

Reviewing and Withdrawing an Expiation Notice Procedure

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Applicable Legislation	Expiation of Offences Act 1996, Expiation of Offences Regulations 2011 and Local Government Act 1999
Related Policies	Enforcement Policy
Related Documents	By-laws

1. Purpose and Scope

Expiation notices are written for offences under many pieces of legislation administered by Local Government and offences created by Council By-laws. A recipient of an expiation notice is entitled to request a review or withdrawal of the notice which must be undertaken in accordance with the legislation. This procedure starts with a request to review the decision to issue an expiation notice by Council and covers the steps necessary to withdraw the notice if so determined. It does not deal with the separate and specific process for withdrawing a notice in order to commence a prosecution.

Its purpose is to ensure the consistent and accurate application of relevant legislation and Council Policy when reviewing and withdrawing expiation notices issued by Council.

1.1 Responsibility

This procedure applies to persons with valid authorisation to issue expiation notices and/or who have the relevant delegated authority to withdraw expiation notices (*see 2 Relevant Documentation*) and associated administrative staff. Only Authorised Persons can issue an expiation notice and only persons with the relevant delegated authority can withdraw an expiation notice.

Officers are required to act reasonably and transparently, demonstrate good customer service, undertake their responsibilities in a proficient manner and use their judgement where necessary to ensure an outcome in line with legal requirements and Council's Enforcement Policy.

1. Purpose and Scope cont'd

1.2 Legislation & Policy

Expiation of Offences Act 1996

- Section 8A Review of notices on ground that offence is trifling
- Section 16 Withdrawal of expiation notices

Expiation of Offences Regulations 2011

Local Government Act 1999

- Section 125 – Internal Control Policies

Council's Enforcement Policy

Council By-laws.

1.3 Definitions

The definitions contained in this procedure are not exhaustive and officers may need to consider the relevant legislation for further applicable definitions.

Trifling is defined in Section 4(2) of the *Expiation of Offences Act* (EO Act). An alleged offence will, for the purposes of this Act, be regarded as trifling if, and only if, the circumstances surrounding the commission of the offence were such that the alleged offender ought to be excused from being given an expiation notice on the ground that:

- (a) there were compelling humanitarian or safety reasons for the conduct that allegedly constituted the offence; or
- (b) the alleged offender could not, in all the circumstances, reasonably have averted committing the offence; or
- (c) the conduct allegedly constituting the offence was merely a technical, trivial or petty instance of a breach of the relevant enactment.

1.4 General Notes

Explanation of 'the offence' - An expiation notice may relate to up to three alleged offences arising out of the same incident. Throughout this procedure 'the offence' refers to a single offence as defined in the notice. Care should be taken to examine all the single offences listed on a notice.

Review Officer - Council should designate a person to deal with requests for review who, where possible, has not been associated with the process of issuing the original expiation notice. This person will need to have the appropriate delegated authority to withdraw expiation notices. A Review Officer should have knowledge of the offences to which expiation notices relate and an understanding of the processes generally followed by Council's issuing officers.

Legal test to apply when considering the withdrawal of an Expiation Notice - The reviewing officer will need to be satisfied that there is a prima facie case to support the issue of the expiation notice. That is, that it appears on the evidence at hand that an offence has been committed. This is the same test as the issuing officer is required to apply when considering the evidence to support issuing an expiation notice. While there is no obligation on the reviewing officer to undertake further investigation in respect of the alleged offences, any information provided by an applicant for review should be taken into account.

1. Purpose and Scope cont'd

1.4 General Notes cont'd

Calculation of time - the 28 day period for payment of an expiation notice is calculated from, and includes, the date the notice was issued. (Note: This calculation of time differs from many other procedures, where the time is calculated from the day after).

2. Relevant Documentation

Best Practice Procedures for Appointing Authorised Persons.

3. Records Management

All documents, notes, photographs and correspondence must be retained and stored in accordance with Council's Records Management protocols as required by Section 125 of the *Local Government Act*.

