

Notation added 15 January 2015

Subsequent to the publication of this review report the Information Commissioner's view about whether an internal reviewer can consider the original decision has changed. The Information Commissioner's current view and guidance on internal reviews is set out in the IPC's *Internal Reviews under the GIPA Act* fact sheet.



office of the information commissioner
new south wales

Report about a complaint under the *Government Information (Information Commissioner) Act 2009*

Complainant: Mr Colin Sagers

Agency: Office of Environment and Heritage

OIC reference: 11-361

Date of this report: 8 February 2012

Summary of this report

1. Mr Sagers made a complaint that the Office of Environment and Heritage (OEH) did not comply with section 84(1) of the *Government Information (Public Access Act) 2009* (GIPA Act) when making a decision on internal review.
2. We have considered the issues raised by Mr Sagers' complaint and the interpretation of section 84 of the GIPA Act. We agree that OEH did not comply with section 84(1) of the GIPA Act, because it considered the original decision when making the new determination on internal review.
3. We therefore recommend that OEH make a new decision for Mr Sagers, as if the other decisions had not been made.

Background to the complaint

4. On 26 July 2011, Mr Sagers made an access application to OEH under the *Government Information (Public Access) Act 2009* (GIPA Act).
5. In a notice of decision dated 22 August 2011, OEH advised Mr Sagers of its decision to release most but not all of the information. OEH granted Mr Sagers a 50% discount in processing fees but did not exercise its discretion under section 127 of the GIPA Act to waive the charges in full. The release of the information was conditional upon payment of the processing charges.
6. On 13 September 2011, Mr Sagers asked OEH for an internal review of the decision to impose processing charges. An internal review decision was made on 5 October 2011 and it is OEH's process in coming to that decision that is the subject of Mr Sagers' complaint to us.

7. We received Mr Saggars' request for assistance in relation to OEH's decision on 24 October 2011. In response to enquiries about his request, Mr Saggars told us that he did not want the decision itself reviewed. Rather, he wanted us to investigate the way in which the decision was made and OEH's compliance with section 84(1) of the GIPA Act. Accordingly, we decided to deal with Mr Saggars' request as a complaint made under section 17 of the *Government Information (Information Commissioner) Act 2009* (GIIC Act). We advised OEH and Mr Saggars of this on 31 January 2012.

The complaint

8. The basis of Mr Saggars' complaint is that OEH did not comply with section 84(1) of the *Government Information (Public Access) Act 2009* (GIPA Act) when making a decision on internal review. Mr Saggars submits that the internal review decision was not made as a new decision, but rather as a continuation of the original decision. This is because the internal review decision maker took into account:
 9. the original decision maker's opinion, and
 10. correspondence between Mr Saggars and OEH that occurred after the date of the original access application (26 July 2011).

How we have dealt with the complaint

11. In addressing this complaint, we have:
 - spoken with both parties about the complaint
 - reviewed OEH's internal review decision and other relevant information
 - considered the relevant provisions of the GIPA Act, and
 - set out our view and recommendations in this report.

Our view

12. Section 84 of the GIPA Act provides:

84 Conduct of internal review

- (1) An internal review is to be done by making a new decision, as if the decision being reviewed (the *original decision*) had not been made, with the new decision being made as if it were being made when the access application to which the review relates was originally received.
- (2) An internal review is not to be done by the person who made the original decision and is not to be done by a person who is less senior than the person who made the original decision.

13. Section 84(2) of the GIPA Act sets out the requirements of who can conduct an internal review. OEH complied with section 84(2), as the internal review was done by a person who did not make the original decision and who is more senior than the original decision maker.
14. Section 84(1) of the GIPA Act is not quite so clear and can be interpreted in different ways. Mr Saggars' complaint highlights two aspects of that interpretation:
 - a. Can an internal review decision maker take into account the personal factors of an application if that information was given to the agency after the date of the original application?
 - b. Can an internal review decision maker take into account the agency's original decision?

Consideration of personal factors of the application

15. The internal review decision maker considered information that Mr Saggars provided to OEH in support of his request that the processing charges be waived. He also considered the submissions that Mr Saggars made with his application for internal review.
16. When applying the public interest test and deciding if information can be released to an applicant, section 55 of the GIPA Act provides that a decision maker is entitled to take into account the personal factors of the application, including:
 - (a) the applicant's identity and relationship with any other person,
 - (b) the applicant's motives for making the access application,
 - (c) any other factors particular to the applicant.
17. It is open to a decision maker, on the original application or on internal review, to consider the personal factors of an application. This is particularly important given that personal factors of an application can be considered as factors in favour of releasing information, or in this case in favour of granting a discount.
18. Section 84(1) of the GIPA Act prevents an applicant or an agency from changing the scope of the access application or the nature of the information sought. An internal review decision is to be made based on the requested information as it was at the time that the access application was received, and not on the requested information as it is at the time of internal review. In our view, section 84(1) does not go so far as to prevent an agency from taking into account personal factors of the application because they were raised after the date of the original application. If an applicant provides information to an agency, supplementary to an access application, then it is open to the internal review decision maker to consider that information when making a new decision. This broader interpretation of section 84(1) of the GIPA Act promotes the objects of the Act and a common sense approach to the release of information.

Consideration of the original decision

19. Section 84 of the GIPA Act protects an internal review decision maker from being influenced by the original decision. If a decision maker considers the original decision, they may (albeit inadvertently) rely on the original decision maker's hypothesis or conclusions rather than forming their own independent view.
20. In line with this, and as a matter of good practice, an internal review decision maker should not read or consider the original decision when making a new determination. An internal review decision should be a fresh determination, made as though the original decision does not exist.
21. While the internal review decision is clearly reasoned, it is clear from page 6 of the notice of decision that the internal review decision maker did in fact consider the original decision maker's comments and reasoning. Indeed, the internal review decision maker has quoted from the original decision. The decision therefore does not satisfy section 84(1) of the GIPA Act, as it is not a decision made "as if the decision being reviewed...had not been made".

Resolution of the complaint

22. In our view, this complaint will be best resolved by OEH making a new decision for Mr Saggars. We therefore ask OEH to make a new decision, as if the original decision had not been made. The decision should be made:
 - a) within 15 working days of the date of this report (by 29 February 2012);
 - b) by a person not less senior than the original decision maker, who has had no prior involvement with the matter;
 - c) with regard to any personal factors of the application (including any supplementary information supplied by the applicant); and
 - d) without taking into account the original decision nor the internal review decision.
23. If OEH makes a new reviewable decision, Mr Saggars will have review rights attached to that decision. Mr Saggars will have eight weeks from the date of the new decision to request a review by the OIC or the Administrative Decisions Tribunal (ADT).

Closing our file

24. This complaint is now closed.
25. If you have any questions, please contact the IPC on 1800 472 679.

Level 11, 1 Castlereagh Street, Sydney NSW 2000 • GPO Box 7011, Sydney NSW 2001
t 1800 INFOCOM (1800 463 626) • f 02 8114 3756 • e oinfo@oic.nsw.gov.au

www.oic.nsw.gov.au