

# Confidentiality

## 1. Objectives

- To advise organisations how best to maintain the confidentiality for staff who report wrongdoing, where this is practical and appropriate.
- To help organisations to support and prevent reprisals against staff who report wrongdoing if their confidentiality cannot be maintained.

## 2. Why is this important?

Maintaining confidentiality when handling PIDs can be the most effective and practical way to prevent reprisals against staff who report wrongdoing.

Staff are often more likely to report wrongdoing if they believe that their identity can and will be kept confidential, especially if they fear that reprisals may be taken against them for their report. Keeping the internal reporter's identity confidential, where this is practical and appropriate, also avoids the workplace disharmony that often occurs if their identity is revealed. The organisation can focus resources on determining whether the report identifies any substantive problem that needs to be fixed.

The *Whistling While They Work* research showed that both managers and casehandlers considered confidentiality to be a very important part of the support and protection of staff who report. When asked how effective maintaining confidentiality was for managing and ensuring the welfare of staff who report wrongdoing, 85.1% of respondents said it was very or fairly effective.<sup>1</sup>

## 3. Legal and management obligations

### 3.1 PID Act

#### a) Confidentiality requirements

Section 22 of the *Public Interest Disclosures Act 1994* (PID Act) provides that an investigating authority or public authority or public official to whom a public interest disclosure (PID) is made or referred must not disclose information that might identify or tend to identify a person who has made a PID.

#### b) The exceptions

The PID Act recognises that there are circumstances where it may be necessary for information to be disclosed that may identify the person who has reported wrongdoing. This information may be disclosed by an investigating authority, public authority or public official who receives a PID if:

- The person consents in writing to the disclosure of the information.
- It is 'generally known' that the person has made the PID as they have voluntarily identified themselves as the person who made the PID.
- It is essential for the identifying information to be disclosed to a person to satisfy the principles of natural justice.
- It is necessary for the information to be disclosed for the effective investigation of the matter.
- It is otherwise in the public interest to do so.

#### c) What does 'generally known' mean?

Generally known means that the identity of the person who made the PID is generally known to the 'relevant public'. This includes people within their workplace and, in particular, a person who might have a motive to take reprisals against them.

Some examples where a person's identity could be generally known are:

- They have identified themselves to colleagues as the person who made the PID.
- They identify themselves to the media as the person who made the PID.

#### d) Policy and procedures about confidentiality

Section 22(c) of the PID Act requires public authorities to establish procedures for ensuring that a public official maintains confidentiality in relation to a PID made by the public official. These procedures must form part of the organisation's internal reporting policy.

## 4. What does this mean for your organisation?

### 4.1 Practical difficulties in ensuring confidentiality

Even though your organisation may take all of the measures it can to ensure confidentiality, there is no way that you can be certain that these measures have succeeded. Your organisation

may not be aware or be able to predict whether information that is revealed may identify the internal reporter. Someone may simply have seen the person approaching management to report their concerns. The following examples show some of the ways in which an internal reporter's identity may be revealed.

## a) Process of gathering evidence

When a person makes serious allegations, it is appropriate to make an objective assessment of the facts by gathering evidence. This process may alert people in the workplace to the fact that a report of wrongdoing has been made. Once that happens, it can be expected that there will be speculation – misguided or otherwise – by other staff members about who made the report. In some cases, the subject matter will reveal some aspects that might make identifying the staff member who reported easier.

A further complication arises where people speculate about the source of the report and take reprisals against the wrong person, that is, a person who did not make the report. Your organisation's systems for protecting internal reporters should also aim to prevent this sort of behaviour taking place.

## b) Previous concerns

The staff member may have already voiced their concerns or their intention to complain - either generally within the workplace, to particular colleagues and supervisors, or to management.

## c) Limits on ability to provide support

Sometimes, maintaining confidentiality can inhibit your organisation's capacity to support the staff member reporting wrongdoing. These staff members will often not be allowed to talk to their colleagues about what has happened and so will not be able to benefit from their support.

## d) Impeding effective investigation

The need to maintain confidentiality may impede the progress of an investigation. There may also be a conflict between maintaining confidentiality and the principles of procedural fairness.

## e) Principles of procedural fairness

There may be other overriding legal obligations that conflict with maintaining confidentiality. For example the principles of procedural fairness require that a person who is the subject of allegations must be told:

- the substance of the allegations made against them
- the substance of any adverse comment that is to be made against them.

