NSW GOVERNMENT | Crown Solicitor's Office

Quick Reference Guide

Conducting privacy internal reviews

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Crown Solicitor's Office

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Overview

The *Privacy and Personal Information Protection Act 1998* ("*PPIPA*") and the *Health Records and Information Privacy Act 2002* ("*HRIPA*") regulate the ways in which public sector agencies deal with personal and health information through the adoption of 12 information protection principles ("IPPs") and 15 health privacy principles ("HPPs") which address the collection, use, storage, and disclosure of information.

Individuals who suspect that a public sector agency has not complied with the IPPs and HPPs can apply to the public sector agency for internal review of the relevant conduct.

The jurisdiction of the NSW Civil and Administrative Tribunal to administratively review a public sector agency's[1] conduct is enlivened once an application for internal review is made, and either 60 days have passed or the public sector agency's internal review[2] is completed (whichever occurs sooner).

The Tribunal's role in administratively reviewing a public sector agency's conduct is to "decide what the correct and preferable decision is having regard to the material". While a public sector agency is not bound by its findings of the internal review, care should be taken in conducting an internal review.

A well-conducted internal review may:

- address the concerns an individual may have and, therefore, not result in the individual applying for administrative review in the Tribunal; and
- assist the Tribunal in understanding the scope of the conduct to be reviewed and whether the proceedings should be listed for hearing or mediation.

[1] See *PC v University of New South Wales (GD)* [2005] NSWADTAP 72 at [20]-[21], [29].
[2] See *DQW v Secretary, Department of Family and Community Services* [2019] NSWCATAD 213 at [25].

Determining validity of application for internal review

Under s. 53(1) of *PPIPA*, a person who is "aggrieved" by the "conduct" of a public sector agency is entitled to an internal review of that conduct. "Conduct" includes the contravention or alleged contravention of an applicable IPP or HPP and an applicable privacy code of practice or health privacy code of practice (s. 52, *PPIPA*; s. 21, *HRIPA*).

A person will be "aggrieved" if the conduct has prejudicially affected that person's interests.[3] In other words, it is possible for a person to complain about an agency's handling of another person's personal and/or health information if the person has been specifically and adversely affected by the alleged breach of an applicable IPP or HPP.[4]

Some Tribunal decisions have determined that a person cannot complain about the handling of the person's partner's, friends' or fellow inmate's personal information as the conduct of concern did not involve the person's own personal information.[5] It is not clear whether the Tribunal reached that conclusion on the implicit basis that the person's interests could not be said to have been prejudicially affected by such conduct in some tangible and measurable way.[6] It would therefore be unsafe to rule out any application for internal review on the mere basis that the person was not complaining about the handling of his or her own personal and/or health information. It would therefore be unsafe to rule out any application for internal review on the mere basis that the person was not complaining about the handling of his or her own personal and/or health information.

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[3] *Altaranesi v Administrative Decisions Tribunal* [2012] NSWCA 19 at [52].

[4] See, eg, *KO & Anor v Commissioner of Police, NSW Police* [2004] NSWADT 3 at [18]; *DSG v Department of Education* [2019] NSWCATAD 182 at [97].

[5] See, eg, *DSN v NSW Department of Justice* [2019] NSWCATAD 174 at [58]-[59]. See generally *DVG v Western Sydney Local Health District* [2020] NSWCATAP 78 at [28].

[6] *Waters v Transport for NSW* [2018] NSWCATAD 40 at [119]-[121].

