

Assessing a report of wrongdoing to identify whether it is a voluntary PID

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What this guideline covers

When agencies receive a report of wrongdoing, they have an obligation to assess whether the report has the features of a voluntary public interest disclosure (**PID**). If a report is a voluntary PID, the agency must decide what action will be taken to deal with the PID. It is important that agencies promptly and accurately assess reports, because if it is a voluntary PID special protections apply to the PID maker.

Even if a report is not a voluntary PID, an agency must still take appropriate action so that the content of the report is addressed in accordance with the agency's other internal complaints policies.

This guideline provides guidance on:

- what an agency must do when they receive a disclosure that is, or may be, a voluntary PID
- recognising the 5 features of a voluntary PID
- the steps an agency should take after they have identified that they have received a voluntary PID and,
- what agencies should do if a disclosure is not a voluntary PID.

When does an agency ‘receive’ a disclosure?

At times, it will be immediately clear that a report received by an agency is a voluntary PID. Therefore, it will be obvious that the agency has an obligation to deal with these reports as voluntary PIDs.

Other times, the agency will have to undertake an assessment to ascertain whether the report is a voluntary PID. However, agencies should note that there is an obligation to deal with a report as a voluntary PID *as soon as it is received* as long as:

- the report is about serious wrongdoing, and
- the report is made by a person who is or appears to be a public official, and
- the report is not a mandatory or witness PID.¹

A report is taken to have been received by an agency when it is:

- made to a disclosure officer of the agency, including the head of the agency
- communicated to a disclosure officer of the agency by a manager, a Minister or a Minister’s staff member
- communicated to a disclosure officer of the agency by another agency that is referring the PID to the agency, or
- otherwise communicated to the agency in accordance with an applicable law, policy, procedure or arrangement.²

This means that as soon as an agency receives a report that *may* be a voluntary PID, it should be dealt with as if it were a voluntary PID, unless and until it is assessed as not being a voluntary PID. This ensures that reports are dealt with appropriately from the time they are received by an agency. This is an important safeguard for both makers of PIDs and for agencies, as it ensures that agencies will have been complying with their obligations under the *Public Interest Disclosures Act 2022 (PID Act)* if the disclosure is a voluntary PID. It also ensures that PID makers are protected from the time the PID is made.

It should be noted that an agency’s obligations arise as soon as the PID is received and are not delayed until after the disclosure has been assessed and recognised by the agency to be a PID.

1. *Public Interest Disclosures Act 2022*, s 49(1).

2. *Public Interest Disclosures Act 2022*, s 50.

Assessing the report

For a disclosure of serious wrongdoing to be a voluntary PID, it does not need to be made in a particular form nor does it have to contain particular language. For example, it is not necessary for the maker to say that they are making, or wish to make, a PID and they do not need to refer to the PID Act in any way.

A voluntary PID can be made in writing or orally. There is no obligation on a PID maker to reduce their disclosure to writing or to identify themselves.

When an agency receives a report which is, or appears to be, a voluntary PID it has an obligation to identify whether it has the 5 features of a voluntary PID.

The 5 features of a voluntary PID are outlined in the table below. This assessment is objective — that is, a report either has all of these features or it does not. There is no discretion or subjectivity on the part of the recipient who is assessing the report.

It is important to remember that the purpose of this assessment is not to determine whether the PID maker is being truthful or whether the alleged serious wrongdoing has occurred. The purpose of this assessment is to determine whether the agency must deal with the report under the PID Act and whether the protections under the PID Act apply. An agency may need to make additional enquiries with the PID maker or other sources to assist with the assessment process.

| | Feature | A report will be a voluntary PID only if it: | Guidance |
|----|---------------------------------|---|--|
| 1. | Who <i>made</i> the report? | <p>...was made by a <i>public official</i>. Guidance can be found in the guideline <i>Core concepts in the PID Act</i>.</p> <p>AND</p> | <p>To be a voluntary PID, the report must have been made by a 'public official'.³</p> <p>Even though an MP is a public official as defined in the PID Act, section 25 of the PID Act expressly states that an MP cannot make a voluntary PID. This means that a report of serious wrongdoing by an MP is not a voluntary PID.</p> |
| 2. | Who <i>received</i> the report? | <p>...was made to one of the following:</p> <ul style="list-style-type: none"> the person's manager the head of any agency a disclosure officer of any agency a Minister or Minister's office (but only if in writing) Guidance can be found in guideline PIDs to Ministers, Members of Parliament and journalists. only in very limited circumstances, to a journalist or MP. Guidance can be found in the guideline PIDs to Ministers, Members of Parliament and journalists. <p>AND</p> | <p>Section 27 of the PID Act outlines who can receive a voluntary PID.</p> |