4. Procedure

4.1 Request for a Review or Withdrawal of the Notice

Any person in receipt of an expiation notice is entitled to apply for a review of the decision to issue the notice, which may lead to the withdrawal of the notice. The EO Act provides a range of grounds which allow for the withdrawal of expiation notices. The request should be provided in writing, either by letter, email or Council form. If appropriate, assistance should be offered to complete the written request.

4.1.1 Ensure that the request is lodged and forwarded to Council's reviewing officer. Where possible ensure that this person has not been involved with previous decision making on this matter.

4.1.2 The decision to withdraw an expiation notice is a legal decision made under the EO Act. A review of the decision to issue a notice should be undertaken formally and in compliance with that Act, after considering the relevant circumstances, provided by the Departmental Manager. 'Informal' decisions to withdraw an expiation notice, that is decisions made without undertaking all relevant procedural steps, should be avoided.

4.2 Commence the Review

Commence the process by considering whether the application for review or withdrawal of the notice falls within any of the grounds under either Section 8A or Section 16(1) of the EO Act. If no grounds have been specified by the applicant, consider all the grounds available under the EO Act and whether the circumstances of the application fit one or more of the grounds.

Those grounds are that:

- the offence is trifling (see Section 8A);
- the person did not commit the offence (see Section 16(1)(a));
- the notice should not have been given in respect of the offence (see Section 16(1)(a));
- a statutory declaration is received naming another offender (see Section 16(1)(ab));

4. Procedure cont'd

4.2 Commence the Review cont'd

- the expiation notice is defective (see Section 16(1)(ac)); or
- the Council has decided that the alleged offender should be prosecuted (see Section 16(1)(b)).

(Note: This procedure does not cover this ground for withdrawal for the purposes of prosecution. However, a notice cannot be withdrawn for the purposes of prosecution if more than 60 days have elapsed from the date of the notice or an enforcement determination has been made by the Fines Enforcement and Recovery Officer).

- 4.2.1 Read the information provided with the request for review and any notes from the issuing officer. While there is no obligation on a Review Officer to seek further information, if necessary consider whether more information or a Statutory Declaration would be of assistance in the circumstances.

Interview the issuing officer in order to understand how the initial decision to issue the expiation notice was made. Advise the officer of any claims made in the request for review and seek his/her comments.

- 4.2.2 The following factors (which are not exclusive) may be relevant to consider, depending on the nature of the alleged offence. These factors mirror those which the issuing officer should have considered when forming the decision to issue an expiation notice in the first instance.

- Has an offence been committed?
- Is the offence expiable?
- If an offence has been committed, is it 'trifling' within the meaning of the Act (see definition above)?
- Has there been an appropriate investigation of the case?
- Is the evidence collected sufficient to support the issuing of the expiation notice?
- Has the available evidence been fully analysed?
- Are any material inconsistencies in the available evidence reasonably explicable?
- Should the person in receipt of the expiation notice be interviewed?
- Has the person who has received the expiation made any admissions?
- Has consideration been given to the need to seek professional or other advice that might bear on the case?
- Has consideration been given to the above factors, both separately and together, by the person issuing the expiation notice?

Further factors to consider may also include the following.

- Does Council's Enforcement Policy support this form of enforcement in these circumstances?
- Has an identifiable person or organisation committed the offence?
- How serious is the offence (i.e. would it be more appropriate to issue a warning, or conversely, move directly to prosecution)?

4. Procedure cont'd

4.2 Commence the Review cont'd

- What degree of intention was involved in committing the offence?
- What is the past history of offending of the person involved (if known)?
- What is the likely effectiveness of this or other enforcement options?
- Are there any other factors that should be taken into account in the particular circumstances?

4.3 Determining the Decision

Consider all of the information gained from the applicant and the issuing officer, weigh the evidential factors and come to a decision about whether the notice should be withdrawn.

Document the reasons for proceeding according to Council's records management protocols.

4.3.1 Respond to the applicant in writing and advise as appropriate:

- why a review is not possible; or
- of the outcome of the review; or
- if obtaining further information is warranted, what is required, by when and that a review will be undertaken when a response is received, indicating a timeframe in which the review will occur e.g. within 10 business days of receipt of the information.