They must also be given an appropriate opportunity to respond to both those allegations and any proposed adverse comments or findings. This means that, in some circumstances, the subject of the allegations may need to be told the identity of the internal reporter, or information that effectively identifies the reporter, to properly accord them procedural fairness.

## 4.2 Managing confidentiality and the disclosure of information

Your organisation should identify at the outset what processes there are for maintaining confidentiality. You need to obtain information from the person reporting wrongdoing and conduct a risk assessment to assess the likelihood of confidentiality being lost throughout the course of the dealing with the PID (see [Guideline C4](#) for further information about conducting risk assessments).

### a) Analysing whether the identity of the internal reporter is likely to remain confidential

As soon as possible after a report has been made, the officer responsible for assessing the report should talk to the internal reporter about whether maintaining confidentiality will be practical and appropriate. This should include asking the internal reporter who they have talked to about the issues in their report, who they have told that they have made the report, and whether they are likely to be identified if it becomes known that the report was made.

If it is decided that confidentiality is practical and appropriate, your organisation should provide guidance to the internal reporter about the importance of maintaining confidentiality and advise them how best to protect their identity, for example, by advising them not to draw attention to themselves or the report. You should also make sure that the internal reporter is aware that they may somehow be identified in the course of any inquiries and that they are prepared for this possibility.

### b) Assessing risk

Some issues that should be considered are:

- Has the staff member reporting wrongdoing indicated their intention to do so, or complained about the issue before?
- Can the information or issues raised be readily attributed to the staff member who reported them?
- Can the issues raised in the report be investigated without disclosing information that would identify or tend to identify the staff member?
- What is the risk of the subject of the report guessing who made the disclosure?
- What is the risk that the subject of the report will threaten or take reprisals if they guess who made it?
- If both of these risks are high then would disclosing the identity of the staff member reporting wrongdoing:
  - › subject them to no further harm than they were already at risk of
  - › prevent a person taking reprisals from arguing that they did not know the identity of the staff member?
- Are any of the exceptions to maintaining confidentiality under the PID Act relevant?

Organisations should also develop strategies to support the internal reporter, both while their identity is kept confidential and also if their identity is disclosed (see [Guideline D1](#) for more information about providing support).

## c) Managing risk

### Is the identity of the staff member reporting wrongdoing likely to remain confidential?

If the identity of the staff member reporting wrongdoing is likely to remain confidential your organisation should adopt an approach that ensures that confidentiality is maintained.

Organisations should:

- Limit the number of people who are aware of the identity of the internal reporter or information that could tend to identify them.
- Remind each person who has the information that there is a statutory obligation to keep it confidential.
- Assess whether anyone who is aware of the internal reporter's identity might have a motive to cause reprisals to be taken against the internal reporter or impede the progress of the investigation.
- Put in place procedures to make sure that the internal reporter can communicate with support people and investigators without alerting others to the fact that a PID has been made. The reporter should be told how and by whom they will be contacted and also who they should contact if they need further advice or information.

Investigators should use approaches that are least likely to result in the internal reporter being identified. For example:

- Arrange for a 'routine' internal audit of an area or activity that covers but is not focussed solely on the issues disclosed.
- Don't identify any trigger or reasons for an audit or investigation or alternatively allude to a range of possible triggers without confirming any particular one.
- Ensure that the internal reporter is interviewed if it would be expected that everyone in the workplace would be interviewed.

### Is the identity of the staff member reporting wrongdoing known or likely to become known?

If the identity of the staff member reporting wrongdoing is known or likely to become known, it may be better to adopt a proactive approach – either at the outset (if the identity of the internal reporter is known then) or at the stage where their identity becomes known.

If confidentiality cannot be maintained or the identity of an internal reporter needs to be revealed to someone, your organisation should consult the internal reporter and ask for their informed consent to the disclosure of the information, if possible.

#### *Proactive management intervention*

The colleagues of the internal reporter and the subject of the report should be told:

- that the report has been made
- the general substance of the allegations made
- the identity of the internal reporter.

Your principal officer and senior managers should reinforce that they welcome the report and will not tolerate any harassment or victimisation in connection with it. They should also point out that the protections in the PID Act are likely to apply and make staff aware that criminal, disciplinary or management action may be initiated if detrimental action is taken or threatened against the internal reporter.

Unless it is necessary to disclose information that identifies the subject of the report, this should not be done.

#### *Supporting and protecting the internal reporter*

The supervisor and line managers of the internal reporter should be advised that they are responsible for:

- providing support to the internal reporter
- protecting them from harassment or any other sort of reprisal.

