

Dealing with witness PIDs

Contents

What this guideline covers	3
What is a witness PID?	4
How to deal with witness PIDs	6
Identify witness PIDs.....	6
Provide notice of witness PID protections.....	6
Keep secure and confidential records of witness PIDs	6
Protections	7

ISBN: 978-1-922862-16-7

NSW Ombudsman, Level 24, 580 George Street, Sydney NSW 2000

Email pidadvice@ombo.nsw.gov.au

Web www.ombo.nsw.gov.au

General inquiries 02 9286 1000

Toll free (outside Sydney metro) 1800 451 524

© State of New South Wales, July 2023

This publication is released under a Creative Commons License CC BY 4.0

What this guideline covers

This guideline explains what a witness public interest disclosure (**PID**) is, how agencies should deal with witness PIDs and the protections provided to the makers of witness PIDs.

What is a witness PID?

Agencies — including integrity agencies — that are investigating serious wrongdoing in relation to a PID will typically need to obtain information from witnesses to assist them to understand what happened and whether, in fact, wrongdoing occurred. This information may be provided by answering questions, providing an oral or written statement, or by providing documents or other material.

Witnesses may be *requested* by an investigator to provide information, or they may be *required* to do so, for example by being issued with a formal summons or statutory notice to give a statement or to answer questions, or by otherwise being under some legal obligation to provide information. Information could be provided, for example, during an informal discussion, when answering questions in a voluntary interview, or when being formally examined in a hearing.

Regardless of whether they are requested or required to come forward and provide information, witnesses may fear detrimental action if they provide, or are seen to have provided, evidence in an investigation into serious wrongdoing.

It is important to an effective investigation that witnesses come forward willingly, provide information openly, and that they do so without fear of detrimental action. Witnesses who do so should not suffer harm as a result.

For this reason, the *Public Interest Disclosures Act 2022 (PID Act)* extends many of the protections that apply to voluntary PID makers (whistleblowers) to those who provide information as a witness in an investigation into serious wrongdoing.

A disclosure will be a ‘witness PID’ if:

- a person (whether they are a public official or not) discloses information during an investigation, and
- that investigation is into serious wrongdoing, and
- they disclosed the information following a request or requirement of the investigator or investigating agency.¹

All information provided by a person in these circumstances constitutes a witness PID (provided the person is not wilfully providing false information).

Important note: Unlike voluntary PIDs or mandatory PIDs, witness PIDs can be made by a person who is not a public official.

Even if the person provides information showing that serious wrongdoing did not in fact occur, or if the person discloses that they did not see or do not otherwise know anything about any alleged wrongdoing, the disclosure of *that* information will be a witness PID. This ensures that (again providing the person is not wilfully providing false information) all witnesses receive appropriate protections, no matter what information they are able to provide.

Important note: A witness PID can be made in any agency investigation of serious wrongdoing.² The investigation does not have to arise from a voluntary PID, be into a voluntary PID or otherwise relate to a voluntary PID. It includes investigations that are being conducted by an external investigator commissioned by an agency.

The following are examples of disclosures that would be witness PIDs:

- An investigation is being conducted into whether a public official has breached procurement rules by awarding a contract to someone with whom they have an undeclared conflict of interest (that is, serious maladministration). This information did not come to light from a voluntary PID, but rather a routine audit

1. *Public Interest Disclosures Act 2022*, s 22.

2. *Public Interest Disclosures Act 2022*, s 22(1).

of the procurement file. A member of the evaluation panel is asked to be interviewed in relation to the investigation. They do so voluntarily and honestly answer all the questions put to them. All those answers will be considered to be a witness PID.

- An integrity agency is investigating alleged corrupt conduct by an agency they oversight. This investigation commenced as a result of a complaint from an officer of that agency. The integrity agency conducts hearings and issues a notice to a public official who works in the relevant branch of the agency. The notice compels the public official to appear to be examined (and cross-examined) at the hearing. The information provided by that public official at the hearing is a witness PID.

Important note: When serious wrongdoing is being investigated because of an agency having received a voluntary PID, section 65 of the PID Act requires that public officials must use their best endeavours to assist in the investigation.