Requirements for an application for internal review

To constitute an application for internal review, the application must, upon face value, reasonably convey to the agency that an application for internal review under *PPIPA* is sought.[7] No particular formality is required and the applicant does not have to refer to the privacy legislation by name or refer to the IPPs or HPPs.[8] There just "needs to be material [including the surrounding context] that can be understood by the agency, fairly read, as connecting the action or circumstances of concern to a principle, whether or not the principle itself is actually specified by the application".[9]

Accordingly, a failure to "sufficiently particularise with the necessary clarity the privacy breaches … to enable … [an agency] to investigate" will render an application for internal review under *PPIPA* invalid.[10] If there has been such a failure, it is considered good practice for agencies to write to the person and ask the person to clarify or provide further particulars about the conduct complained of before refusing to deal with the application on the basis that it has not been sufficiently particularised (that is, invalid).[11] This is because:

- the conduct complained of may be more accurately or specifically identified in subsequent correspondence or discussions between the applicant and the agency;[12] and
- in circumstances where there is doubt as to whether the particularisation of conduct is sufficient, the applicant will be given the benefit of that doubt as there may be limits to the applicant's ability to particularise the conduct (for example, the applicant may not know all the particulars).[13]

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[7] *PC v University of New South Wales (GD)* [2005] NSWADTAP 72 at [28].
[8] *GL v Director-General, Department of Education and Training* [2003] NSWADT 166 at [26].
[9] *CYL v YZA* [2017] NSWCATAP 105 at [58]; *DVG v Western Sydney Local Health District* [2020] NSWCATAP 78 at [28].
[10] *NZ v Commissioner of Police, NSW Police* [2007] NSWADT 263 at [25].
[11] *GA v Commissioner of Police, NSW Police* [2004] NSWADT 254 at [7].
[12] *Department of Education and Training v GA (No.3)* [2004] NSWADTAP 50 at [7].
[13] *BVV v Commissioner of Police* [2020] NSWCATAD 182 at [36].

The absence of any reference to personal or health information, the privacy legislation, IPPs or HPPs or the concept of privacy or the remedy being sought may indicate that a document is an expression of grievance or request for action rather than an application for internal review.[14] This means that an agency does not have to consider every complaint that it receives in terms of the privacy legislation,[15] even if some of the allegations raised could be dealt with under *PPIPA*.[16]

Under s. 53(3) of *PPIPA*, an application for internal review must:

- be in writing;
- be addressed to the agency concerned;
- specify an address in Australia to which notification of the decision may be sent; and
- be lodged at an office of the agency within 6 months (or such later date as the agency may allow) from the time the applicant first became aware of the conduct the subject of the application.

Care should be taken prior to an agency proceeding on the basis that a communication is a "privacy complaint" and not an "application for internal review" under *PPIPA*. The Tribunal has expressed concerns about agencies adopting such a semantic approach and noted that:

> "the only constraint or requirement on a public sector agency that would distinguish a privacy complaint from a privacy Internal Review is the requirement to inform the Privacy Commissioner and the situation where a review not completed within 60 days can be subject to administrative review and the remedies under s 55 (2) of the PPIP Act. In all other respects the

[14] See *CCM v University of Western Sydney trading as Western Sydney University* [2016] NSWCATAP 185 at [18].
[15] *DHU v Commissioner of Police, NSW Police Force* [2018] NSWCATAD 126 at [41]-[53], affirmed on appeal: *DHU v Commissioner of Police* [2018] NSWCATAP 282 at [46].
[16] *CJN v University of Sydney* [2016] NSWCATAD 173 at [31].

> matters are the same. For practical purposes a public sector agency deals with a privacy complaint received in writing as an internal an internal review."[17]

One way to address the risk that an application for internal review is not recognised and properly dealt with is to ask the applicant to elect how he or she would like his or her complaint dealt with after briefly explaining or providing documents that explain the difference between the agency's complaint handling processes and privacy internal review process.

APPLICATION IN WRITING

The Information and Privacy Commission NSW has an internal review application form on its website which may be used to apply for an internal review. Some agencies also have their own internal review application forms. However, it is not necessary for a person to use a form: as long as the application is made in writing to the agency (e.g. by email), this is sufficient to enliven an agency's obligation to conduct an internal review.