If the report is about the conduct of the internal reporter's supervisor or line manager or they are somehow involved in the conduct reported, then a person external to the area should be appointed as the support person. You may also consider whether, under certain circumstances, appointing a support person outside of the area is preferable.

#### *Advice and training*

Relevant staff, including the colleagues of the internal reporter and the subject of the report, should be given advice or training about the:

- importance of reports of wrongdoing
- relevant provisions of your organisation's internal reporting policy.

#### *Relocation and transfer*

If there are concerns about the internal reporter's safety or wellbeing, or other factors that would make it impossible for them to remain in their current workplace, you should consider whether it is practical to:

- relocate their workstation to another part of the premises
- transfer or second them to another part of your organisation
- transfer or second them to an equivalent position in another organisation
- help them to obtain alternative employment.

If this is done it should be made clear to staff that this was at the request of the internal reporter and is not punishment.

In some circumstances, it may be appropriate to relocate the subject of the allegations (see [Guideline C8](#) for more information about people subject to internal reports).

## 5. Your questions answered

### What if the internal reporter does not ask for confidentiality?

The confidentiality requirements of the PID Act still apply. If the internal reporter does not want confidentiality then you need to consider the reasons for this and the resulting impact on both your organisation and the reporter. For example:

- Is the internal reporter putting themselves at unreasonable risk of reprisal if confidentiality is not maintained?
- Does the internal reporter want to publicise their report as a political tool? If so, and this is not appropriate, how will your organisation manage any associated risks?
- Does the internal reporter feel that the culture of your organisation is supportive enough that any risk of reprisal will be managed effectively? They may feel that being frank and open about the report will lead to a more harmonious situation within the workplace as opposed to any innuendo that may result from secrecy.

### Does the person who is the subject of the report have a right to know the identity of the internal reporter?

No, the confidentiality requirements of the PID Act still apply. However this may not be the case in any subsequent disciplinary or criminal proceedings that may arise, where the evidence of the internal reporter may be vital. For example, procedural fairness may require the identity of the internal reporter to be revealed at this stage.

### Can the internal reporter require confidentiality as a condition of making a public interest disclosure?

No. Section 22 sets out a number of exceptions to maintaining confidentiality. Under certain circumstances, the organisation may not be able to maintain confidentiality, for example, if it is unable to conduct an effective investigation or needs to satisfy the requirements of procedural fairness.

If an internal reporter requests that their report be kept confidential, this may be an indication that they fear reprisals or other negative consequences from reporting. Disclosure officers, coordinators or principal officers should:

- discuss the situation with the internal reporter and explore with them the reasons that they are fearful
- explain to the internal reporter the measures that your organisation will put in place to protect and support them (see [Guideline D1](#) for more information about providing support)
- explain any options available to the internal reporter that may make them feel more at ease.

## Contact us for more information

Our business hours are: Monday to Friday, 9am–5pm (*Inquiries section closes at 4pm*)

If you wish to visit us, we prefer you make an appointment. Please call us first to ensure your complaint is within our jurisdiction and our staff are available to see you.

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Telephone Interpreter Service (TIS): 131 450  
We can arrange an interpreter through TIS or you can contact TIS yourself before speaking to us.

### Are there any penalties for the disclosure of information that would identify or tend to identify a staff member reporting wrongdoing?

There are no penalties in the PID Act for disclosing information that identifies or tends to identify a staff member who reports wrongdoing. However, there are penalties for then using that information to take reprisals against the staff member, once their identity is known. If the identity of an internal reporter is disclosed in the course of dealing with a PID without good reason, this may also be conduct which could be made the subject of adverse comment by the NSW Ombudsman.

Other legislation such as the [Independent Commission Against Corruption Act 1988](#) and the [Privacy and Personal Information Protection Act 1998](#) or your organisation's code of conduct may also impose penalties for the improper disclosure of information.

## 6. Additional resources

- [Fact sheet No. 7: Confidentiality and its practical alternatives](#)
- [Guideline C4: Assessing risk of reprisals and conflict](#)
- [Guideline C8: People subject to internal reports](#)
- [Guideline D1: Internal reporter support strategy](#)
- [Independent Commission Against Corruption Act 1988](#)
- [Privacy and Personal Information Protection Act 1998](#)
- [Public Interest Disclosures Act 1994](#)

## 7. Last updated

November 2011

## 8. Endnotes

- 1 Roberts, P, Olsen, J & Brown, AJ 2009, *Whistling while they work: Towards best practice*, Griffith University, Brisbane, p. 74.