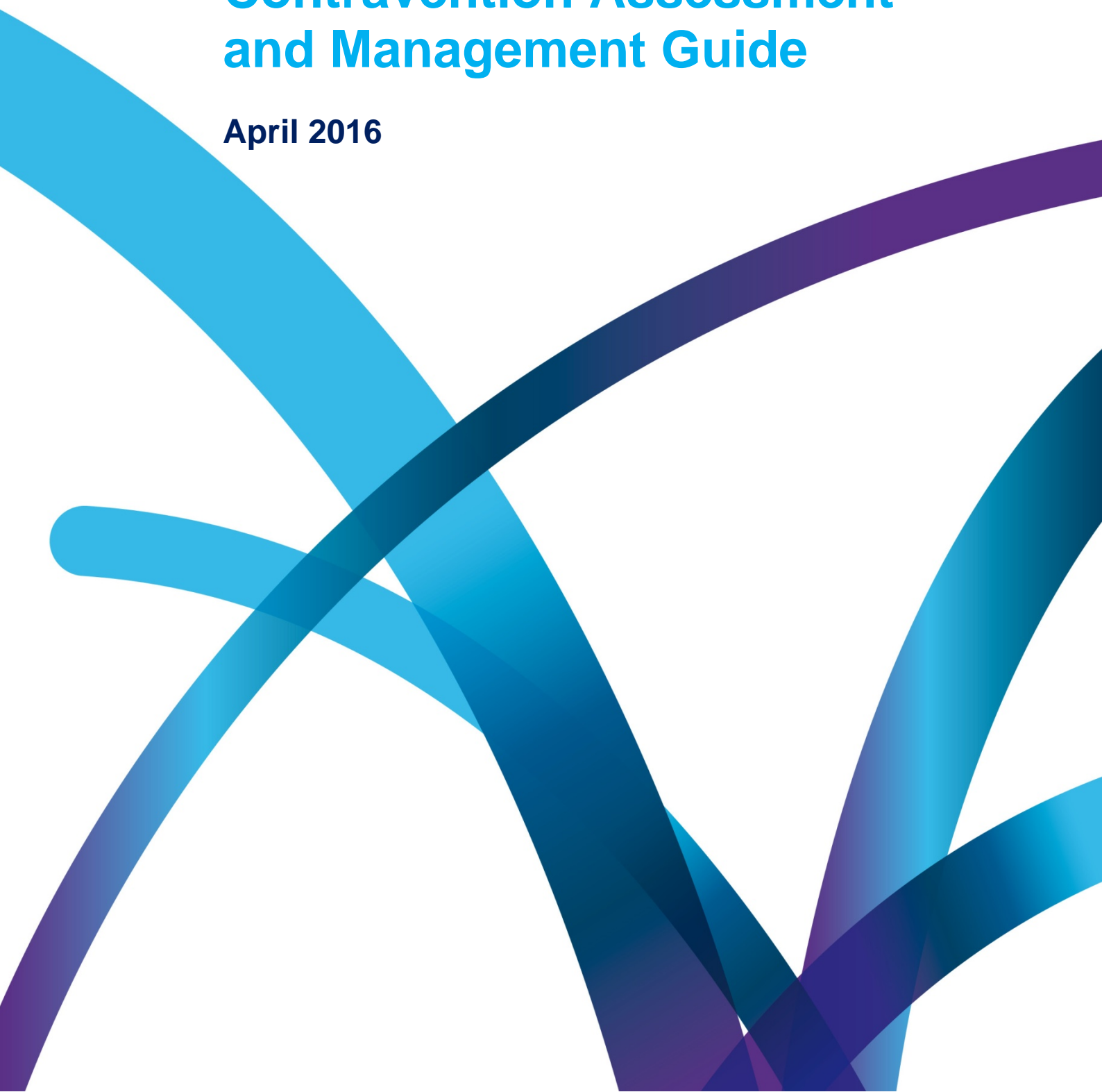




information
and privacy
commission
new south wales

Public Interest Disclosures Government Information Contravention Assessment and Management Guide

April 2016



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1. Purpose and context of the Assessment and Management Guide

PURPOSE: The *Public Interest Disclosures Act 1994* (PID Act) sets in place a system to encourage public officials to report wrongdoings. The NSW Information Commissioner is responsible for receiving PIDs about government information contraventions. The Information Commissioner is defined as an investigating authority under section 4(1) of the PID Act. This allows public officials to make public interest disclosures to the Information Commissioner. Further the Information Commissioner has specific responsibilities in relation to PIDs made about government information contraventions in terms of section 12D of the PID Act.

OBJECTIVE: The Information Commissioner, in taking action on any disclosure made either directly or referred by another public sector agency or investigating authority, will consider the information by applying the following principles of of of of:

- Impartiality
- Procedural fairness
- Confidentiality
- Communication
- Standard of Proof
- Rules of evidence.

In assessing whether the disclosure is to be classified as a PID, the Information Commissioner will apply the threshold tests as set out in the legislation.