ADDRESSED TO THE AGENCY CONCERNED

It will not always be straightforward to determine which public sector agency is responsible for the conduct complained of.[18] While an agency can only act through its officers, there may be situations where an officer may be employed and/or engaged by more than one agency and situations where one agency has delegated its functions to another. Accordingly, regard may need to be had to documents recording the arrangement, such as any instruments of delegations, memoranda of understanding or exchange of lettersto determine the agency responsible for the conduct complained of.

[17] See *DPD v Far West Local Health District* [2020] NSWCATAD 141 at [56].
[18] See *APV v Department of Family and Community Services (NSW)* [2014] NSWCATAD 9 at [14]-[15].

However, if it is clear that the application for internal review has been lodged with the incorrect agency, then it is important to note that there are no express mechanisms for an agency to refer an application of internal review under *PPIPA* to the correct agency such as there are for access applications made under the *Government Information (Public Access) Act 2009*.[19]

While it could be argued that s. 27A(b)(ii) of *PPIPA* applies to exempt public sector agencies from breaching the prohibition against disclosure of personal information in s. 18 of *PPIPA* if they were to forward an application for internal review to the appropriate public sector agency, there is no decision accepting that an "inquiry" in s. 27A(b)(ii) includes an "application for internal review". Accordingly, the much safer approach would be to either:

- advise the applicant that the conduct complained of in his or her application is not the public sector agency's but appears to be of another agency, and therefore the applicant should lodge an application with that other agency; or
- seek the applicant's consent to forward his or her application for internal review to the appropriate agency prior to doing it.[20]

LODGED WITHIN 6 MONTHS OF WHEN THE APPLICANT FIRST BECAME AWARE OF THE CONDUCT

An agency should clarify at an early stage when the applicant first became aware of the relevant conduct, since the agency may otherwise be deemed to have "allowed" a late application to be made (for example, if it writes to the applicant saying when it expects the internal review to be completed[21] or undertakes the internal review).[22] Such allowance may enable the applicant to seek administrative review of the conduct in the

[19] See Div. 2 of Pt 4 of the *Government Information (Public Access) Act 2009.*
[20] See generally *EMF v Cessnock City Council* [2021] NSWCATAD 219 at [40(4)], [95]-[96], although the decision is the subject of an appeal.
[21] See, eg, *JW v Pittwater Council* [2009] NSWADT 4 at [31] and [35].
[22] See, eg, *DVG v Western Sydney Local Health District* [2019] NSWCATAD 237 at [25].

Tribunal, when the applicant previously would not have been able to do so if the applicant is dissatisfied with the internal review.

One way to minimise the risk that conduct that is otherwise out of time is inadvertently considered in an internal review is to draw a chronology setting out the various relevant dates. A template of such a chronology, which also includes other relevant dates and steps to be taken is set out in the Appendix.

An applicant only becomes "aware of conduct" when the applicant is aware that:

- the fact of event has occurred; and
- there has been a possible breach of an agency's obligations under *PPIPA* and *HRIPA*.[23]

It will generally not be sufficient for a person's awareness of the relevant conduct of an agency to be imputed or constructive awareness. For example, it will not be sufficient for a person's agent to be merely aware of the relevant conduct. The person's agent must have become aware of the conduct in circumstances where: that knowledge is material to the purpose for which the agent has been appointed and was received while the agent was acting in the course of, and within the scope of, the agent's authority; and the agent has a duty to communicate that information to the person before the person will be regarded as being "aware" of the conduct because his or her agent is aware for the purposes of *PPIPA*.[24]

It is not relevant to the assessment of whether a person was aware of the agency's conduct whether or not the person was aware of the six-month time limit to lodge an application for an internal review,[25] although I note that there are some Tribunal decisions of questionable correctness that suggest that it might be.[26]

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[23] *Department of Education and Training v EM* [2011] NSWADTAP 4 at [13]-[15].
[24] See *DTN v Commissioner of Police (No 2)* [2020] NSWCATAD 107 at [41].
[25] *CTH v University of New South Wales* [2017] NSWCATAD 244 at [26].
[26] See, eg, *ALZ v Lismore City Council* [2013] NSWADT 154 at [33].

