



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 circumstances and evidence that may enliven consideration of these offence provisions
- inform members of the public and agencies of the IPC's role and procedures in dealing with allegations that offences under the GIPA Act have been committed.

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 places obligations on agencies within NSW for publication and release of the information that they create and hold. The GIPA Act also provides rights for persons to apply for access to this government information.

The GIPA Act identifies five specific offences where a person may take actions, often in response to an access application, that are contrary to the object of the GIPA Act.

Each offence carries a penalty of 100 penalty units, which as at May 2016 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 (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.

What is required to substantiate each offence?

To substantiate an offence it is important to examine the elements of the offence and the evidence required.

Some of the elements of the offences include terms defined in the GIPA Act and these terms should be applied to the information, details or facts of the alleged offence.

Section 116 offence of acting unlawfully

Elements of the offence	Consideration
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?
Makes a reviewable decision.	Reviewable decision is defined in section 80 of the GIPA Act. Is the decision covered by section 80?
In relation to an access application.	Access application is defined in section 4 of the GIPA Act. The application must be covered by section 4.
Decision is contrary to requirements of GIPA Act.	Need to show that the decision was contrary to the GIPA Act.
Officer 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 117 (a) directing officer of agency required to make decision in an access application in unlawful action

Elements of the offence	Consideration
Offender	Offender is defined as a person. Person is defined in clause 1 or Schedule 4 of the GIPA Act. Is the person covered by the definitions?
Directs	Directions would need to be in the context of employment as an officer of the agency.
Officer of an agency required to make a decision in relation to an access application.	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? Access application is defined in section 4 of the GIPA Act The application must be covered by section 4.
To make a reviewable decision.	Reviewable decision is defined in section 80 of the GIPA Act. Is the decision covered by section 80?
Decision is not permitted to be made by GIPA Act.	Need to show that the decision was not permitted by 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 117 (b) directing officer of agency involved in an access application in unlawful action

Elements of the offence	Consideration
Offender	Offender is defined as a person. Person is defined in clause 1 or Schedule 4 of the GIPA Act. Is the person covered by the definitions?
Directs	Directions would need to be in the context of employment as an officer of the agency.
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?
Involved in access application.	Access application is defined in section 4 of the GIPA Act. The application must be covered by section 4.
To act in manner otherwise contrary to requirements of GIPA Act.	Need to show that the decision was contrary to the GIPA Act.
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?

Section 118 improperly influencing a decision on an access application

Elements of the offence	Consideration
Offender	Offender is defined as a person. Person is defined in clause 1 or Schedule 4 of the GIPA Act. Is the person covered by the definitions?
Influences the making of a decision	What inducements were offered, and was a decision made?
By 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?
For the purposes of causing the officer to make a reviewable decision	Reviewable decision is defined in section 80 of the GIPA Act. Is the decision covered by 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
Person in connection with access application.	Person is defined in clause 1 or Schedule 4 of the GIPA Act. Access application is defined in section 4 of the GIPA Act. The application must be covered by section 4. Need to show the person has a connection to the access application.
Knowingly misleads or deceives.	Need to show the person knows that what they are seeking is something they would not be able to access.
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?
For purpose of obtaining access to government information.	Need to show the person attempted to obtain access to government information.

Section 120 offence of concealing or destroying government information

Elements of the offence	Consideration
Person	Person is defined in clause 1 or Schedule 4 of the GIPA Act. Is the person covered by the definitions?
Destroys conceals or alters.	Records are not available, have been amended or have been destroyed.
Any record	Any record is defined in clause 10 of Schedule 4 of the GIPA Act.
Of government information	Government information is defined in section 4 of the GIPA Act.
Purpose of preventing disclosure of the information.	Disclose is defined in clause 1 of Schedule 4 of the GIPA Act. Need to show purpose to prevent disclosure.
As authorised or required by GIPA Act.	Need to show government information was authorised to be disclosed under GIPA Act.

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.

The Information Commissioner will assess the complaint and evidence to decide whether to deal with the complaint or decline to deal with the complaint.

Dealing with a complaint

The Information Commissioner may deal with the complaint in terms of section 18 of the GIIC Act, and deal with the complaint by taking appropriate measures to assist in resolving the complaint in terms of section 19 of the GIIC Act. The measures 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 in terms of section 22 of the GIC Act then the process involves formal notification to both the complainant and the agency.

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 both the complainant and any other persons who may be able to inform the investigation.

It is also a requirement that if the Information Commissioner considers there are grounds for adverse comments in respect of any person that the person be informed of the substance of the comments and provided with an opportunity to make submissions on those comments.

If the Information Commissioner finds in an investigation that the conduct of an agency is conduct of a kind that constitutes a failure to exercise its functions properly in accordance with any provision of an Information Act, the Information 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.

Section 28(6) of the GIPA Act makes clear that the Information Commissioner cannot bring proceedings for an offence under the GIPA Act.

Referral to the DPP or Attorney General

If the Information Commissioner has, following an investigation, formed a view that an offence may have been committed then the Information Commissioner would refer the matter to the DPP and notify the Attorney General.

The Information Commissioner would, in making that referral, provide any evidence gathered that had led her to drawing that conclusion to the DPP.

Who makes the decision to prosecute an offence?

The DPP will consider the evidence and determine whether an offence is prosecutable.

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: <http://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.