APPROACH: The Information Commissioner's approach is to consider the information provided with the disclosure to decide what action, if any, that can be taken. Disclosures of wrongdoing are taken seriously as is confidentiality and communication.

CONTEXT

It is important that, as an investigating authority, the Information Commissioner (IC) has in place appropriate and effective systems to assess and manage disclosures about government information contraventions reported directly to or referred to us by other agencies. Good internal assessment guidance as well as sufficient information available to a person considering making a complaint will assist in managing the person's or agency's expectations as to how the Information Commissioner will conduct the assessment process including what can be considered and investigated.

Realistic expectations and external guidance should mean that future complaints made to or received by the Information Commissioner will be specific and should meet the threshold criteria of the PID Act and the *Government Information (Information Commissioner) Act 2009* (GIIC Act). This will also allow for the informed choice of jurisdiction in those persons contemplating making a complaint under the PID Act.

This guide has been developed as an internal document to assist those staff of the Information Commissioner who are required to assess or manage complaints made or referred to the Information Commissioner as a public interest disclosure.

It provides guidance on the threshold considerations to assist in deciding whether the complaint received is a PID and relevant pathways available to deal with the complaint once it has been assessed. The

guide also includes a decision tree and template assessment sheets and letters to ensure that the complaint is managed in the most effective way.

This guide is not intended as an alternative or replacement of the IPC Public Interest Disclosures internal reporting policy, required under section 6D of the PID Act to provide policy and procedures for receiving, assessing and dealing with public interest disclosures made by staff of the IPC.

2. Complaint received/referred

For a report to be considered a public interest disclosure, it has to meet all of the requirements under the PID Act. The requirements for the purposes of considering government information contraventions are:

- the person making the disclosure must honestly believe on reasonable grounds that the information shows or tends to show wrongdoing (government information contravention)
- the report has to be made by a public official to the Information Commissioner or referred to the Information Commissioner by an investigating authority (as defined in section 4 of the PID Act) or another public sector agency
- the disclosure has to be about either a public official or a public sector agency in relation to the wrongdoing alleged.

An initial assessment should be applied to consider if the complaint meets the requirements of the PID Act. Matters where the reporter claims it may be a public interest disclosure may not meet the preliminary threshold assessment against the PID Act.

In circumstances where the complaint does not meet the threshold requirements of the PID Act there may still be pathways open to the Information Commissioner to consider and deal with the complaint. These pathways are identified at each requirement as discussed below.

(a) Complaint made by a public official

The first requirement is that the complaint be made by a public official (section 8 of the PID Act). If the complaint clearly is not from a public official then the complaint cannot receive the protections of the PID Act and cannot be considered to be a PID. This does not mean the case is automatically closed, it just means that the protections of the PID Act will not apply.

If the complainant is not a public official is there another pathway that would allow the complaint to be considered by the Information Commissioner?

Section 17 of the GIIC Act allows the Information Commissioner to receive a complaint from any person about the conduct of an agency in the exercise of functions under an Information Act. The complaint may then be considered and examined under the IPC complaint processes.

Information Commissioner administrative action where the complaint has not been made by a public official or is outside the jurisdiction of the Information Commissioner.

1. Where the complaint is one that falls within section 17 of the GIIC Act. Following preliminary review and communication regarding options with the complainant, the PID complaint file should be closed, the complainant should be notified in writing that their concerns, although not a PID may be considered and dealt with under section 17 of the GIIC Act, and then a new complaint file should be created.

2. Where the complaint is outside the jurisdiction of the Information Commissioner. Following preliminary review and communication regarding options with the complainant, the PID complaint file should be closed and the complainant notified in writing that the Information Commissioner does not have the jurisdiction to deal with their complaint. If there is an option for referral of the complaint to another investigative agency or another public sector agency that referral should be included in the correspondence to the complainant.

(b) Complaint about a public official and /or a public sector agency

If the complaint is about a public official and or a public sector agency, it is still a complaint to which the PID Act may apply and further assessment of the complaint and issues raised continues.

If the complaint is not about a public official or a public sector agency then the complaint would not fall within the protections of the PID Act. This does not mean the case is automatically closed, it means that the complaint is not a PID.

Where a complaint is not a PID there are a number of issues that may warrant specific examination by the Information Commissioner. If the complaint is not about the conduct of a public sector agency, or the complaint raises or identifies potential systemic issues that are unrelated to the functions of the agency in terms of the GIPA Act, these may be issues where the Information Commissioner would have no jurisdiction to consider the complaint under either section 17 or section 21 of the GIIC Act, or it is more appropriate to refer the issue to another investigating authority. If the complaint does not meet the threshold for section 17 then it is not open for the Information Commissioner to investigate the complaint under section 22 of the GIIC Act. The nature of the complaint, not involving either a public official or a public sector agency, may be a matter that may give rise to consideration an offence under the *Government Information (Public Access) Act 2009* (GIPA Act) (s118, s119 or s120).

There are two possible offences under the GIPA Act that do not specifically apply to the actions of public officials and potentially may apply to persons outside the public sector.

