



Delegation or authorisation of functions under the GIPA Act

Fact sheet

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This fact sheet is designed to clarify for agencies what is required when the principal officer of the agency proposes to delegate or authorise their functions under the *Government Information (Public Access) Act 2009* (GIPA Act).

The GIPA Act outlines a number of functions and responsibilities for agencies in relation to access to government information. These functions include making decisions about access to information through the four pathways – mandatory open access, proactive release, informal access and formal access.

Agencies may, in administrative decision-making, look to delegate or authorise others to facilitate decision-making and streamline administrative processes.

It is an accepted principle of administrative law that the repository of power must exercise that power personally. However, there are two exceptions to this principle.

1. Legislation provides for the power to delegate or authorise

An **express power to delegate**, usually in legislation, allows the person who has the legislative authority to delegate that authority to others. The individual/s or position/s having the delegation can exercise the authority in their own right. An example of an express power to delegate can be seen in section 378(1) of the *Local Government Act 1993*.

An **express power to appoint an authorised officer**, again often in legislation, allows the person who has the legislative authority to authorise others to exercise statutory functions. The individual/s or position/s is not exercising the functions in their own right, but for and on behalf of the person who has the statutory functions. An example of an express power to appoint an authorised officer can be seen in section 23 of the *Fire Brigades Act 1989*.

2. Implied power to authorise

An **implied power to authorise**, arises where even though there may or may not be an express power to delegate in legislation, there can be an implied power for

an official to exercise the power on the person's behalf – it is often termed the 'alter ego' principle, the '*Carltona principle*' or an implied power to delegate. This principle arose from the decision *Carltona Limited v Commissioner of Works* [1943] 2 ALL ER 560.

The principle is: devolving power is permitted in cases where the nature, scope, and purpose of the power in legislation means that it is unlikely that Parliament intended that the power is to be exercised personally, and the only practical way the power can be exercised is by officers who are responsible to the person (who has the power by legislation).

This is also known as the principle of agency – where the agent is acting in the principal's name.

3. General principles - does the GIPA Act allow for delegation or authorisation?

The GIPA Act has three general provisions which provide that the functions may be exercised with the authority of the principal officer of an agency. These provisions are:

- Section 7(5) in respect of authorised proactive release of government information.
- Section 8(6) in respect of informal release of government information.
- Section 9(3) in respect of making a reviewable decision in response to an access application made to the agency.

It is open to the principal officer, in terms of the above provisions of the GIPA Act, to either delegate or authorise individual/s or position/s to exercise the identified function.

Although these sections of the GIPA Act make reference to "*with the authority of the principal officer of the agency*", other legislation applicable to the agency may provide a power of delegation. Agencies would need to consider their own legislation to see if such a power is included in that legislation.

Clause 1 to Schedule 4 of the GIPA Act, defines principal officer of an agency to mean the head or chief executive officer (however designated) of the agency, or the person of the greatest seniority in the agency.

As an illustration, section 335 of the *Local Government Act 1993* describes the functions of the general manager. Section 335(3) also provides that a function

may be conferred on the general manager by another Act.

Further, section 378 provides a power of delegation for the general manager of any of the functions of the general manager.

However, not all legislation relevant to principal officers will have a power of delegation of all functions under other Acts, and therefore it may be more appropriate and preferable in the circumstances for a principal officer to authorise individual/s or position/s to exercise functions in terms of, for example, section 9(3) of the GIPA Act.

This can be done generally (as part of the agency's administrative authorisations) or specifically by a single instrument or letter.

It is worth noting that the IPC Notice of Decision template includes a reference to the decision-maker being authorised by the principal officer to make the decision in terms of section 9(3) of the GIPA Act.

4. What is the difference between delegation and authorisation?

The main difference between a delegation and an authorisation is how the function is exercised –

- **a delegation:** the function is exercised in the name of, or under the title of the position of, the delegate.
- **an authorisation:** the function is exercised for and on behalf of the principal officer.

A delegation or authorisation may only be given to either a named individual or an identified position title or role.

Where the delegation is made under a statutory power it is usually desirable that the delegation is to identified position/s rather than individual/s. This ensures continuity of the exercise of the delegated power, even where the individual occupying the position changes over time.

5. Can a delegation or authorisation be to a person outside an agency and if so to whom can it be made?

The GIPA Act does not prevent a principal officer from delegating or authorising individual/s or position/s outside their agency to exercise functions in terms of, for example, section 9(3) of the Act. Further, the GIPA Act does not place specific limits on the authority given by the principal officer of the agency however; the instrument of delegation or authorisation may be limited to particular functions.

