

Public interest determinations

This resource provides an overview of public interest determinations (**PIDs**) made under section 29 of the *Privacy and Data Protection Act 2014* (Vic) (**PDP Act**) and the process of making an application to the Office of the Victorian Information Commissioner (**OVIC**).

What is a public interest determination?

A PID is a written determination made by the Information Commissioner (**the Commissioner**) permitting one or more Victorian public sector organisations to engage in acts or practices that may otherwise breach the Information Privacy Principles (**IPPs**) or an approved code of practice.

A PID can be made where the Commissioner is satisfied that the public interest in an organisation doing an act or engaging in a practice substantially outweighs the public interest in complying with specified IPPs, except in relation to IPP 4 – Data Security or IPP 6 – Access and Correction, or an approved code of practice.

What is the meaning of ‘public interest’?

There is no set definition of ‘public interest’. Deciding what is in the public interest involves a case-by-case consideration of the relevant context and circumstances.

It is important to note that the interests of the government are distinct from those of the public.¹ This distinction is important where an act or practice may allow an organisation to work more conveniently and efficiently if granted a PID, but it is nonetheless not in the interests or to the benefit of the public.

The Commissioner will carefully distinguish between an act or practice that benefits an organisation as opposed to the public.

Weighing of opposing public interests

Determining where the ‘public interest’ lies in a PID application involves weighing the public interest in the organisation doing the act or engaging in the practice against the public interest in complying with the specified IPP or approved code of practice.

The public interest in doing the act or engaging in the practice must substantially outweigh the public interest in complying with the specified IPP or approved code of practice.

What is the meaning of ‘substantially outweighs’?

‘Substantially outweighs’ does not have a precise definition, however as it is used in a weighing exercise, the word ‘substantially’ should be interpreted as meaning ‘large, weighty or big’² relative to the competing interest under consideration. There is no fixed standard of comparison.³

Consequently, once satisfied that there is a substantial difference between the weight of matters being compared, the Commissioner will decide how to balance the respective weights.

What is the difference between a PID and temporary PID?

