

## Temporary public interest determinations

This resource provides an overview of temporary public interest determinations (**TPIDs**) made under section 37 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 temporary public interest determination?

A TPID 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 TPID can only be made in urgent circumstances where 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.

A TPID can operate for no longer than 12 months.

### Urgent circumstances

A TPID can only be made where the “circumstances require that a determination be made urgently”.<sup>1</sup> An urgent circumstance can be defined as one that is “pressing; compelling or requiring immediate action or attention; imperative”.<sup>2</sup>

Noting this definition, whether a matter is considered urgent or not will depend on the particular circumstances and surrounding context of the matter.

### What is the meaning of ‘public interest’?

There is no 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.<sup>3</sup> This distinction is important where an act or practice may allow an organisation to work more conveniently and efficiently if granted a TPID, 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 TPID 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’<sup>4</sup> relative to the competing interest under consideration. There is no fixed standard of comparison.<sup>5</sup>

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 TPID and PID?

TPIDs and public interest determinations (**PIDs**) are closely related mechanisms. The key differences between TPIDs and PIDs 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 PIDs](#) for more information.

## What is the application process?



## Who can apply for a temporary public interest determination?

One or more organisations subject to Part 3 of the PDP Act may apply to the Commissioner for a TPID. This includes all public sector agencies, councils, and statutory authorities.<sup>6</sup>

### Consultation with OVIC

OVIC acknowledges that in urgent circumstances organisations may not have time to consult with OVIC before submitting an application.

However, where circumstances permit, organisations are encouraged to consult with OVIC before applying for a TPID. This will enable OVIC to consider whether a TPID 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 at: [policyteam@ovic.vic.gov.au](mailto: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 at: [policyteam@ovic.vic.gov.au](mailto:policyteam@ovic.vic.gov.au).

If relevant, 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 as they see fit.

### 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 stating that an application has been received. The notice will also include a summary of the background to the application and what the application seeks.<sup>7</sup>

### Assessment of application

The Commissioner may make a TPID if satisfied that:

- the public interest in the organisation doing the act or engaging in the practice substantially outweighs the public interest in complying with the relevant IPP or approved code of practice; and
- the application raises matters that require that a determination be made urgently.<sup>8</sup>

In deciding whether to make a TPID, the Commissioner must have regard only to the following factors:<sup>9</sup>

- whether not permitting the organisation to do the act or engage in the practice is in the public interest; and
- the objects of the Act.

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 TPID.

A TPID must include a statement of reasons for making the determination.<sup>10</sup>

## Publication

Where a TPID is made, it must be published on the Commissioner's website and remain there until:<sup>11</sup>

- the expiry date specified in the TPID;
- the TPID is revoked;
- the TPID is disallowed by Parliament; or
- if a PID is subsequently made, the date from which it is effective.<sup>12</sup>

## 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 if a privacy complaint is made?

A complaint cannot be made about an act or practice that is undertaken in accordance with a TPID.<sup>13</sup>

## Can a TPID be revoked?

The Commissioner must revoke a TPID if satisfied that:<sup>14</sup>

- 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 TPID; or
- the reasons set out in the application for the determination no longer apply.

Before revoking a TPID, 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 TPID should not be revoked. The submission must be considered within any period stated in the notice before effecting a revocation.<sup>15</sup>

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<sup>1</sup> PDP Act section 37.

<sup>2</sup> Macquarie dictionary.

<sup>3</sup> *Re Bartlett and Department of Prime Minister and Cabinet* (1987) 12 ALD 659.

<sup>4</sup> *Tillmanns Butcheries Pty Ltd v AMIEU* (1979) 42 FLR 331 (quoting *Palsler v Grinling* [1948] AC 291 at 317).

<sup>5</sup> 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].

<sup>6</sup> See section 13 of the PDP Act to determine if an organisation is captured.

<sup>7</sup> PDP Act section 38(4).

<sup>8</sup> PDP Act section 39(1).

<sup>9</sup> PDP Act section 39(2).

<sup>10</sup> PDP Act section 39(4).

<sup>11</sup> PDP Act section 39(6).

<sup>12</sup> PDP Act section 40.

<sup>13</sup> PDP Act sections 32, 37 and 57(1)-(2).

<sup>14</sup> PDP Act section 41.

<sup>15</sup> PDP Act section 41(3).