The relevant offences are:

Section 118 Offence of improperly influencing a 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 this 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.

The other offence, section 120, although possibly applying to the action of a person outside of a public sector agency, is more likely to relate to the actions of a public official, as the person would require access to the government information in order to conceal, alter or destroy the information.

Section 120 Offence of concealing or destroying government information

A person who destroys, conceals or alters any records of government information for the purpose of preventing the disclosure of the information as authorised or required by or under this Act is guilty of an offence.

The Information Commissioner may not be able to deal with the complaint as one made under section 17 of the GIIC Act however it may be a matter where there is a referral to either ICAC in the case of an allegation relating to corrupt conduct, to other agencies as appropriate or the Director of Public Prosecution in the case of an offence under section 118, 119 or 120 of the GIPA Act.

The investigative functions provided by the GIIC Act may not allow the Information Commissioner to investigate matters where the complaint does not relate to the conduct of a public sector agency in relation the exercise of functions under an Information Act. The Commissioner may consider a preliminary review and enquiry, as well as discussion with the complainant before any decision is made regarding the complaint.

To make out the government information contraventions described in sections 118 or 119 each element of the offence must be proved to a criminal standard, that is beyond a reasonable doubt. The GIPA Act does not require direct evidence of each element of the offence, inferences may be made from the circumstances to support the allegation. Further discussion on the offences and consideration of the issues is at 3 below.

Information Commissioner administrative action if the complaint is not about a public official or a public sector agency:

1. Where the complaint should be referred to another investigating authority. Following preliminary review and communication regarding options with the complainant, the PID complaint file should be closed; the complainant should be notified in writing that their complaint is a matter that should be referred to another investigating authority for consideration and action.
2. Where the complaint is relates to an offence under either section 118 or section 119 of the GIPA Act. Following preliminary review and communication regarding options with the complainant, the PID complaint file should be closed and the complainant notified in writing that the Information Commissioner does not have the jurisdiction to deal with their complaint, as it relates to a matter that is an offence. The complainant should be advised the Information Commissioner does not prosecute offences but may refer the matter to the Director of Public Prosecutions (DPP). More information may be required in relation to the complaint to assist the Information Commissioner in referring the matter to the DPP.
3. Where the complaint is not a matter that should be referred as an offence, or to another investigative authority, and does not relate to a public sector official or agency. The PID complaint should be closed and the complainant notified in writing that the complaint is not a matter the Information Commissioner can consider.

(c) Honest belief

Section 9A of the PID Act provides that an assertion by a public official as to what the official believes in connection with the disclosure is, in the absence of evidence to the contrary evidence that the belief is an honest belief. NSW Ombudsman guidance on PIDs provides that an honest belief is a belief genuinely held.

A complaint made as a PID would meet this threshold.

(d) Reasonable grounds

Section 12D(b) of the PID Act includes the requirement that the complainant making the disclosure to the Information Commissioner must be a belief made on reasonable grounds. The principle in relation to “reasonable grounds” is whether from an objective viewpoint the basis for a person’s viewpoint is reasonable. The belief cannot be based on personal animosity or prejudice. This can also be summarised by asking the question: would a reasonable person in the circumstances believe that the wrongdoing occurred?

The reasonableness test at law requires a consideration, not of the view or contention of the person making the complaint, but of an objective question as outlined in the principle above: would a reasonable and prudent person in the circumstances and on the face of the material provided by the complainant believe a wrongdoing occurred? This test is one that requires an objective consideration of the facts. Accordingly, as part of the preliminary review other information may be obtained from the complainant to inform this assessment. This may be for the purpose of better understanding the report or to clarify what has been alleged.

Information Commissioner administrative action if the complaint does not meet the reasonable grounds test:

1. The complainant should be notified in writing that following assessment the Information Commissioner has formed a preliminary view that the reasonable grounds test has not been met and is proposing to close the file but would seek the complainant’s feedback on this. Following any feedback and discussion with the complainant the PID complaint should be closed and the complainant notified in writing that the complaint does not meet the threshold requirements of section 12D of the PID Act. The notification would include the reasoning for this assessment and any reference to other actions, for example consideration of systemic issues and the forward work program identified by the Information Commissioner.

(e) Shows or tends to show

Section 12D(b) of the PID Act includes the requirement that the disclosure of information by the complainant to the Information Commissioner shows or tends to show that the wrongdoing is occurring or has occurred. The principle in relation to “shows or tends to show” requires that there must be sufficient information to show the wrongdoing has happened. If reasonable alternative explanations for the conduct or activities observed can be thought of, this may have some relevance or bearing to the assessment of the complaint. However it does not automatically exclude the complaint.

An assessment of the facts and information provided will inform whether the complaint meets this threshold. If the complaint does not have sufficient information to make this assessment it may be necessary to contact the complainant to provide additional information. This may include asking the complainant a series of questions about the complaint and may benefit from asking the complainant to attend an interview to clarify issues.