The Tribunal does not have any jurisdiction to *administratively review* an agency's decision not to accept a late internal review application.[27] The Tribunal does, however, have jurisdiction to consider whether an internal review application was, in fact, late.[28]

However, it is possible that the applicant may apply for *judicial review* of the decision not to accept his or her internal review application out of time. Therefore, it would generally be good practice to provide the applicant:

- with an opportunity to explain why an extension of time should be granted, even if the Tribunal cannot review that decision; and
- a brief explanation as to why the internal review application has not been accepted out of time.

[27] *CCM v Western Sydney University* [2019] NSWCATAP 103 at [88].
[28] *EN v University of Technology, Sydney* [2009] NSWADT 50 at [23].

Conducting an internal review

After determining that there is a valid internal review application, the following are key questions that arise when conducting an internal review:

- Is the reviewer able to deal with the application?
- What is the scope of the internal review?
- Has the Privacy Commissioner been notified?
- How should I approach the fact-finding investigation?

It is important to note that the internal review must be completed as soon as is reasonably practicable and not necessarily within 60 days (s. 53(6) of *PPIPA*).[29] If the internal review is not completed within 60 days, the applicant may apply to the Tribunal for administrative review of the conduct prior to the internal review being completed.

There is no need to write to the applicant to seek his or her consent to an "extension" if the agency is not able to complete the internal review within 60 days.[30] However, it is good practice to notify the applicant of the delay to manage the applicant's expectations and limit the risk that the applicant applies for administrative review prior to the internal review being completed, although the Tribunal may direct an agency to prepare a document in the nature of an internal review.[31]

Is the reviewer able to deal with the application?

The person conducting the internal review should be, as far as practicable, an employee or officer of the agency who was not substantially involved in any matter relating to the conduct the subject of the application and who is otherwise suitably qualified (s. 53(4) of *PPIPA*). In very small agencies, it may be unavoidable that the person conducting the internal review will have had some involvement in the conduct complained of.

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[29] See *EMF v Cessnock City Council* [2021] NSWCATAP 234 at [104]-[106].
[30] Contra s. 57(4) of the *Government Information (Public Access) Act 2009*.
[31] *CZG v Western Sydney Parklands Trust [*2017] NSWCATAD 352 at [3].

If it is not practicable for anyone in the agency to conduct the internal review, the agency can ask:

- the Privacy Commissioner, who may charge an appropriate fee for providing that service (s. 54(3)-(4)); or
- based on some Tribunal decisions, an external reviewer (such as a lawyer or a privacy consultant), particularly where allegations of bias or similar are made against all employees of an agency.[32]

While it has not be determined, it is likely that s. 54(5) of *PPIPA* merely clarifies that, if the Privacy Commissioner is asked to undertake an internal review on behalf of an agency under s. 54(3), an agency is still expected to consider what action it should take following the internal review completed by the Privacy Commissioner and to communicate its findings and proposed actions to the applicant.

What is the scope of the internal review?

It is important to identify the scope of the internal review application. This is both so the agency can deal with it effectively, and because the applicant can later apply to the Tribunal to review conduct that was within the scope of the internal review.[33]

DETERMINING THE CONDUCT

Determining the scope of the application includes deciding which privacy principles are engaged. A request for internal review should not be narrowly construed[34] and conduct will be the subject of the internal review application if it would have been apparent to a reasonable person conducting the internal review.[35]

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[32] *CRE v Blacktown City Council* [2017] NSWCATAD 285 at [67]-[68]; see also *EHW v Secretary, Department of Education* [2021] NSWCATAD 225 at [3].

[33] See, eg, *KO v NSW Police* [2005] NSWADTAP 56 at [13].

[34] *JD v Department of Health* [2004] NSWADT 7 at [38].

[35] *Office of Finance and Services v APV* [2014] NSWCATAP 88 at [42].