3. *Public Interest Disclosures Act 2022*, s 25.

| | Feature | A report will be a voluntary PID only if it: | Guidance |
|----|---------------------------------------|---|---|
| 3. | What the content of the report shows? | <p>...discloses information that the person honestly and on reasonable grounds believes, shows or tends to show, serious wrongdoing</p> <p>AND</p> | <p>A public official can make a PID about serious wrongdoing relating to <i>any</i> agency, not just the agency they are working for.</p> <p>To be a voluntary PID, the maker of the report must honestly, and on reasonable grounds, believe that the disclosure shows or tends to show, serious wrongdoing.⁴</p> <p>Accordingly, a report may be a voluntary PID, whether or not any serious wrongdoing has occurred.</p> <p>It is not necessary for the maker to provide information to establish conclusively, or to any legal or investigative standard of proof, that the serious wrongdoing occurred. On the other hand, a bare allegation or suspicion that is unsupported by any relevant evidence would not be sufficient as there must be ‘reasonable grounds’ for the belief that wrongdoing has occurred.</p> <p>The relevant question is: could a reasonable person, in the position of the person making the report, have formed the belief that the information being reported shows or tends to show that serious wrongdoing has occurred?</p> |
| 4. | In what way was the report made? | <p>...was made in writing or orally. (An exception is a report to a Minister or Ministerial staff, which will be a voluntary PID only if made in writing).</p> <p>AND</p> | <p>To be a voluntary PID, a report can be made in a few ways.</p> <p>A public official can make a PID:</p> <ul style="list-style-type: none"> • <i>in writing</i> — an email, letter, online form or even an SMS to a suitable recipient or • <i>orally</i> — having a discussion with a suitable recipient, face-to-face, via telephone or virtually. It will usually be a private discussion but may occur in the context of a broader discussion that may involve other persons. <p>A PID could be made partly orally and partly in writing. For example, a person might send an email containing some information that does not, of itself, establish reasonable grounds to believe it shows or tend to show, serious wrongdoing. However, that person might then provide the email recipient with additional information orally that, together with what was disclosed in writing, does establish reasonable grounds for believing that serious wrongdoing has occurred.</p> <p>However, a PID to a Minister or their staff can only be made in writing.⁵</p> |

4. *Public Interest Disclosures Act 2022*, s 26(1).

5. *Public Interest Disclosures Act 2022*, s 24(3)(c).

| | Feature | A report will be a voluntary PID only if it: | Guidance |
|----|----------------------------------|---|--|
| | | | <p>However, a PID to a Minister or their staff can only be made in writing.⁶</p> <p>A report can be a PID whether or not the person making the report identifies themselves and provides contact details. A PID can be made anonymously.⁷ Guidance can be found in the guideline <i>Dealing with anonymous voluntary PIDs</i>.</p> |
| 5. | Is the report <i>voluntary</i> ? | ... is voluntary (in the sense of not being a mandatory PID. Guidance can be found in the guidelines <i>Dealing with mandatory PIDs</i> and <i>Dealing with a witness PID</i> . | <p>To be a voluntary PID, the report must not be a mandatory PID or a witness PID.⁸</p> <p>In other words, a voluntary PID is a report that a person has made voluntarily, in the sense that when they made the disclosure:</p> <ul style="list-style-type: none"> • they were not acting under a legal or statutory duty to make the report • they were not meeting the ordinary requirements of their role or functions • they were not responding to a request or requirement of an investigator during an investigation of serious wrongdoing. |

6. *Public Interest Disclosures Act 2022*, s 24(3)(c).

7. *Public Interest Disclosures Act 2022*, s 24(2)(b).

8. *Public Interest Disclosures Act 2022*, s 24(3)(a)–(b).