Information Commissioner administrative action if the complaint does not have sufficient information to show the wrongdoing alleged has occurred:

1. Where the complaint may still be considered a PID. A request may be made to the complainant for more information. This request may include a request to interview the complainant to clarify the issues. Depending on the assessment of the additional information once provided the complaint may continue as PID or may not meet the threshold.

2. Where there is an alternative explanation that can reasonably be thought of to explain the complaint. The complainant should be notified in writing that following assessment the Information Commissioner has formed a preliminary view that shows or tends to show test has not been met and is proposing to close the file but would seek the complainant's feedback on this. Following any feedback and discussion with the complainant the PID complaint should be closed and the complainant notified in writing that the complaint does not meet the threshold requirements of section 12D of the PID Act. The notification would include the reasoning for this assessment and any reference to other actions, for example consideration of systemic issues and the forward work program identified by the Information Commissioner.

(f) Complaint about a government information contravention

In considering what is a government information contravention it is easier first to identify and exclude those matters that are not government information contraventions.

If the complaint is made under the PID Act but is a disclosure concerning maladministration, serious and substantial waste, concerning police, or local government then the complaint should be referred to the appropriate investigating authority. These are the most appropriate agencies to consider allegations in these areas. The investigating authorities are described at 16.

A complaint made to the Information Commissioner will usually relate to an allegation relating to information access. Section 4 of the PID Act defines a government information contravention as conduct of a kind that constitutes a failure to exercise functions in accordance with the GIPA Act.

For example:

- destroying, concealing or altering records to prevent them from being released
- knowingly making decisions that are contrary to the legislation
- directing another person to make a decision that is contrary to the legislation.

Some of these examples may also fall within the offences under the GIPA Act (see discussion at 3)

Often however complaints alleging government information contraventions may not be matters that could be considered as failure to exercise the functions of the GIPA Act. Examples include:

- Complaints about reviewable decisions (see discussion at 4).
- Complaints about an agency not publishing policy documents as required by section 23 of the GIPA Act where the policy documents are internal policies applying and relating only to staff of the agency.
- Complaint that searches were not undertaken or were not adequate.
- Opinion that an agency is not following a particular policy.
- Complaint that recommendations by Information Commissioner in an external review were not adopted by the agency.
- Complaint following a decision by the NSW Civil and Administrative Tribunal in relation to external review noting that the searches made for records was not adequate, or that records were found in later searches does not mean that agency was engaged in an information contravention.

- Opinion that a record should have been created does not necessarily mean it was created, and is not evidence that a record was destroyed.

Some of these types of complaints 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. Others may relate to record keeping by agencies and may, in particular cases be referred to another agency.

In examining whether a specific complaint identifies that an agency has engaged in a government information contravention the following considerations will assist in an assessment:

- Firstly consider the objects of the GIPA Act as identified in section 3 to open government information to the public by authorising and encouraging the proactive release of information by agencies, to give members of the public an enforceable right to access government information, and to provide that access is only restricted where there is an overriding public interest against disclosure.
- The functions, obligations, responsibilities and actions required by an agency under the GIPA Act and how the particulars of the complaint or conduct alleged on the face of the complaint may be in breach of those functions obligations, responsibilities and or actions.
- It is possible that an agency may, in the exercise of its functions under the GIPA Act, inadvertently take some action that could constitute a government information contravention. This may give rise to a complaint, although an assessment of the impact of this action is not required in considering whether or not the complaint is a PID, it may be useful to make some inquiries relating to the particular facts and circumstances. In making some general inquiries, the issue of inadvertent or deliberate actions or inactions giving rise to the conduct may be considered.
- The PID Act does not require a consideration of the seriousness or impact of the conduct. Looking at the conduct or contravention alleged assists in the later decision of whether or not to deal with the complaint even where the matter may not have been assessed as a PID. It may be noted at the assessment stage on the face of the information provided in the complaint and if the information has been provided by the complainant it is helpful to look at the impact of the conduct. The issues to consider are:
 - what is the impact on the individual or the public of the conduct alleged?
 - Has the conduct continued for some time, and when or if it was identified, did it stop?
 - Is there any financial or other form of gain by the conduct?
- Particular actions or inactions by individuals may on the face of the information, appear to clearly be government information contraventions but it is important to balance what may be a judgment or assessment based on weighting the considerations for and against the disclosure of information against a deliberate and intentional decision not to provide access to the information sought. A complaint may for example, include an absence of a specific action or conduct on the part of the agency or staff of the agency which may be assessed to be a government information contravention.

Consideration of these issues should be a balanced and reasonable assessment, which assists in considering the complaint.

