

Deeming that a disclosure is a voluntary PID

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What this guideline covers

The head of an agency has a discretionary power, in certain circumstances, to determine that a disclosure is a voluntary public interest disclosure (**PID**) even if the report does not otherwise have all the features of a voluntary PID.¹ This is referred to in this guideline as the ‘deeming power’.

By deeming that a disclosure is a voluntary PID, it ensures that reporters are provided with protections and that serious wrongdoing is acted upon.

This guideline covers the circumstances in which the deeming power may be used, factors to consider when deciding to deem that a disclosure is a voluntary PID and the process to be followed when using the deeming power.

1. *Public Interest Disclosures Act 2022*, s 29.

When the deeming power can be used

The head of an agency can determine that a disclosure is a voluntary PID, even though it does not have all the features of a voluntary PID. By making this determination, they will have deemed that the disclosure is a voluntary PID.

The following are some examples of circumstances where the head of an agency may consider using the deeming power:

- There is some technical uncertainty as to whether a person who has made a disclosure falls within the definition of public official.
- A public official, who has recently retired as a public official, or is on a career break, wants to make a disclosure about serious wrongdoing that occurred during their time as a public official.
- A contractor, who provides services to an agency, such as IT services or cleaning services, wants to make a disclosure about serious wrongdoing they have seen in the agency.
- A public official made a disclosure of serious wrongdoing to a person without realising that the person was technically not a proper recipient of PIDs under the *Public Interest Disclosures Act 2022 (PID Act)* (for example, they made their disclosure to a senior legal officer in their agency, who is not their manager or a nominated disclosure officer of the agency).
- A family member of a public official comes across information concerning serious wrongdoing but is afraid of the repercussions of reporting that information.
- A vulnerable member of the public, in the course of receiving services from an agency, has information that amounts to evidence of serious wrongdoing. They may be afraid of coming forward because of their vulnerability or because they are reliant on the continued services provided by that agency.

Important note: The head of the agency can delegate the deeming power to others in their agency.² Any reference to the head of the agency in this guideline also refers to their delegate.

2. *Public Interest Disclosures Act 2022*, s 80(1)(a).

How to use the deeming power

The head of an agency can deem that a disclosure of serious wrongdoing is a voluntary PID, either on their own initiative or at the request of the maker of the report.³

A person making a report may not be aware that they can request that the head of the agency deem the report to be a voluntary PID. It is important that recipients of reports of wrongdoing are aware of this avenue so they can refer matters to the head of the agency for consideration. Persons who have made a disclosure that does not have all the features of a voluntary PID, but that reports serious wrongdoing, should also be informed of the possibility of requesting that the disclosure is deemed to be a voluntary PID.

If the head of an agency is requested to deem that a disclosure is a voluntary PID, the head of the agency *must*, after considering the request, do one of the following:

- *Make the determination* (that is, deem that the disclosure is a voluntary PID). In this case, the maker must be informed of the determination in writing. This written communication is admissible in criminal or civil proceedings as evidence that the disclosure is a voluntary PID.⁴
- *Refuse to make the determination* (that is, refuse to deem that the disclosure is a voluntary PID). In this case, the maker must be informed of this decision to refuse in writing and be provided with reasons for the decision.⁵

The head of the agency's decision has effect from the time it is made.⁶ This means that the protections under the PID Act also apply from that time. Once a decision has been made to deem that the disclosure is a voluntary PID, the agency must decide how it will deal with the matter in accordance with the PID Act.⁷

3. *Public Interest Disclosures Act 2022*, s 29(2)(a).

4. *Public Interest Disclosures Act 2022*, s 29(7)(a).

5. *Public Interest Disclosures Act 2022*, s 29(7)(b).

6. *Public Interest Disclosures Act 2022*, s 29(6).

7. *Public Interest Disclosures Act 2022*, s 55(1).

Does the head of the agency believe the report shows serious wrongdoing?

A disclosure can only be deemed to be a voluntary PID if the head of the agency believes honestly and on reasonable grounds that the disclosure shows or tends to show serious wrongdoing.⁸

An error by the agency head in making the decision to deem a disclosure to be a voluntary PID does not affect the validity of the decision.⁹ This means that the person making the disclosure is not ‘at risk’ of the agency head making a mistake — they will not lose the protections. In particular, if it later turns out that the head of the agency deemed the disclosure to be a voluntary PID, but there were not reasonable grounds to believe that the disclosure showed serious wrongdoing, the matter will continue to be dealt with as a voluntary PID. The validity of the determination is not affected and the decision to deem the report as a voluntary PID is not invalidated.

The head of the agency can, however, revoke their decision if they form the view that the maker of the PID wilfully made a false statement to, or misled or attempted to mislead, the agency or person to whom the disclosure was made.¹⁰

Important note: An agency’s PID policy should include information about to whom (if anyone) this power is delegated, the process and timeframes for dealing with requests, relevant considerations, and processes for informing the report maker of the decision.

There is no right under the PID Act to an internal review of the decision to refuse to deem a disclosure as a voluntary PID. This does not stop agencies from providing avenues for an internal review.

If an internal review is granted, it should be conducted by someone who is appropriately authorised and was not substantially involved in the decision to refuse to deem the disclosure. This means that internal review will only be possible if the agency head has delegated the power to make deeming decisions to others in the agency. For that reason, delegating the power — for example, to the agency’s disclosures coordinator — would be good practice to enable an appropriate avenue of internal review.