In some instances agencies may recognise that a perceived or actual conflict of interest exists for the decision maker. Accordingly it may be necessary or desirable to delegate or to authorise to a person in a law firm, or a consultancy. Additionally where service

agreements are in place between agencies delegations should be in place.

Any delegation or authorisation to individual/s or position/s outside the agency should recognise the obligation set out by section 126(1)(d) of the GIPA Act. This section sets out the requirements for notices or notifications given by agencies under the GIPA Act. Section 126(1)(d) specifically requires that the contact details of an officer of the agency to whom inquiries may be directed in connection with the decision or other action of the agency with which the notice or notification is concerned.

Therefore, a delegation or authorisation to a company or agency name (agency has a meaning under section 4 of the GIPA Act), such as a law firm, without any other detail is will not be adequate. The powers the principal officer intends to delegate or authorise and who can exercise the delegation or authorisation is required.

6. Can a delegation be sub-delegated?

Where a power of delegation is provided for in legislation, the provision will usually make clear whether the delegation may be sub-delegated.

If a principal officer of an agency prepares a delegation, it should include whether there is authority for sub-delegation.

7. How should delegations or authorisations of functions under the GIPA Act be recorded?

The first thing to make clear is whether it is a delegation or an authorisation. The delegation or authorisation should then specify the provision and function of the GIPA Act that is to be delegated or authorised – for example section 7(5) for proactive release, section 8(6) for informal release and section 9(3) for the making of a reviewable decision.

In either case it is recommended that an authorisation or delegation of functions under the GIPA Act be made as follows:

- Describe whether it is a delegation made under another Act or an authorisation.
- Specify the time frame for the delegation or authorisation – is it until replaced or for a specific time and or purpose.
- Identify if the delegation or authorisation is about specific access application/s.
- Identify the individual/s or position/s delegated or authorised – by naming the individual/s directly or identifying the title/s or the position/s or role/s. (If it is to a position/s or role title then the delegation or authorisation does continue if the occupant is absent and another person acts in their role, however if it is to a named individual then only that person can exercise the delegated or authorised functions).

- Identify whether the delegate is allowed to sub-delegate to another person.

It is worth noting the comments of *Bauer J in Public Service Association (NSW) v Public Employment Industrial Relations Authority (NSW) (1991) 37 IR 76* at 85 suggesting that the terms of a delegation should be sufficiently clear:

“Delegation of statutory powers should in the interest of administrative certainty be given with precision and accuracy. Caution indicates that the elements of a delegation; the delegator, the delegate, the statutory base, the authority to grant the delegation and the precise nature of terms of the delegation should all be set out in such a document.”

These comments can easily also be applied if the individual/s or position holder/s is authorising another individual/s or position/s to exercise functions on their behalf.

There is no specific form for the delegation or authorisation – it may be an instrument or by way of letter, and must be provided to the individual/s or position holder/s who is now delegated or authorised to exercise the functions delegated.

8. Correcting an invalid delegation or authorisation

It is important to note that a delegation or authorisation cannot be made to operate retrospectively.

Therefore, if there is an error in the delegation or authorisation (for example the function to be delegated was wrong, or the named individual has left the agency and a new delegation has not been made) and a decision has already been made which purports to be made under the delegation, a principal officer cannot remedy the invalidity by making a new delegation or authorisation at a later date to replace the invalid instrument.

9. Updating delegations or authorisations

Delegations or authorisations should be reviewed and updated from time to time and where there are significant changes in the governance of an agency such as, a reorganisation or restructure of an agency. A reorganisation or restructure may impact on the existing delegation or authorisation by creating new roles, changing job titles or removing old positions, roles or job titles.

10. When will additional delegations be necessary

There may be circumstances where the principal officer (or the individual or position who has been authorised by the principal officer of the agency to make a reviewable decision under the GIPA Act) identifies that it may be

more appropriate for another individual or position to make the decision.

This may include where an actual or perceived conflict of interest creates an apprehension of bias or actual bias, or the information sought directly relates to the principal officer or the individual or position who has authority to exercise the decision-making functions under the GIPA Act.

In this circumstance a specific authorisation or delegation would be required.

11. Where do agencies keep records of delegations or authorisations?

It is expected that the delegation or authorisation would be included in the agency's policy or procedures for dealing with access applications under the GIPA Act. However, an agency may also have a schedule or list of administrative delegations or authorisations outlining the relevant roles, positions or persons who are authorised or delegated to exercise the identified functions within that agency.

The instrument or schedule of delegations or authorisations should be published on the agency's website as open access information under section 23(c) of the GIPA Act.

For more information

Contact the Information and Privacy Commission NSW (IPC):

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