Information Commissioner administrative action if the complaint is not about a government information contravention, or is a matter where the Information Commissioner does not have the jurisdiction to investigate:

1. Where the complaint should be referred to another investigating authority. The PID complaint file should be closed; the complainant should be notified in writing that their complaint is a matter that should be referred to another investigating authority for consideration and action.
2. Where the complaint is outside the jurisdiction of the Information Commissioner. The PID complaint file should be closed and the complainant notified in writing that the Information Commissioner does not have the jurisdiction to deal with their complaint. If there is an option for referral of the complaint to another investigative authority or another public sector agency that referral should be included in the correspondence to the complainant. If relevant, the advice to the complainant may make reference to other actions, for example consideration of systemic issues and the forward work program identified by the Information Commissioner.
3. Where the complaint is not a matter that is appropriate for referral. The complainant should be notified in writing that following assessment the Information Commissioner is proposing to close the file but would seek the complainant's view on this. Following any feedback and discussion with the complainant the PID complaint should be closed and the complainant notified in writing that the complaint is not a matter the Information Commissioner can consider. If relevant, the advice to the complainant may make reference to other actions, for example consideration of systemic issues and the forward work program identified by the Information Commissioner.

(g) Complaint is not a PID

Sections 17 and 18 of the PID Act identify matters where the protections of the PID Act do not apply. It is unlikely that a complaint made to the Information Commissioner will be about one of the exclusions.

For the sake of completeness the exclusions are:

- Disclosures principally involving questioning the merits of government policy (section 17 PID Act)
- Disclosures made solely or substantially with the motive of avoiding dismissal or other disciplinary action (Section 18 PID Act)

If a complaint is received relating to one of the above issues then the Information Commissioner would not have jurisdiction to deal with the matter.

Information Commissioner administrative action would be to notify the complainant in writing that following assessment the Information Commissioner has formed a preliminary view the complaint is not a matter that is within her jurisdiction and is proposing to close the file but would seek the complainant's view on this. Following any feedback and discussion with the complainant the PID complaint should be closed and the complainant notified in writing to advise that the Information Commissioner does not have the jurisdiction to deal with the matter.

3. Offences under the GIPA Act

The nature of the complaint may be a matter that may give rise to consideration of one of the five offence under the GIPA Act (sections 116 to 120). Complainants making a PID may, as part of the complaint, allege that one of the offences under the GIPA Act has occurred. The assessment of a

complaint as falling within the protections of the PID would occur as a distinct assessment process which may occur prior to the consideration of whether a person or persons are alleged to have committed one of the offences under the GIPA Act.

It is worth noting that in some circumstances a complainant seeking the protections of the PID Act will allege an offence occurred as it may be the most convenient or simplest way to describe the government information contravention.

The offences 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 this Act.

Section 117 Offence of directing unlawful action

A person (the offender) must not:

- (a) 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 this Act, or
- (b) 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 this Act.

Section 118 Offence of improperly influencing a 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 this 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 records of government information for the purpose of preventing the disclosure of the information as authorised or required by or under this Act is guilty of an offence.

4. Complaint is about a reviewable decision

Section 89(4) of the GIPA Act provides that the conduct of an agency that constitutes a reviewable decision cannot be the subject of a complaint made to the Information Commissioner. Therefore if the complaint is made about a reviewable decision the Information Commissioner is unable to consider the complaint.

Section 80 of the GIPA Act defines reviewable decisions as:

- An application is not valid
- To transfer an access application to another agency

- To refuse to deal with an application (including a deemed refusal)
- To provide access or to refuse to provide access to information
- That information is not held
- That information applied for is already available to the applicant
- To refuse to confirm or deny information is held
- To defer providing access to information
- To provide access in a particular way or not in the way requested
- To impose processing charges or require an advanced deposit
- Refuse reduction in processing charges
- Refuse to deal further with an access application for failure to pay an advance deposit within the time required
- Include information in a disclosure log despite objections.

If the complaint made as a PID identifies a reviewable decision as the basis of the contravention then the Information Commissioner may explore what actions and reviews have occurred as it may be that the Commissioner does not have the jurisdiction to consider the complaint. This is because there is an avenue available to a person to have the decision taken by the public sector agency in relation to the access application reviewed, both internally and externally. If the allegation identified deficiencies in agency conduct in the way an access application is handled then the Information Commissioner may wish to explore these matters further.

It is important to examine the specific nature of the complaint and consider what actions and reviews have occurred including whether the specific nature of the complaint was raised in the Tribunal and what evidence discussion or decisions were made in relation to that complaint.

It is important to make preliminary enquiries including consideration of reports and any relevant transcripts or decisions by the Tribunal, further information and communication with the complainant.

Information Commissioner administrative action if the complaint is about a reviewable decision:

1. The complainant would be notified in writing that following assessment the Information Commissioner has formed a preliminary view the complaint is not a matter that is within her jurisdiction and is proposing to close the file but would seek the complainant's view on this. Following any feedback and discussion with the complainant the PID complaint should be closed and the complainant notified in writing that as the complaint is about a reviewable decision the Information Commissioner is unable to consider the complaint as provided by section 89(4) of the GIPA Act. The notification would include the explanation of what constitutes a reviewable decision, and that section 89(4) applies even in circumstances where the decision had not been reviewed.

5. Anonymous reporting

There will be some situations where a person may not wish to identify themselves when making a complaint. These reports will still be assessed and dealt with by the Information Commissioner. However,

in the absence of identity it will not be possible to provide correspondence or feedback on the outcome of any assessment or investigation of the allegations.