What if an agency is unsure the report is a voluntary PID?

When assessing the report to identify whether it has the features of a voluntary PID, the PID Act should not be interpreted in an overly narrow or technical way. The PID Act is beneficial legislation and is likely to be interpreted by a court generously. Given the serious ramifications for agencies if they fail to recognise a report as a voluntary PID, if there is doubt as to whether a report is a PID, an agency should generally err on the side of caution and treat the report as a voluntary PID. This way they ensure they comply with their obligations under the PID Act and that the maker of the voluntary PID is appropriately protected.

Important note: Agencies should also consider deeming a report to be a voluntary PID in circumstances where the report shows or tends to show, serious wrongdoing but where the report may not be a voluntary PID due to purely technical grounds. For example, if the maker did not make their report to someone who can receive a disclosure under the PID Act or an agency's PID policy. In these situations, the person assessing the report should consider whether the head of the agency should deem it to be a voluntary PID. This ensures the maker is afforded protections under the PID Act. Guidance can be found in the guideline *Deeming a disclosure to be a voluntary PID*.

When to consider whether the maker 'honestly and on reasonable grounds believes'

One of the purposes of the PID Act is to facilitate the reporting of serious wrongdoing. Public officials may come forward with detailed firsthand evidence. They may also make a report based on information they have come across second or third hand, which may also be valuable information of serious wrongdoing that agencies should act upon.

Given the beneficial purpose of the PID Act, and its object of facilitating and encouraging PIDs, agencies should not seek to interrogate, or require proof of, the honesty of a person who has made a report. This undermines the purpose of the legislation and diverts agency resources away from dealing with the report. The relevant question is: could a reasonable person, in the position of the person making the report, have formed the belief that the information being reported shows or tends to show that serious wrongdoing has occurred? If, based on the information provided in the report, a person appears to have reasonable grounds on which to believe their disclosure shows or tends to show, serious wrongdoing, and there is no evidence to the contrary, then their honesty can be assumed.

It is better practice to accept a report to be a PID and to cease to deal with it as a PID if it later turns out that the allegations were made dishonestly. Determining the state of mind of the maker of the disclosure can be difficult and distracts an agency from its key task, which is dealing with the serious wrongdoing the subject of the disclosure and protecting the maker of the disclosure.

If it appears, when assessing the information contained in the report, that the report may have been made dishonestly and without reasonable grounds, the agency can seek further information from the maker of the disclosure to ascertain this, before deciding on how to proceed with the disclosure.

It is an offence for a person to wilfully make a false or misleading statement to an agency in relation to a PID.⁹ This means the maker of the disclosure may have committed an offence if they have intentionally lied about serious wrongdoing or misled agencies about whether wrongdoing occurred. The maximum penalty for this offence is 100 penalty units or 2 years imprisonment, or both.

9. *Public Interest Disclosures Act 2022*, s 84.

Even if an agency suspects that a wilfully false report may have been made, it would generally be prudent for the agency to separately consider:

1. an investigation of the serious wrongdoing alleged in the report, and
 2. an investigation of whether the maker of the report has made a wilfully false report
- and *not* to deal with those 2 matters as a single investigation.

In most cases it would be appropriate to complete point 1 above first (while treating a report as a legitimate PID) before then proceeding separately to consider point 2 above if that is necessary.

Investigating and taking disciplinary or criminal proceedings in respect of the offence of wilfully making a false report is *not* detrimental action under the PID Act (see section 32(3) of the PID Act).

What does ‘shows or tends to show serious wrongdoing’ mean?

The maker of a report does not need to prove the allegations contained in their disclosure. They only need to provide information which is sufficient to reveal that serious wrongdoing may have occurred or be occurring.

The type of information a reporter may provide includes:

- a recount of their direct observation of the wrongdoing being reported
- documentary evidence (such as emails, file notes, documents) of the alleged serious wrongdoing
- observations made by others which supports the maker’s belief of what had occurred or may occur
- information regarding missing items of value (such as the outcome of audits).

The reporter may also provide factual information such as:

- what occurred
- who was involved
- when the suspected wrongdoing occurred
- where the suspected wrongdoing happened
- further information or material that would assist in any investigation
- why the person believes the conduct was wrong.