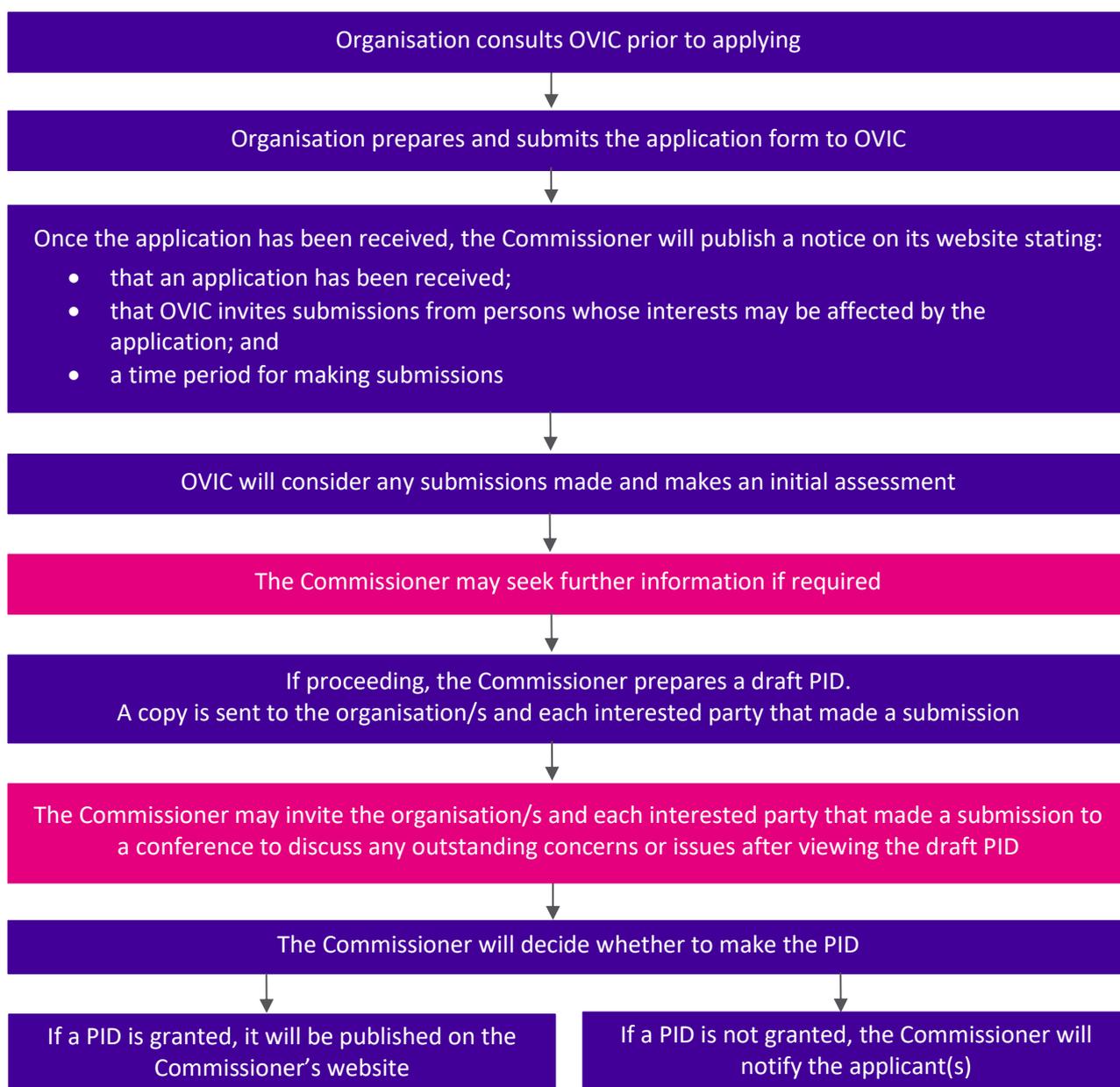
PIDs and temporary public interest determinations (**TPIDs**) are closely related mechanisms. The key differences between PIDs and TPIDs are:

- PIDs are required to go through a public consultation process before being made. A TPID may be made without any public consultation due to it being required in urgent circumstances; and
- PIDs remain in force until any specified expiry date, it is revoked by the Commissioner, or disallowed by Parliament. TPIDs can last no more than 12 months.

If requested by an organisation, the Commissioner may first deal with an application for a PID as if it were an application for a TPID. This enables a TPID to be granted in the interim, while the application for a PID progresses.

See OVIC's [guidance on TPIDs for more information](#).

What is the PID application process?



Who can apply for a public interest determination?

One or more organisations subject to Part 3 of the PDP Act may apply to the Commissioner for a PID. This includes all public sector agencies, councils, and statutory authorities.⁴

Consultation with OVIC

Organisations are encouraged to consult with OVIC before applying for a PID. This will enable OVIC to consider whether a PID is necessary, or whether some alternative act or practice could be pursued to avoid breaching an IPP or approved code of practice.

Contact OVIC via email: policyteam@ovic.vic.gov.au to arrange a meeting and discuss potential options.

How to apply

Organisations must complete the [application form](#) and submit it to OVIC via email: policyteam@ovic.vic.gov.au.

A request should also be accompanied by supporting documentation. This may include a copy of any legal advice received on the matter, a privacy impact assessment and policy documents. The Commissioner may request other supporting materials to accompany the application.

Receipt of application

When the application is received, the Commissioner is required to publish, as the Commissioner thinks fit, a notice on OVIC's website that includes the following details:⁵

- that an application has been received;
- an invitation to persons whose interests would be affected by the determination to make submissions in relation to the application; and
- the time period for making submissions in relation to the application. At a minimum, the Commissioner will allow seven days for submissions to be made.

The notice will also include a summary of the background to the application and what the application seeks.