6. Maintaining confidentiality

Section 22 of the PID Act places an obligation on the Information Commissioner, as an investigating authority not to disclose information that might identify or tend to identify or the complainant unless the person consents in writing or has voluntarily identified themselves. Section 22 also provides for the following exceptions to the requirement of confidentiality:

- it is generally known that the reporter has made the public interest disclosure
- it is essential for the identifying information to be disclosed to satisfy the requirements of procedural fairness
- the identifying information needs to be disclosed for the matter to be effectively investigated
- it is otherwise in the public interest for the identifying information to be disclosed

The Information Commissioner will exercise its responsibilities to keeping the identity, and the fact a complainant has reported wrongdoing confidential. However, there may be situations where this may not be possible in considering and assessing the complaint, and it may not be possible to fully assess or manage a complaint where the complainant has requested their identity not be disclosed to the relevant public sector agency.

The initial correspondence with the complainant will seek clarification of whether the complainant consents to their identity being disclosed to the agency they have complained about. It may be relevant to ask the complainant if the matter that they have raised has been raised before or discussed as it could have an impact on the ability for the Information Commissioner to maintain confidentiality.

7. Risk Assessment

A risk assessment is to be conducted for all complaints received by the Information Commissioner. The risk assessment should look to the issues for the person making the complaint, including any proposals to address or mitigate risks for reprisal action. The assessment should also identify all those persons who are aware of the complaint made by the person, as well as any prior complaints made about the same issue, who the complaints were made to and any outcomes.

Often where the complainant has not consented to the disclosure of their identity to the public sector agency they have made the complaint about the potential for putting in place any specific protections to manage reprisal actions are limited.

Penalties can be imposed under the PID Act on anyone who takes detrimental action, substantially in reprisal for the disclosure, against the person who reported wrongdoing.

The criminal penalties that can be imposed include imprisonment or fines. Detrimental action is also misconduct that justifies disciplinary action. People who take detrimental action against someone who has made a disclosure can also be required to pay damages for any loss suffered by that person.

Detrimental action includes:

- injury, damage or loss

- intimidation or harassment
- discrimination, disadvantage or adverse treatment in relation to employment
- dismissal from, or prejudice in, employment
- disciplinary proceedings.

The Information Commissioner will as part of the regular contact and feedback with the complainant seek advice as to whether there appears to be any reprisal actions taken so that these may be managed and addressed at the earliest opportunity.

The following procedures outline the possible pathways that will be considered by the Information Commissioner for dealing with confidential complaints that warrant further examination. These confidential complaints for further examination may be: one assessed as a PID or alternatively a complaint that has, following assessment, not been assessed as a PID

8. Options for consideration of the complaint

Once a complaint has been assessed to be considered as a PID and those provided under the GIIC Act for the Information Commissioner receiving the complaint under section 17, the Information Commissioner has a number of options for considering the complaint.

As identified at page 15 of the NSW Ombudsman's *Oversight of the Public Interest Disclosures Act 1994 Annual Report 2013 – 2014*, public authorities do not always have to formally investigate a report once it has been assessed as a PID. There may be circumstances where dealing with the PID is appropriate through an audit or fact finding investigation. Therefore where a complaint has been assessed as a PID there may be circumstances where the issues identified can be identified through an audit process. For example, complaints about website publications may be an issue where a desktop audit would provide sufficient information to consider the complaint.

The Information Commissioner may under section 18 of the GIIC Act decide to deal with the complaint or decline to deal with the complaint.

If the Information Commissioner decides to deal with the complaint then section 19 of the GIIC Act provides that the Information Commissioner deals with the complaint by taking appropriate measures to assist in the resolution of the complaint including:

- Providing information to the parties to the complaint
- Undertaking discussions with the parties
- Facilitating the direct resolution of the complaint by the parties including by conciliation or other informal processes.

The Information Commissioner may, under section 19(2) of the GIIC Act decide to deal with the complaint by investigating the complaint under sections 22 to 24 of the GIIC Act.

Section 22 of the GIIC Act is the provision allowing the Information Commissioner to investigate a complaint.

9. Case Management plan

All PIDs that have passed the thresholds for consideration as a complaint should have a case management plan. A case management plan will include timeframes, proposed actions and correspondence, file management and confidentiality protections.

The plan should:

- define the issues arising from the complaint
- list the steps involved in dealing with or investigating the complaint and state whether further information is required, either from the complainant or others
- provide an overview of the evidence to be sought
- identify if it may be necessary to interview the complainant or others
- identify any issues arising from a risk assessment and any factors or actions to mitigate the risks
- provide an estimate of the time, where possible it will take to resolve the complaint
- identify the remedy the complainant is seeking, whether the complainant's expectations are realistic or need to be managed through measures including the provision of additional information, and other possible remedies
- note any special considerations that apply to the complaint – for example, if the complainant has asked for their identity to be withheld and if there is sensitive or confidential information that needs to be safeguarded.

A written plan will focus attention on what is to be considered. This will ensure that important matters are not overlooked and that the complaint is considered and managed in a timely and effective way.