In determining the conduct complained of in the application for internal review, regard should be had to:

- the words used in the internal review application
- the correspondence/interactions between the applicant and respondent prior to the internal review application being lodged; and
- the obligation of the agency to conduct an internal review under s. 53 of *PPIPA*.

In determining the scope of the internal review, the Tribunal will also have regard to the agency's consideration of material subsequently provided by the applicant (notwithstanding that the mere provision of documents by an applicant does not demonstrate that the agency has widened the scope of an internal review) and the contents of the internal review report/decision.[36]

The Tribunal has held that the conduct complained of in an internal review application may include conduct that was discovered by the agency in undertaking the internal review that may breach some other IPP or HPP (for example, if an applicant complained about the sending of some correspondence and it is discovered during the internal review that there are some inaccuracies in the correspondence relating to the applicant's personal information).[37]

DETERMINING THE APPLICATION OF PPIPA *AND/OR* HRIPA

Once the conduct complained of is understood, an agency should have regard to whether either *PPIPA* or *HRIPA* or both apply to the alleged conduct. This will require consideration of whether the information the subject of the application is personal information, health information or a mixture of both. If it is neither, there can be no breach of the IPPs or HPPs.

[36] *ALL v Sydney Local Health District* [2020] NSWCATAD 174 at [58] and [63].
[37] See, eg, *DPD v Far West Local Health District* [2020] NSWCATAD 141 at [33].

The Privacy Commissioner has suggested that agencies should "first seek advice from the IPC as to the extent of which the exemption" from the statutory definition of personal information in *PPIPA* and *HRIPA* applies before relying on them.[38]

Some internal review application forms prompt an applicant to identify the IPPs and/or HPPs being complained of by asking the applicant to tick the corresponding box(es). However, the mere ticking of a box by the applicant does not require the agency to accept that the ticked IPP and/or HPP is relevant to the conduct being considered or limit the IPP and/or HPPs that the agency may consider in the internal review.[39] The agency is required to address any contravention of an IPP or a HPP that is reasonably open on a reading of the entire application for internal review.

Once the agency has determined whether the IPPs and/or HPPs are relevant, it can work out whether these were applicable to the particular factual scenario and, if so, whether they were breached.

Acknowledgement of receipt of an internal review application

It is good practice for agencies to write to the applicant after determining the application for internal review is valid informing the applicant:

- the agency's understanding of the scope of the internal review (including the contraventions of the IPPs and HPPs to be considered);
- who is conducting the internal review and the person's ability to conduct an independent and impartial review;
- when the applicant will be given an opportunity to submit any additional material (s. 53(5)(a));
- when it is anticipated that the internal review will be completed;

[38] See Information and Privacy Commission New South Wales, "Checklist for Agencies: Conducting a Privacy Internal Review" (as at April 2020 <https://www.ipc.nsw.gov.au/sites/default/files/2021-10/Checklist_Privacy_internal_review_April_2020.pdf>.
[39] See *Department of Education and Training v GA (No.3)* [2004] NSWADTAP 50 at [13]- [14], [17].

- that the applicant can apply to the Tribunal for administrative review if the internal review has not been completed within 60 days of it being received as a valid internal review application; and
- that the Privacy Commissioner will be contacted and provided with a copy of the internal review application and draft report.

Interaction with the Privacy Commissioner

Under s. 54 of *PPIPA,* the agency is required to notify the Privacy Commissioner of the application as soon as practicable after receiving it, to keep the Privacy Commissioner informed of the progress of the internal review, and to inform the Privacy Commissioner of the outcome of the review to enable the Privacy Commissioner to fulfil her obligations under s. 36,[40] such as monitoring and complaint handling under Pt 4 of *PPIPA*.