Include a Statutory Declaration form if necessary.

4.3.2 Ensure the expiation notice record is tagged so that a reminder notice is not generated during the review and advise the applicant of the extended due date.

4.3.3 When received, consider any additional information gained from the applicant and the issuing officer, weigh the evidential factors and come to a decision about whether the notice should be withdrawn.

4.3.4 Document the reasons for proceeding according to Council's Records Management protocols.

4.4 Withdrawing a notice

4.4.1 If a decision is made to withdraw the notice, Council must advise the applicant, by notice in writing, that the expiation notice has been withdrawn and the grounds for the withdrawal. This notice in writing must be given personally to the applicant or sent by post, preferably by registered mail. If the expiation notice is withdrawn following payment of the expiation fee or any instalment of the fee, the fee must be refunded.

Note that a notice **cannot** be withdrawn in some circumstances, even if the evidence supports it. The EO Act does not permit a notice to be withdrawn on the grounds that the offence is **trifling** if:

4. Procedure cont'd

4.4 Withdrawing a notice cont'd

- any amount has been paid toward the expiation fee; or
- a person has entered into an arrangement under S9 of the EO Act (hardship provisions administered by the Fines Enforcement and Recovery Officer); or
- an enforcement determination has been made by the Fines Enforcement and Recovery Officer under s13 of the EO Act.

However, the notice could still be withdrawn if it met any of the other grounds for withdrawal under Section 16(1) of the EO Act set out above.

If a decision is made to withdraw a notice using the grounds in Section 16(1) of the EO Act:

- check whether any amounts have been paid toward the expiation fee, and arrange for a refund where necessary; and
- if an enforcement determination has been made by the Fines Enforcement and Recovery Officer, inform the Fines Enforcement and Recovery Officer of the withdrawal of the notice.

4.4.2 If the notice has been withdrawn because it was found to be defective, consider whether the offence warrants the issue of a replacement notice, or could be commuted to a written warning. If a notice is withdrawn on that ground and a new expiation notice is to be issued, it must be issued within 6 months of the date of the offence.

4.4.3 A notice **must** be withdrawn if it becomes apparent that the alleged offender did not receive the notice until after the expiation period (28 days), or never received the notice as a result of an error by the Council (or authorised officer) or as a result of a failure of the postal system. (**Note**, however, that if the alleged offender has paid any part of the expiation fee, this requirement does not apply).

If an expiation notice is withdrawn because the alleged offender did not receive it for any of the above reasons, then the period within which a new expiation notice can be given for the alleged offences is extended to one year from the date of the alleged offence.

4.4.4 Note that where a Council decides to withdraw a notice after it has sought enforcement action from the Fines Enforcement and Recovery Officer, any lodgement fee paid to the Fines Enforcement and Recovery Officer will be forfeited.

4.5 Decision not to Withdraw the Expiation Notice

The applicant must be advised in writing of a decision not to withdraw a notice. Include a full and personal explanation (i.e. not a form letter) of the reasons for the decision and a clear explanation of the options which remain available.

4. Procedure cont'd

4.6 Advising the Applicant

In all circumstances the advice must be in writing, delivered personally or by post. When using section 16 it is a requirement of the Act that reasons for the decision are given.

4.7 Formal Complaints

Council's Internal Review of a Council Decision Policy & Procedure (MMC-MP3) can be referenced in regard to formal complaints and outcomes of a review of decisions of Council, Council staff or other persons acting on behalf of Council.

5. Review and Evaluation

This Procedure will be subject to annual evaluation and review to ensure currency is maintained. Such review will be endorsed by Council.

6. Further Information

This Procedure will be available for inspection at Council's Principal Office during ordinary business hours and on the Council's website www.mid-murray.sa.gov.au.

Any queries or questions regarding this Procedure should be directed to either Council's Director – Development & Environmental Services by calling (08) 8564 6020 or by emailing at postbox@mid-murray.sa.gov.au.