A plan also allows the Information Commissioner to review the course of the investigation. This is especially important if the investigation cannot be completed by the officer to whom the complaint was initially assigned. A common cause of inefficiency and delay in complaint investigation is that responsibility for investigating a complaint is passed from one officer to another, without adequate handover or planning.

Planning and conducting an investigation is a dynamic and ongoing process. It is not always possible to know at the outset how an investigation will develop, and more complex investigations can take a long time. It is important to revisit the investigation plan regularly and make adjustments as circumstances change and new information becomes available. It also acts as a reminder for regular contact with the complainant.

10. Resolution of the complaint by informal means

Section 19 of the GIIC Act provides for the Information Commissioner to deal with a complaint to take appropriate measures to assist in the resolution of the complaint. Some of the options open to the Information Commissioner to assist in the resolution of the complaint include:

- Providing information to the parties
- Undertaking discussions concerning the complaint with the parties
- Facilitating the direct resolution of the complaint by way of conciliation or other informal means.

The most appropriate way to deal with the complaint will depend upon the facts of the complaint and any issues around disclosing the identity of the complainant to the agency.

11. Investigation

Section 19 (2) of the GIIC Act provides for the Information Commissioner to deal with a complaint by investigating the complaint. Section 22 of the GIIC Act provides that if the Information Commissioner decides to investigate a complaint the Commissioner must give notice to both the complainant and the agency of the decision to investigate the complaint about the agency. The Commissioner may, at any time discontinue an investigation and if so then both parties (the complainant and the agency) are to be notified.

Section 23 of the GIIC Act outlines the procedures for investigations. If the Information Commissioner is investigating a complaint then:

- The investigation is to be made in the absence of the public
- Opportunities for submissions on the subject matter of the investigation must be given, if practicable to the agency whose conduct is the subject of the investigation and also to the complainant
- If there are grounds for adverse comment in respect of any person, then before the comment is made the Commissioner must inform the person of the substance of the grounds of the adverse comment and give the person the opportunity to make submissions
- Before publishing a report on an investigation that makes an adverse comment in respect of an agency, the Commissioner must inform the Minister responsible for that agency that the Commissioner proposes to publish a report and must at the request of the Minister consult the Minister.

Section 24 of the GIIC Act deals with reports on compliance with an Information Act. This section provides that where the Commissioner in an investigation finds that any conduct of an agency who is the subject of an investigation is conduct that constitutes a failure to exercise its functions properly in accordance with any provision of an Information Act, the Commissioner must report the matter to the following:

- 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 to the Secretary Department of Premier and Cabinet.

The Commissioner may where the investigation has arisen out of a complaint to the Commissioner, 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.

If the Commissioner decides to conduct an investigation into a complaint then an investigation plan would be prepared. This plan would be similar to a case management plan as described above, but will factor in the requirements for the parties to the complaint making submissions and the reporting requirements as outlined.

12. Monitoring and guidance

Even where the Information Commissioner has decided not to investigate a complaint there may be some benefit in providing guidance to the particular agency or agencies generally about matters identified by a complaint.

It also may be an issue that could be considered as part of a later compliance program. This will depend upon the nature of the complaint.

13. Reporting

All agencies are required to report on PIDs to NSW Ombudsman. Reporting is six monthly and PID data is also required in annual reporting.

14. Systemic issues, policies or practices

Some complaints may raise issues that are systemic or identify policies or practices that require some guidance from the Information Commissioner.

If the complaint relates to these types of issues the options available to the Information Commissioner are:

- Resolve the complaint by informal means including providing guidance as described at 10 above.
- Investigate and report on agency systems policies and practices in terms of section 21 of the GIIC Act.

For formal investigations there are obligations outlined by sections 23 and 24 of the GIIC Act. If the Information Commissioner decides to deal with the complaint by conducting an investigation under section 21 of the GIIC Act then the procedural and reporting requirements identified in sections 23 and 24 of the GIIC Act would apply.

These obligations would be identified and factored into any investigation plan developed.

Section 21 of the GIIC Act provides that the Information Commissioner may investigate and report on the exercise of any functions of one or more agencies under an Information Act, including the systems, policies and practices of agencies (or of agencies generally) that relate to agency functions under an Information Act. The Commissioner is to give a report made under section 21 to the Minister responsible any agency to which the report relates as well as the principal officer of the agency.

Section 23 of the GIIC Act outlines the procedures for investigations. If the Information Commissioner is investigating systemic issues, policies or practices then:

- The investigation is to be made in the absence of the public
- Opportunities for submissions on the subject matter of the investigation must be given, if practicable to the agency whose conduct is the subject of the investigation
- If there are grounds for adverse comment in respect of any person, then before the comment is made the Commissioner must inform the person of the substance of the grounds of the adverse comment and give the person the opportunity to make submissions

- Before publishing a report on an investigation that makes an adverse comment in respect of an agency, the Commissioner must inform the Minister responsible for that agency that the Commissioner proposes to publish a report and must at the request of the Minister consult the Minister.