This provision "envisages that the Privacy Commissioner is to receive information from agencies before the internal review is formally completed and the relevant report has been sent to the complainant. This means that when an agency completes its fact-finding and has draft findings of fact and proposed actions, these are to be provided to the Privacy Commissioner."[41]

However, it is important to note that s. 54 does not authorise an agency to disclose all the personal information it holds about the applicant to the Privacy Commissioner.[42] Rather, it authorises the disclosure of personal information in or related to determining the application for internal review to the Privacy Commissioner.[43]

[40] *EEC v Federation Council (No 2)* [2021] NSWCATAD 241 at [71].
[41] *EEC v Federation Council (No 2)* [2021] NSWCATAD 241 at [73].
[42] *JD v Medical Board (NSW)* [2008] NSWADT 67 at [47].
[43] *ALZ v SafeWork NSW* [2017] NSWCATAP 51 at [117].

Conducting the fact-finding investigation

An internal review is a fact-finding investigation, "whereby the reviewer accumulates evidence and material to the extent necessary to make a factual finding in respect of the alleged conduct (the conduct under review) and then applies those findings to the relevant provisions of the PPIP Act [or *HRIPA*]. After considering the statutory provisions and the availability (or otherwise) of various exemptions, the reviewer then makes a series of findings in respect of the IPP's and ensuing recommendation".[44]

EVIDENCE AND MATERIAL TO BE ACCUMULATED AND REVIEWED

While it is open to an agency to eventually find that there is insufficient evidence to suggest that the conduct complained of has occurred, it is important that the internal review be thorough, including by "obtaining a full statement as to what occurred from any officer with direct knowledge"[45] and others who are not officers of the agency with direct knowledge.[46] Accordingly, in order to conduct the review, the agency would generally need to interview the key people who can or can reasonably be expected to be able shed light on the privacy complaint.

It is possible that a person being interviewed as part of the internal review process may find the process stressful and the internal reviewer should take steps to minimise that stress, including by:

- providing a list of questions that are proposed to be asked before the interview; and
- permitting a support person (who is not a relevant person to the conduct being investigated) to be present.

[44] *CRP v Department of Family and Community Services* [2017] NSWCATAD 164 at [7]; *BKM v Sydney Local Health District* [2015] NSWCATAD 87 at [21],
[45] *WL v Randwick City Council* [2007] NSWADTAP 58 at [11].
[46] *EEC v Federation Council* [2020] NSWCATAD 169 at [31].

There would generally not be a breach of any IPPs and HPPs from any persons being interviewed disclosing personal or health information to the internal reviewer for the purposes of an internal review being conducted.[47]

The agency is required to take into account any relevant material submitted by the applicant and the Privacy Commissioner (s. 53(5)) and, depending on the IPP and/or HPP alleged to have been breached, may have regard to the agency's policy and procedures documents or user guides. However, an agency is not required to adopt the Privacy Commissioner's views.[48]

It is good practice to keep a record of all the material considered in the internal review (including by keeping them in a separate folder) so that:

- it is easy to set out what was considered in the internal review report, which assists in understanding the basis of the agency's factual findings; and
- if administrative review proceedings are commenced in the Tribunal, the task of compiling the documents to be lodged pursuant to s. 58 of the *Administrative Decisions Review Act 1997* will be relatively straightforward.

DETERMINING WHETHER THERE HAS BEEN A BREACH OF AN IPP AND HPP

The agency must then make findings as to what occurred and decide whether the agency's conduct contravenes any IPPs or HPPs.

Before making a finding, it is good practice to break down an IPP and HPP to its elements to ensure that all the elements have been satisfied before deciding that there has been a prima facie breach.[49] For example, the provision of personal information to a third person who is already aware of that information would not breach s. 18 of *PPIPA*.

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[47] *GA v Department of Education and Training (No 2)* [2005] NSWADT 119 at [16]-[17].
[48] See Information and Privacy Commission New South Wales, "Guidance: The Privacy Commissioner's oversight role in internal reviews of privacy complaints under Part 5 of the Privacy and Personal Information Protection Act 1998" (as at December 2016), p. 6 <https://www.ipc.nsw.gov.au/sites/default/files/file_manager/2016.12.13_Oversight_Role.pdf>.
[49] See, for example, *DTJ v NSW Ministry of Health* [2020] NSWCATAD 65 at [37], which listed the elements for a breach of s. 17 of *PPIPA*.