Information contained in a report may not contain enough information to show that serious wrongdoing has occurred or may be occurring. Further information may need to be obtained from the maker when the disclosure is being made or when the report is being assessed. The purpose of this is not to test the honesty of the maker but to fully understand the circumstances of the alleged serious wrongdoing and obtain as much information as possible to establish if the matter requires investigation.

Important note: Once a disclosure is assessed as a voluntary PID, an agency must take appropriate action to deal with the disclosure. Guidance can be found in the guideline *Dealing with voluntary PIDs*.

Reports that will not be a voluntary PID

A report will not be a voluntary PID if it *only* discloses the following:

- a disagreement with government policy, including a government decision concerning amounts, purposes or priorities of public expenditure
- a disagreement about a policy of the governing body or a local government authority
- a grievance about a matter relating to the employment or former employment of an individual and that grievance either:
 - does not have significant implications beyond matters personally affecting or tending to affect the individual, or
 - relates to a disagreement with the taking of reasonable management action.¹⁰

Important note: There is a risk that PIDs are not properly identified because they are considered to only disclose the above subject matter and not contain reports of serious wrongdoing. Given this, agencies should apply a cautious approach when assessing that a disclosure falls within one of the above categories.

Disagreement with government policy

Government policy is different to organisational or administrative policy, which concerns the procedural issues or routine practices of an agency. Government policy is set by the highest level of decision-makers - usually at Cabinet or at least Ministerial level – and will often involve inherently political controversies or directions. Government policy sets the general strategic agenda for an agency, whereas organisational or administrative policy provides the mechanisms for achieving the agenda set by the government of the day or elected council. Reports of serious wrongdoing can be about organisational or administrative policy.

There are some aspects relating to government policy, which may be serious wrongdoing such as a public official or agency purposely giving inadequate and/or incorrect advice, or failing to disclose information, which results in a particular government policy being adopted. A report, however, that in substance questions the merits of the adopted policy would not be considered a PID. For example, a report criticising the government's decision to close a particular school would not be a PID. However, a report alleging corrupt conduct during the closing of the school (for example, school equipment being inappropriately disposed of to the benefit of a staff member) could be a PID.

Grievance relating to employment or former employment

The purpose of the PID Act is to facilitate the reporting of serious wrongdoing because it is in the public interest to do so. It is not the appropriate forum within which to deal with employment decisions (such as recruitment, performance management, change of duties and dismissal). There are more appropriate mechanisms to deal with these matters, such as through the Industrial Relations Commission.

A disclosure will not be a voluntary PID if it:

- *solely* relates to a grievance about either employment, former employment or the taking of reasonable management action, unless there are significant implications beyond matters personally affecting an individual or
- if it relates to a disagreement with a decision to take, or a proposal to take, reasonable management action.

Some factors that indicate that the information disclosed does not have significant implications beyond an individual include:

- the contents of the disclosure relate to an employment decision about a particular person
- there is no indication that there is a widespread or systemic concern with the manner in which employment-related decisions are being made by the agency
- reasonable management action has been taken by the agency or employer to address or deal with the conduct of a particular person.

10. *Public Interest Disclosures Act 2022*, s 26(3).

What should an agency do if the report is not a voluntary PID?

If after looking at the report, the agency considers that it does not have the features of a voluntary PID, the agency must still address the allegations in the report by:

- determining if the matter requires further action and applying the appropriate policy or procedure to the complaint depending on the issues, for instance a policy that deals with bullying and harassment if the complaint relates to unfair treatment in the workplace
- dealing with the complaint through the agency's complaints management framework (or other relevant mechanism – for example grievance policies) and,
- supporting the staff member who has made the complaint by explaining what will occur with their matter and considering whether they need protection from detrimental action.

Reports of serious wrongdoing are also often entwined with grievances, workplace conflict or performance management concerns. In these cases, it is important to distinguish allegations of serious wrongdoing from any other issues and ensure those allegations are dealt with in accordance with the PID Act and the agency's PID policy.

If after considering the contents of the report, it becomes apparent that the disclosure reveals serious wrongdoing, the agency should assess the content of the report to establish if it has the features of a voluntary PID.