8. *Public Interest Disclosures Act 2022*, s 29(2)(c), (3).

9. *Public Interest Disclosures Act 2022*, s 29(4).

10. *Public Interest Disclosures Act 2022*, s 29(8).

Factors to consider when deciding to deem a disclosure

The decision whether to deem a disclosure to be a voluntary PID is discretionary.

In considering whether to exercise that discretion, regard should be had to the public interest and, in particular, to the objects of the Act.¹¹ These include:

- to facilitate the disclosure by public officials of serious wrongdoing in or affecting the public sector
- to promote a culture in which public interest disclosures are encouraged
- to protect public officials, witnesses and other persons from detriment or liability that might arise because of public interest disclosures.

Some considerations that might be relevant when deciding whether to exercise the deeming power include:

- *Does the disclosed information show serious wrongdoing?*

As noted above, the deeming power may *only* be used if the head of the agency believes honestly and on reasonable grounds that the disclosure shows or tends to show serious wrongdoing.

- *Is there uncertainty about whether the person is a public official?*

The PID Act is principally concerned with disclosures made by public officials. There may be borderline cases where there is legal doubt whether a person who has made a disclosure falls within the legal definition of a public official. In those circumstances, deeming the disclosure to be a voluntary PID will remove any uncertainty, and avoid the risk to that person that the protections under the PID Act may turn out not to apply to them.

- *Is the person in a position akin to that of a public official as defined in the PID Act?*

Even if it is clear that a person is not a public official as defined in the PID Act, the circumstances may be such that it could be appropriate to deem their disclosure to be a PID, and thus ensure that the PID protections apply to them. The deeming power exists to provide a mechanism to ensure that people are not excluded from the protections of the PID Act on a 'technicality'.

For example:

- A contractor who is providing services to an agency may not be a public official.¹² However, some service contractors could (like a public official) witness serious wrongdoing in the agency and could (like a public official) be at similar risk of retribution if they report it — such as the termination or nonrenewal of their contract.
- A person may witness something when they were a public official, but they report it at a later time when they are no longer a public official — for example, because their role has already been terminated, or they are retired or are now 'between roles'. It might be the case that the person was unable or unwilling to report earlier (when they were a public official) because of a legitimate fear of detrimental action.

- *What is the risk to the person if the disclosure is not deemed to be a voluntary PID?*

Deeming a disclosure to be a voluntary PID ensures that the maker of the disclosure has the protections under the PID Act. A relevant consideration, therefore, in deciding whether to exercise the deeming power is to consider what risks the person may face because of making the disclosure, and whether it is appropriate, having regard to the objects of the PID Act and the public interest, that they have statutory protection from those risks.

- *Why is the disclosure not otherwise a voluntary PID?*

In considering whether to deem a disclosure to be a voluntary PID, it will be important to consider why the disclosure otherwise lacks the features to be a voluntary PID.

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

12. This is distinct from a contractor who has provided services on behalf of an agency, who will be a public official.

For example:

- Is the disclosure not a voluntary PID only because the maker made the disclosure to someone who was not technically the ‘right’ person in their agency — that is, did they disclose to someone they reasonably thought was an appropriate person to whom to report the matter, without realising that the person was not authorised to receive PIDs?

An example might be where a person makes a disclosure to the chief legal officer of their agency, but the chief legal officer is not their manager, and has not otherwise been specifically nominated by the agency as a disclosure officer. In those circumstances, the disclosure would not be a voluntary PID — but consideration could be given to deeming it to be a voluntary PID so that the person still receives the protections of the PID Act based on what might otherwise seem to be a technicality.

- Is the disclosure not a voluntary PID only because it is already a mandatory PID or a witness PID?

One feature of a voluntary PID is that the disclosure must be voluntary — in the sense of it not being a mandatory PID or a witness PID. If, however, the only reason a disclosure is not a voluntary PID is because it is a mandatory PID or a witness PID, consideration could be given to deeming the disclosure to be a voluntary PID.

This might be considered where it would be clearly beneficial to the maker of the PID to be afforded the additional protections of a voluntary PID that do not ordinarily apply to the other kinds of PIDs (for example, the statutory confidentiality protections) or the obligation on the agency to undertake a risk assessment.

- *What are the benefits of deeming the disclosure to be a PID?*
 - Will deeming the disclosure to be a voluntary PID ensure that a person who has reported serious wrongdoing will be appropriately protected?
 - Will it encourage others to report wrongdoing and is it consistent with promoting a culture where the reporting of wrongdoing is encouraged?
 - Will it help to ensure that the serious wrongdoing is appropriately investigated or otherwise dealt with?

Whether or not a person has formally requested that their disclosure be deemed to be a voluntary PID, if consideration is being given to that question, the head of the agency should, where practicable, seek and consider any submissions from the person that may be relevant to that decision. This should always be done in cases before a decision is made *against* deeming the disclosure to be a voluntary PID.

However, a decision may be made *in favour* of deeming a disclosure to be a voluntary PID, without seeking submissions from the person, in cases where it appears that a person may be at imminent risk and in need of immediate protection (noting that the protections will apply only from the time the deeming decision is made, and do not apply retrospectively).