If all the elements are satisfied, regard should then be had to whether non-compliance with the IPP or HPP is otherwise exempt, including by considering whether any exemptions apply, whether there are any privacy codes of practices that modify the application of the IPP or HPP, or whether there are any public interest directions.

Determining what action to take

Once the agency has completed the review, it may do any one or more of the following (s. 53(7) of *PPIPA*):

- take no further action (for example, if the agency finds that the complaint is not substantiated);
- make a formal apology to the applicant;
- take appropriate remedial action (for example, payment of monetary compensation); or
- implement administrative measures to ensure that the conduct will not occur again.

If it is determined that an apology should be provided,[50] it would be best practice for the agency to offer it at the earliest possible time, upon completion of the internal review which verified the breach.[51]

While there is no express limit on the monetary compensation that an agency can pay under s. 53(7) of *PPIPA*, there is a limit on how much the Tribunal can award an applicant on review (namely, $40,000), which is a useful reference point for agencies deciding whether to pay a person compensation after finding that there has been a breach of an IPP or a HPP.

[50] Ombudsman NSW, "Apologies; A Practical Guide" (as at March 2009) <https://www.ombo.nsw.gov.au/__data/assets/pdf_file/0013/1426/Apologies_A-practical-guide.pdf>.
[51] *DQP v Commissioner of Police, NSW Police Force* [2019] NSWCATAD 201 at [62] and [85], [92].

Administrative measures may include: undertaking reasonable searches of the agency's files and correcting any inaccuracies in the applicant's personal or health information;[52] training for employees or contractors, improving systems and processes to prevent the breach occurring again and removing of access rights to information systems.[53]

[52] *DTN v Commissioner of Police (NSW) (No 2)* [2020] NSWCATAD 227 at [44].
[53] *EEC v Federation Council (No 2)* [2021] NSWCATAD 241 at [68].

Reasons for findings of internal review and actions proposed to be taken

The agency must notify the applicant of the following as soon as practicable (or in any event within 14 days of completion of the review) (s. 53(8)):

- the findings of the review (and the reasons for these);
- the action proposed to be taken by the agency (and the reasons for this); and
- the right of the person to have those findings and the agency's proposed action reviewed by the NCAT.

While there is no prescribed way as to how the notification should take place, it generally occurs by way of a letter and/or an investigation report. The Tribunal has made the following observation as to what the letter and/or investigation report should generally contain:

> "Typically, agencies complete internal reviews in the style of investigation reports that contain:
>
> - an account of the complaint(s);
> - the evidence gathered and considered;
> - an assessment of that evidence, including its veracity and credibility;
> - findings of fact arising from an assessment of the evidence;
> - conclusions as to whether or not the agency contravened its privacy obligations;
> - actions proposed to be taken."[54]

[54] *EEC v Federation Council (No 2)* [2021] NSWCATAD 241 at [66]. See also Information and Privacy Commission New South Wales, "Guidance: The Privacy Commissioner's oversight role in internal reviews

Moreover, while not directly applicable, under s. 49(3) of the *Administrative Decisions Review Act 1997*, a public sector agency is required to address the following in its reasons for an administratively reviewable decision that is provided following a request from an interested person:

> "The statement of reasons is to set out the following:
>
> a) the findings on material questions of fact, referring to the evidence or other material on which those findings were based
>
> b) the administrator's understanding of the applicable law
>
> c) the reasoning processes that led the administrator to the conclusions the administrator made."

It would be preferable for any letter or report provided by an agency for the purposes of s. 53(8) of *PPIPA* to also satisfy the requirements in s. 49(3) of the *ADR Act* as the agency's understanding of how *PPIPA* and/or *HRIPA* applies and its reasoning process may at least assist the applicant understand the outcome of the review.