Section 24 of the GIIC Act deals with reports on compliance with an Information Act. This section provides that where the Commissioner in an investigation finds that any conduct of an agency who is the subject of an investigation is conduct that constitutes a failure to exercise its functions properly in accordance with any provision of an information Act the Commissioner must report the matter to the following:

- 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 to the Secretary Department of Premier and Cabinet.

The Commissioner may where the investigation has arisen out of a complaint to the Commissioner, 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.

15. Feedback to the complainant

A person who makes a PID complaint to the Information Commissioner will be told what is happening to their complaint.

When the person makes a PID complaint, the person will be given:

- an acknowledgement that the disclosure has been received
- guidance on what can be expected from the Information Commissioner in considering complaints where possible
- the timeframe for when further updates will be provided
- the name and contact details of the people who can tell the complainant what is happening.

The initial assessment template must be completed within two weeks from the date the report has been received by the Information Commissioner. It is expected that an initial acknowledgement letter would be sent to the person making the complaint within two working days from the date of receiving the complaint.

After a decision is made about how the report will be dealt with, the complainant will be given:

- information about the assessment process
- information that may be required to consider the complaint
- likely timeframes for any investigation
- This information will be given to the complainant within **ten** working days.

During any investigation, the complainant will be given:

- information on the ongoing nature of the investigation, including regular updates, at least monthly

- information about the progress of the investigation and reasons for any delay
- advance warning, and advice will be sought from the complainant, if the complainant's identity is to be disclosed.

At the end of any investigation, the complainant will be given:

- contact regarding proposed outcomes
- enough information to show that adequate and appropriate action was taken and/or is proposed to be taken in response to the disclosure and any systemic issue brought to light.

16. Investigating authorities

The PID Act lists a number of investigating authorities in NSW that wrongdoing can be reported to, and the categories of wrongdoing each agency can deal with.

The investigating authorities (other than the Information Commissioner) are:

- the Auditor-General – for serious and substantial waste
- the Independent Commission Against Corruption (ICAC) – for corrupt conduct
- the Ombudsman – for maladministration
- the Police Integrity Commission (PIC) – for police misconduct
- the PIC Inspector – for disclosures about the PIC or its staff
- the Office of Local Government – for serious and substantial waste in local government agencies
- the ICAC Inspector – for disclosures about the ICAC or its staff.

17. Contacts for investigating authorities

The contact details for other external investigating authorities where the complaint received should be referred to another investigating authority or to seek advice from are listed below.

For disclosures about corrupt conduct:

Independent Commission Against Corruption (ICAC)

Phone: (02) 8281 5999

Toll free: 1800 463 909

Tel. typewriter (TTY): (02) 8281 5773

Facsimile: (02) 9264 5364

Email: icac@icac.nsw.gov.au

Web: www.icac.nsw.gov.au

Address: 7, 255 Elizabeth Street, Sydney NSW 2000

For disclosures about maladministration:

NSW Ombudsman

Phone: (02) 9286 1000

Toll free (outside Sydney metro): 1800 451 524

Tel. typewriter (TTY): (02) 9264 8050

Facsimile: (02) 9283 2911

Email: nswombo@ombo.nsw.gov.au

Web: www.ombo.nsw.gov.au

Address: Level 24, 580 George Street, Sydney NSW 2000

For disclosures about serious and substantial waste:

Auditor-General of the NSW Audit Office

Phone: (02) 9275 7100

Facsimile: (02) 9275 7200

Email: mail@audit.nsw.gov.au

Web: www.audit.nsw.gov.au

Address: Level 15, 1 Margaret Street, Sydney NSW 2000

For disclosures about serious and substantial waste in local government agencies:

Office of Local Government

Phone: (02) 4428 4100

Tel. typewriter (TTY): (02) 4428 4209

Facsimile: (02) 4428 4199

Email: dlg@dlg.nsw.gov.au

Web: www.dlg.nsw.gov.au

Address: 5 O'Keefe Avenue, Nowra, NSW 2541

For disclosures about police misconduct:

Police Integrity Commission (PIC)

Phone: (02) 9321 6700

Toll free: 1800 657 079

Facsimile: (02) 9321 6799

Email: contactus@pic.nsw.gov.au

Web: www.pic.nsw.gov.au

Address: Level 3, 111 Elizabeth Street, Sydney NSW 2000

19. Document information

Title:	Public Interest Disclosure Assessment and Management Guide
Business Unit:	Information and Privacy Commission
Author:	Principal Review Officer
Owner:	
Approver:	Information Commissioner
Date of Effect:	xx 2016
Next Review Date:	
File Reference:	
Key Words:	Public Interest, Disclosure, assessment, management.
Purpose and use:	Document prepared for internal use only

20. Document history

Version	Date	Reason for Amendment
1.0	August 2015	Initial Draft
1.1	September 2015	Incorporate feedback by Information Commissioner
1.2	October 2015	Updated for further feedback from Information Commissioner
1.3	Novemer 2015	Draft for consultation
1.4	February 2016	Updated following consultation from NSW Ombudsman
1.5	April 2016	Revised following Information Commissioner consideration of NSW Ombudsman comments