



Information Commissioner's right of appearance in the NSW Civil and Administrative Tribunal

The Information Commissioner has a right to appear and be heard in the NSW Civil and Administrative Tribunal (the Tribunal) in any administrative review of an agency decision under the *Government Information (Public Access) Act 2009* (NSW) (GIPA Act), as well as in related proceedings and appeals.¹ This fact sheet has been prepared to provide citizens and agencies information about the role of the Information Commissioner in those proceedings.

Who is the Information Commissioner?

The Information Commissioner is an independent statutory officer with functions under the GIPA Act and the *Government Information (Information Commissioner) Act 2009* (NSW) (GIIC Act). Among those functions is the promotion of public awareness and understanding of the GIPA Act.²

How does the Commissioner become involved in a Tribunal matter?

The Tribunal notifies the Information Commissioner of all new applications lodged under the GIPA Act, and the Commissioner decides whether to appear and be heard.

The Commissioner can exercise the right of appearance at any stage of the proceedings but will usually become involved from the first time the matter is listed.

Generally, the Commissioner will only appear or file submissions in proceedings that involve novel, complex or significant issues of law, where the Tribunal would benefit from submissions by the Commissioner.

How does the Commissioner exercise the right to appear and be heard?

Where the Information Commissioner decides to appear and be heard, their legal representative will attend case conferences, directions and hearings on their behalf.³

The Commissioner may file written submissions under procedural orders or their representative may make verbal submissions during the proceedings on one or more issues in the case.

Do I need to serve evidence and submissions on the Commissioner?

Where the Information Commissioner exercises the right to appear and be heard in a matter, the Commissioner will be included in the Tribunal's procedural orders for the filing and service of submissions and evidence.

If the Tribunal sets a timetable for the exchange of evidence and submissions, parties are required to serve a copy of their evidence and submissions on the Commissioner.

The Commissioner can receive service electronically at ipcinfo@ipc.nsw.gov.au or by mail.⁴

Parties should also notify the Commissioner of any proposed changes to listing dates or procedural orders.

What do parties need to be aware of?

In exercising the right to appear and be heard, the Information Commissioner is not a party to the administrative review proceedings.⁵ The Commissioner does not put on evidence and cannot be compelled to give evidence nor produce documents in such proceedings.⁶ The role of the Information Commissioner is to promote the object of the GIPA Act and any submissions made will consider the operation of the GIPA Act not individual factual circumstances.

¹ This fact sheet concerns the Information Commissioner's right to appear and be heard under section 104(1) of the GIPA Act and clause 9(4)(a) of Schedule 3 to the *Civil and Administrative Tribunal Act 2013* (NSW) (CAT Act).

The Commissioner also has a right to appear and be heard in any proceedings before the Tribunal in relation to a review under section 55 of the *Privacy and Personal Information Protection Act 1998* (NSW) (PPIP Act) that concerns the provision of government information by an agency (within the meaning of the GIPA Act) (section 55(7)).

² See section 17 of the GIPA Act and Part 3 of the GIIC Act.

³ The Commissioner does not attend mediations. In Appeal Panel proceedings, the Commissioner will generally attend all listings.

⁴ For further contact information, visit:

<https://www.ipc.nsw.gov.au/about-us/contact-us>.

⁵ *Hurst v Wagga Wagga City Council* [2011] NSWADT 307 at [54]-[55].

⁶ Section 41(1) of the *Government Information (Information Commissioner) Act 2009* (NSW) (GIIC Act); *Lonsdale v University of Sydney* [2015] NSWCATAP 277 at [18]; *Pittwater Council v Walker* (10 March 2015)[2015] NSWCATAD 34 at [19].

The Commissioner does not appear at the request of or on behalf of the applicant, the agency or any third party appearing in the proceedings. It is up to the parties to decide how they argue their own cases.⁷

The Information Commissioner has an independent role in the Tribunal and does not provide legal advice or assistance to the parties.

What kinds of submissions does the Commissioner make?

The Information Commissioner's role and functions inform the submissions made in each matter. In particular the Commissioner must promote the object of the GIPA Act.⁸ That includes promoting the proactive release of information, the right to access information and that access is restricted only where there is an overriding public interest against disclosure of information.

The Commissioner appears in proceedings to provide assistance to the Tribunal on the applicable law, relevant policies and guidelines, and issues of statutory interpretation.⁹

The Commissioner makes submissions to assist the Tribunal to make the correct and preferable decision on an administrative review, or to determine an interim matter or appeal.

The Commissioner will not generally make submissions on procedural matters, such as whether the Tribunal should make an order dispensing with a hearing¹⁰ or whether two or more matters should be heard together.

What if the decision has been previously reviewed by the Commissioner?

The role of the Information Commissioner in the Tribunal is separate to the Commissioner's own external review role under the GIPA Act.¹¹

As explained above, the Commissioner's role in the Tribunal is to assist the Tribunal on issues of interpretation of the relevant law. In Tribunal proceedings the Commissioner does not revisit or advocate for its earlier findings in a completed review.

The Tribunal can only review a decision of an agency in respect of an access application under the GIPA Act.¹² An external review report with any recommendations by the Commissioner is not a reviewable decision.

Importantly, any decision made after recommendations by the Commissioner in an external review is the decision of the agency, not the Commissioner.

Therefore, the applicant and the agency are the parties to the administrative review, not the Commissioner.¹³

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

The IPC can give general information the GIPA Act but cannot give legal advice. You should seek your own legal advice about these issues.

⁷ *Hurst v Wagga Wagga City Council* [2011] NSWADT 307 at [54]-[55].

⁸ Section 3 of the GIPA Act.

⁹ *Black v Hunter New England Local Health District* [2011] NSWADT 295 at [53].

¹⁰ See section 50 of the CAT Act.

¹¹ Under Division 3 of Part 5 of the GIPA Act; see *IPC Fact Sheet - External review by the Information Commissioner*.

¹² Sections 80 and 100 of the GIPA Act; section 30 of the CAT Act and sections 7 and 9 of the *Administrative Decisions Review Act 1997* (NSW).

¹³ See *Hurst v Wagga Wagga City Council* [2011] NSWADT 307 at [55].