Assessment of application

The Commissioner may make a PID if satisfied the public interest in the organisation doing the act or engaging in the practice substantially outweighs the public interest in complying with the specified IPP or approved code of practice.⁶

In deciding whether to make a PID, the Commissioner must have regard to the following factors:⁷

- whether not permitting the organisation to do the act or engage in the practice would be in the public interest;
- the objects of the PDP Act;

- any submissions received from interested persons; and
- any matters raised before the Commissioner if a conference was held.

Draft determination

If the Commissioner is inclined to make a PID, a draft PID must be prepared, and a copy sent to the organisation and each interested person who has made a submission (if any).⁸ The draft PID will include an evaluation of the public interest arguments that have been assessed to date.

Conference

The Commissioner may invite the organisation, and any person who has made a submission, to attend a conference about the draft determination.⁹ Unless there are clear reasons to do so, or significant issues are raised in relation to the draft PID, the Commissioner will generally not hold a conference before determining to make the PID.

Final determination

If the Commissioner is of the view that the public interest in the organisation doing the act or engaging in the practice substantially outweighs the public interest in complying with the specified IPP or approved code of practice, the Commissioner will make the PID.

A PID must include a statement of reasons for making the determination.¹⁰

If the Commissioner does not grant the PID, the applicant or applicants will be notified of this decision and the reasoning for not granting the PID.

Publication

Where a PID is made, it must be published on the Commissioner's website and remain there until:¹¹

- the expiry date specified in the PID;
- the PID is revoked; or
- the PID is disallowed by Parliament.

Disallowance of determinations

It is important to note that both PIDs and TPIDs may be disallowed by either House of Parliament.

Once a determination has been made by the Commissioner, it must be sent to the Scrutiny of Acts and Regulations Committee and tabled before both Houses of Parliament for review. This allows Parliament appropriate oversight of the Commissioner's power to make PIDs and TPIDs, which modify the operation of Victorian legislation.

What are the reporting requirements?

An organisation that is subject to a PID must report to the Commissioner annually and at any other time as requested by the Commissioner. Within 60 days of receiving such a report, the Commissioner must then review the PID and consider whether to revoke or amend it.¹²

What if a privacy complaint is made?

A complaint cannot be made about an act or practice that is undertaken in accordance with a PID.¹³

Can a PID be amended or revoked?

Amending a PID

An organisation that wishes to amend their existing PID may apply to the Commissioner for approval¹⁴ by effectively going through the same application process as for their original PID application, with any necessary modifications considering the amendments sought.¹⁵

Revocation of a PID

The Commissioner must revoke a PID if satisfied that:¹⁶

- the public interest in the organisation doing the act or practice no longer substantially outweighs the public interest in complying with the IPP or approved code of practice specified in the PID; or
- the reasons set out in the application for the determination no longer apply.

Before revoking a PID, the Commissioner must give the organisation written notice of the intention to revoke, with reasons, and allow the organisation an opportunity to make a submission outlining why the PID should not be revoked. The submission must be considered within any period stated in the notice before effecting a revocation.¹⁷

¹ Re Bartlett and Department of Prime Minister and Cabinet (1987) 12 ALD 659.

² *Tillmanns Butcheries Pty Ltd v AMIEU* (1979) 42 FLR 331 (quoting *Palser v Grinling* [1948] AC 291 at 317).

³ See *Pfennig v The Queen* [1995] HCA 7; (1995) 182 CLR 461 at 528; and *HML v The Queen* [2008] HCA 16; (2008) 235 CLR 334 at 355 [14].

⁴ See section 13 of the PDP Act to determine if an organisation is captured.

⁵ PDP Act section 29(4).

⁶ PDP Act sections 29 and 31(1).

⁷ PDP Act section 31(2).

⁸ PDP Act section 29(5).

⁹ PDP Act section 29(6).

¹⁰ PDP Act section 31(3).

¹¹ PDP Act section 31(4).

¹² PDP Act section 36.

¹³ PDP Act sections 32 and 57(1)-(2).

¹⁴ PDP Act section 34(1).

¹⁵ PDP Act section 34(2).

¹⁶ PDP Act section 35.

¹⁷ PDP Act section 35(2).

Disclaimer: The information in this document is general in nature and does not constitute legal advice.