It is important to note that the facts, as set out in the internal review report, will ordinarily provide the main evidence for the Tribunal as to what occurred, if the applicant applies to the Tribunal for review of the relevant conduct.[55] For that reason, it is expected that the identity of the individuals consulted or interviewed during the internal review and why they were consulted or interviewed, and what relevant information was provided by those individuals will be set out in the internal review report.[56]

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of privacy complaints under Part 5 of the Privacy and Personal Information Protection Act 1998" (as at December 2016), p. 11 <https://www.ipc.nsw.gov.au/sites/default/files/file_manager/2016.12.13_Oversight_Role.pdf>.

[55] *Roads and Maritime Services v AF* [2011] NSWADTAP 63 at [36].

[56] *EEC v Federation Council* [2020] NSWCATAD 169 at [32].

Where to go for help

This quick reference guide has been developed to supplement your attendance at the CSO's Conducting Privacy Internal Reviews course.

Further information and assistance on conducting internal reviews and your agency's privacy obligations may be found by approaching your agency's legal or privacy officers, the Information and Privacy Commission NSW (ipcinfo@ipc.nsw.gov.au/1800 472 679) or our key CSO privacy contacts (below).

CSO Privacy Contacts

John McDonnell
Assistant Crown Solicitor
E: john.mcdonnell@cso.nsw.gov.au
T: 02 9474 9219

Paolo Buchberger
Director
E: paolo.buchberger@cso.nsw.gov.au
T: 02 9474 9247

Tram Nguyen
Senior Solicitor
E: tram.nguyen@cso.nsw.gov.au
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Appendix: Chronology of key events

The table below sets out the key dates of events or communications that should generally be tracked when conducting an internal review s. 53 of *PPIPA*. Depending on the factual circumstances of each internal review, some rows may be unnecessary or the order of the rows in the table may need to change.

Date	**Event description**	**Source material**
DD MM YY	Date conduct of concern is said to have occurred	• Internal review application • Prior or follow up correspondence
DD MM YY	Date applicant says he or she became aware of the conduct	• Internal review application • Prior or follow up correspondence
DD MM YY	**Date internal review application is lodged**	• **Will depend on how the internal review application was received**
DD MM YY (60 days from when applicant became aware of conduct of concern)	Last date that any conduct stated in the internal review application can be the subject of the internal review without the agency granting an extension of time.	• s. 53(3)(d) of *PPIPA*

Date	Event description	Source material
DD MM YY	Email/Letter sent to applicant seeking to clarify the scope of the internal review and/or requesting particulars if scope of internal review is uncertain	
DD MM YY	Email/Letter sent to applicant confirming scope of internal review to be conducted (including whether or not an extension of time to complain about any of the conduct will be granted) and inviting the applicant to provide material by a certain date	
DD MM YY	Agency advises the Privacy Commissioner that it has received the internal review application.	
	Reviewing documents and/or scheduling conferences with relevant witnesses in the agency	• Copies of documents reviewed (for example, any relevant correspondence, policy documents, guidelines or handbooks) • File notes of conversations with witnesses and/or witness statements

Date	Event description	Source material
DD MM YY	Due date for applicant to provide material/information for consideration in internal review	
	Drafting internal review report and recommending actions to be taken	
DD MM YY (generally 5-6 weeks after date internal review application received)	Provide draft internal review report to Privacy Commissioner for comment	
DD MM YY	Submissions from the Privacy Commissioner's delegate are received	• IPC submissions
	Time spent considering and addressing Privacy Commissioner's submissions	
DD MM YY	**60 days from when internal review application is received (if internal review application is not completed, date letter is sent to applicant advising them of the delay and that they can apply for external review in NCAT)**	• s. 53(6) of *PPIPA*

Date	Event description	Source material
DD MM YY	Date internal review report is finalised and applicant advised of findings and proposed actions	
DD MM YY	Finalised internal review report is provided to the Privacy Commissioner	