

Information sharing and complaint referral Memorandum of Understanding *Ombudsman Act 1974 ss 42, 43*

NSW Privacy Commissioner and NSW Ombudsman

What this Memorandum of Understanding is about

- 1 This Memorandum of understanding (**MOU**) sets out the arrangements made by the NSW Privacy Commissioner and the NSW Ombudsman for:
 - sharing information about the complaints they have dealt with or are dealing with (Part 1 below), and
 - referring complaints to be dealt with each other (Part 2 below).
- 2 In this MOU, the Privacy Commissioner and the Ombudsman are referred to as the **Agencies**.
- 3 This MOU constitutes an arrangement under and for the purposes of ss 42 and 43 of the *Ombudsman Act 1974*. Unless otherwise stated, all references to sections are references to the *Ombudsman Act*.
- 4 Nothing in this MOU or the *Ombudsman Act* limits the operation of *Privacy and Personal Information Protection Act 1998 s 47*, *Health Records and Information Privacy Act 2002 s 67* or other Act that permits or requires the Agencies to share information or refer complaints: ss 42(9) and 43(7).

Purpose and principles

- 5 The Agencies acknowledge the importance of information sharing and complaint referral to support the exercise of their respective functions, including to ensure that complaints are investigated or otherwise resolved in the most effective manner.

- 6 The Agencies agree to apply the information-sharing and complaint-referral authorities given to them under this MOU to mutually support each other in the exercise of their functions. This includes working co-operatively to support the following principles:
 - (a) as far as practicable complainants should experience 'no wrong door' and be assisted through the provision of information about, and if appropriate complaint referral to, the most appropriate agency to deal with their complaint
 - (b) when an Agency receives a complaint (whether or not it is within or partly within its own jurisdiction), it should consider whether it would be more appropriately dealt with by the other Agency
 - (c) to the extent permissible, each Agency should seek to identify and share with the other Agency information that will assist the other Agency to carry out its functions.

Part 1 – Sharing Information

Information the Privacy Commissioner and the Ombudsman can share with each other

Ombudsman Act s 43

- 7 Each Agency may share with the other Agency information it has obtained with respect to a complaint it has dealt with.
- 8 Each Agency may also share information about a complaint it is dealing with, by authorising the other Agency to be present during an investigation or hearing conducted with respect to the complaint.
- 9 However, the sharing Agency may only share such information with the other Agency if:
 - a) it is reasonably necessary to assist the other Agency to carry out its functions, and
 - b) where the sharing Agency has reason to suspect, or should have reason to suspect, the information is or includes sensitive personal information about a complainant (see clause 11 below) – the complainant has expressly consented to the information being shared.
- 10 Information can be shared in accordance with this MOU despite any other Act or law: s 43(3), (4).

How information is shared

11 Before sharing information relating to a complaint, the sharing Agency will notify the other Agency in writing of:

- a) the general nature and volume of the information it holds, or of the investigation or hearing it is to conduct (without disclosing sensitive personal information about any complainant)
- b) how it proposes to deal with the information, apart from potentially sharing it under this MOU
- c) whether it suspects the information is or includes sensitive personal information about a complainant,
- d) if it suspects the information is or includes sensitive personal information about a complainant, whether it has sought the consent of the complainant to share sensitive personal information and consent has been given (as required by clause 13), and
- e) whether it intends to share the information with any other person or to permit any other person to be present during the investigation or hearing.

12 The other Agency that receives such a notice:

- a) may make further inquiries of the sharing Agency for the purposes of determining whether the information should be shared, and
- b) must advise the sharing Agency in writing whether it wishes the information, or any part of it, to be shared with it including, if applicable, whether it wishes to be present during the relevant investigation or hearing.

13 ***Sensitive personal information about a complainant must not be shared without the complainant's express consent.*** Sensitive personal information means information relating to the complainant's:

- ethnic or racial origin
- political opinions
- religious or philosophical beliefs
- trade union membership
- health

- sexual activities: s 41

14 Information that is not sensitive personal information about a complainant may be shared without the complainant's express consent.

Part 2 – Referring complaints

Complaints the Privacy Commissioner and Ombudsman can refer to each other

Ombudsman Act s 42

- 15 Each Agency may, with the consent of the complainant, refer to the other Agency any complaint it has received if it appears that the complaint is within, or partly within, the other Agency's jurisdiction.
- 16 The referring Agency may refer a complaint to the other Agency:
- (a) whether or not the complaint is also within or partly within the jurisdiction of the referring Agency
 - (b) whether or not any investigation or other action has been taken, or is proposed to be taken, in relation to the complaint by the referring Agency
 - (c) whether or not the referring Agency has also referred, or proposes to refer, the complaint to any other person.

How complaints are referred

- 17 Before referring a complaint, the referring Agency will notify the other Agency of:
- a) the nature of the complaint (without disclosing any sensitive personal information about the complainant)
 - b) the basis on which it appears the complaint falls partly or wholly within the other Agency's jurisdiction
 - c) what, if any, steps have been taken in relation to the complaint
 - d) what, if any, steps the referring Agency intends to take in response to the complaint (other than referring it).

- 18 The referring Agency will endeavour to notify the other Agency of the complaint as soon as practicable, given the time limitations in legislation that may apply to the exercise of subsequent investigation, reporting and review functions.
- 19 The other Agency that receives such a notice:
- a) may make further inquiries about the notice for the purposes of determining whether the complaint is within, or partly within, its jurisdiction and should be referred, and
 - b) is to advise the referring Agency whether, in its view, the complaint should be referred.
- 20 No complaint may be referred under this MOU without the complainant's express consent.

Part 3 – General provisions

Other obligations

- 21 Each Agency will ensure that its relevant staff are aware of:
- a) the general types of information that may be relevant to, and of complaints that might be referred to, the other Agency
 - b) the process set out in this MOU for sharing information and referring complaints.

Resolving disagreements

- 22 Any disagreement about the application of this MOU will be referred to the Privacy Commissioner and the Ombudsman for resolution.

Commencement, review and termination of this MOU

- 23 This MOU commences once it is signed by both Agencies, and replaces all previous MOUs or similar arrangements between the Agencies under ss 42 and 43.
- 24 The Agencies will review the operation and effectiveness of this MOU every three years, or at such other times as may be agreed by them.
- 25 Either Agency may terminate this MOU by notice in writing to the other Agency.

Public availability of Memorandum of Understanding

26 This MOU is open access information under s 6 of the *Government Information (Public Access) Act 2009* and is also required to be made publicly available in accordance with s 45. It will be made available on the websites of the Information and Privacy Commission and the Ombudsman.



Samantha Gavel
NSW Privacy Commissioner

Date: 17 August 2021



Paul Miller
NSW Ombudsman

Date: 16 August 2021