.

Before making any adverse comments against a person or agency in an investigation report, the Information Commissioner is required to inform them of the substance of the comments and provide them with an opportunity to respond.

If the Information Commissioner concludes, following an investigation, that an agency has failed to exercise its functions properly in accordance with any provision of the GIPA Act, the Commissioner must report the matter to:

- the Minister responsible for the agency, and
- the principal officer of the agency, and
- where the conduct concerns the conduct of a public service employee, the Secretary of the Department of Premier and Cabinet.

The Information Commissioner may, following the investigation of a complaint, give a copy of the report to the complainant and the agency to whose conduct the report relates.

The agency on receiving a copy of the report may, but if requested by the Commissioner must, notify the Commissioner of any action taken or proposed in relation to the report.

As set out in section 28(6) of the GIPA Act, the Information Commissioner cannot bring proceedings for an offence under the GIPA Act.

Referral to the DPP or Attorney General

If, following an investigation, the Information Commissioner forms the view that an offence may have been committed, the Commissioner will refer the matter to the DPP and notify the Attorney General.

As part of that referral, the Information Commissioner would provide to the DPP any evidence gathered by her Office.

Who makes the decision to prosecute an offence?

The DPP will consider the evidence and determine whether any charges should be laid.

The decision to prosecute an offence under the GIPA Act can only be made with the authority of the DPP or the Attorney General, as provided for by section 128(2) of the GIPA Act.

Where is an offence prosecuted?

If the DPP or the Attorney General decide that an offence under the GIPA Act is to be prosecuted, the proceedings for an offence may be dealt with summarily before the Local Court as provided for by section 128(1) of 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.

Appendix - definitions

Agency

agency means any of the following —

- (a) (a) a Public Service agency,
- (b) (b) a Minister (including a person employed by a Minister under Part 2 of the [Members of Parliament Staff Act 2013](#)),
- (c) (c) a public authority,
- (d) (d) a public office,
- (e) (e) a local authority,
- (f) (f) a court,
- (g) (g) a person or entity that is an agency pursuant to regulations under clause 5 of Schedule 4.

Officer of an agency

A reference in this Act to an officer of an agency includes a reference to a member of the agency, the principal officer of the agency and any other person employed within the agency or as a member of staff of the agency, and in the case of an agency that is a Minister, includes a reference to the Minister.

Access application

access application means an application for access to government information under Part 4 that is a valid access application under that Part.

Reviewable decision

reviewable decision means a decision of an agency that is a reviewable decision under Part 5.

Part 5 Review of decisions

80 Which decisions are reviewable decisions

The following decisions of an agency in respect of an access application are **reviewable decisions** for the purposes of this Part —

- (a) a decision that an application is not a valid access application,
- (b) a decision to transfer an access application to another agency, as an agency-initiated transfer,
- (c) a decision to refuse to deal with an access application (including such a decision that is deemed to have been made),
- (d) a decision to provide access or to refuse to provide access to information in response to an access application,
- (e) a decision that government information is not held by the agency,
- (f) a decision that information applied for is already available to the applicant,
- (g) a decision to refuse to confirm or deny that information is held by the agency,
- (h) a decision to defer the provision of access to information in response to an access application,
- (i) a decision to provide access to information in a particular way in response to an access application (or a decision not to provide access in the way requested by the applicant),
- (j) a decision to impose a processing charge or to require an advance deposit,
- (k) a decision to refuse a reduction in a processing charge,
- (l) a decision to refuse to deal further with an access application because an applicant has failed to pay an advance deposit within the time required for payment,
- (m) a decision to include information in a disclosure log despite an objection by an authorised objector (or a decision that an authorised objector was not entitled to object).

Government information

government information means information contained in a record held by an agency.

Disclose

disclose information includes make information available and release or provide access to information.