Important note: The term ‘investigation’ is not defined in the PID Act. Given the evident purpose of the Act and of the provisions relating to witness PIDs, it should not be given a narrow or technical interpretation. In particular, the protections for witness PIDs apply whenever an agency is undertaking action of an investigatory nature in relation to alleged or suspected serious wrongdoing, even if the agency has not yet commenced what, under relevant legislation or its internal policies and procedures, might be called an ‘investigation’. For example, under the *Ombudsman Act 1974* (**Ombudsman Act**), when serious maladministration is suspected, the Ombudsman may, before deciding to commence a formal ‘investigation’ under the Ombudsman Act, undertake ‘preliminary inquiries’ to determine whether a formal investigation is warranted. For the purposes of the PID Act, those preliminary inquiries and other informal investigatory steps should be considered to be part of an ‘investigation’ — meaning that those who provide information in response to preliminary inquiries are recognised and protected as having made a witness PID

How to deal with witness PIDs

The provisions of the PID Act apply automatically to a witness PID, without the agency or its investigator being required to take any particular action.

However, there are a few steps agencies should take to ensure that the witness PID provisions apply as intended:

Identify witness PIDs

As far as practicable, agencies and investigators should identify and record when a witness PID has been made. Proper identification of a witness PID ensures that both the appropriate people within an agency and the investigator are made aware that the person who provided the information is protected under the PID Act, and they can, if necessary, consider whether any appropriate measures are necessary to ensure those protections are not triggered (for example, by actively considering the risk that the person may become the subject of detrimental action and what can be done to mitigate that risk).

Important note: Agencies and investigators may request information in an investigation into serious wrongdoing in a variety of ways. For example, by interviewing someone or requesting documents or a statement. When making requests for information, investigators should be aware that a person may be making a witness PID when responding to their request.

Provide notice of witness PID protections

When an investigator issues a notice to a witness, or interviews a witness, during an investigation of serious wrongdoing, it would also be prudent to include an explanation about the application of the PID Act. In particular, a statement should be provided explaining that the information provided during the course of the investigation (provided it is not wilfully false) will be a witness PID and what protections flow from that. Agencies could include this explanation in their template investigation notices to use in these circumstances.

Important note: Agencies do not have the same obligations to makers of witness PIDs as they do to makers of voluntary PIDs, in terms of providing updates to the maker about the progress or outcome of the investigation. However, an investigator should consider whether it is or is not appropriate to report back to a witness at the conclusion of an investigation.

Keep secure and confidential records of witness PIDs

All records regarding witness PIDs should be kept securely. While the provisions of the PID Act that provide for confidentiality in the case of voluntary PIDs do not apply to witness PIDs, it is best practice to try to minimise how many people are aware of the identity of the maker of a witness PID, and the information they have disclosed, to mitigate the risk of detrimental action.

Protections

People who make witness PIDs are entitled to protections under the PID Act similar to those that apply to the makers of voluntary PIDs. These protections include:

- *Immunity from civil and criminal liability* that might otherwise arise because they made the report³

For example, a person may be requested to provide information to an investigator that, if disclosed, would breach a confidentiality or secrecy obligation. As a witness PID, the person is protected from any civil or criminal liability for breach of that obligation.

- Protection from detrimental action
 - It is an offence for someone to take detrimental action against a person who has made a witness PID.⁴
 - The maker of a witness PID is entitled to seek compensation if they have suffered injury, damage or loss as a result of detrimental action being taken.⁵
 - An order from the court (injunction) can be sought where detrimental action has been threatened or has occurred.⁶ This could include an order to prevent someone from being dismissed or seeking for them to be reinstated if they have been dismissed. An agency or witness PID maker can make the application for an injunction.

Important note: A person is *not* protected against liability for their own past conduct that is disclosed when they make a witness PID.⁷ For example, if a person provides information to an investigator that reveals misconduct or wrongdoing that they have engaged in — the person will not be protected from civil and criminal liability relating to that past conduct. However, the Attorney General may give the person disclosing their own past conduct, an undertaking that the disclosure or the fact of the disclosure (whichever is applicable) will not be used in evidence against them in civil or criminal proceedings (except if proceedings are brought where the disclosure is false).⁸ An undertaking can be given either before the information is provided or after it has been disclosed.⁹ An integrity agency can make a recommendation to the Attorney General that a person be given an undertaking.¹⁰

3. *Public Interest Disclosures Act 2022*, s 40.

4. *Public Interest Disclosures Act 2022*, s 33.

5. *Public Interest Disclosures Act 2022*, s 34.

6. *Public Interest Disclosures Act 2022*, s 37.

7. *Public Interest Disclosures Act 2022*, s 41(1).

8. *Public Interest Disclosures Act 2022*, s 41(2), (4).

9. *Public Interest Disclosures Act 2022*, s 41(2).

10. *Public Interest Disclosures Act 2022*, s 41(3).

