

What is serious wrongdoing?

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What this guideline covers

This guideline provides information about the types of serious wrongdoing that can be reported under the *Public Interest Disclosures Act 2022* (**PID Act**). It provides guidance on how to identify whether the report is a report of serious wrongdoing.

What is ‘serious wrongdoing’?

A framework for staff to report serious wrongdoing and for those reports to be properly dealt with is vital for maintaining the integrity of the public service.

To ensure that agencies identify when they have received a voluntary public interest disclosure (**PID**), it is important to understand serious wrongdoing. A key feature of a voluntary PID is that the public official making the report must honestly believe on reasonable grounds that the information shows or tends to show serious wrongdoing.

Under section 13 of the PID Act, there are 6 categories of serious wrongdoing:

1. corrupt conduct
2. serious maladministration
3. a government information contravention
4. a privacy contravention
5. a serious and substantial waste of public money
6. a local government pecuniary interest contravention.

There is no further assessment that needs to be made as to the seriousness of the reported wrongdoing. If it is serious wrongdoing, as defined under section 13 of the PID Act, it meets the test under the PID Act and is ‘serious’ enough to be a voluntary PID.

A disclosure can show more than one type of serious wrongdoing. For example, a public official could provide information that reveals both corrupt conduct and a privacy contravention. A disclosure may also contain information of other types of conduct that do not fall within the PID Act.

Important note: Makers of PIDs do not need to state the category of serious wrongdoing that they are reporting. Indeed, they do not even need to necessarily state that they are reporting serious wrongdoing.

Makers of PIDs can make their report to their manager. Managers have an important role in the PID framework, in that they must communicate the report to a disclosure officer on behalf of their staff member. This means that all managers will need to have a good working knowledge of the type of conduct which may be serious wrongdoing, so they can recognise when they have an obligation to pass on a report to a disclosure officer. Disclosure officers will, of course, need to be more adept in their understanding of serious wrongdoing, to ensure they properly identify when a report is a voluntary PID.

Corrupt conduct

Corrupt conduct in the PID Act has the same meaning as in sections 7, 8 and 9 of the *Independent Commission Against Corruption Act 1988*. It involves deliberate or intentional wrongdoing involving (or affecting) a public official or agency in NSW.

Corrupt conduct includes:

- conduct of any person that adversely affects, or could adversely affect, either directly or indirectly, the honest or impartial exercise of official functions by any public official, any group or body of public officials, or any agency
- any conduct of a public official that constitutes or involves the dishonest or partial exercise of any of their official functions
- any conduct of a public official or former public official that constitutes or involves a breach of public trust
- any conduct of a public official or former public official that involves the misuse of information or material that they acquired during their official functions, whether for their benefit or for the benefit of any other person.

Some practical examples include:

- a public official selling confidential information gained while working in an official capacity
- a public official failing to report criminal conduct in exchange for a financial advantage
- a local councillor voting in favour of a development in which the councillor has an undisclosed financial interest
- a public official accepting a financial benefit from someone in exchange for ensuring a particular outcome for that person (such as a favorable outcome on a driver's licence test or a development application).

For conduct to be considered corrupt, it has to be serious enough to involve a criminal or disciplinary offence, be grounds for dismissal or, in the case of Members of Parliament, involve a substantial breach of their code of conduct.

The Independent Commission Against Corruption (**ICAC**) advises that initially, at the time the report is made, you do not need to know with any certainty that the conduct reaches this level of seriousness as this will often be known only after a full investigation.

Important note: The ICAC is the integrity agency that generally investigates corrupt conduct in the NSW public sector.

Serious maladministration

Serious maladministration is defined in the PID Act as conduct, other than conduct of a trivial nature, of an agency or a public official relating to a matter of administration that is:

- unlawful
- unreasonable, unjust, oppressive or improperly discriminatory, or
- based wholly or partly on improper motives.

There are three elements to serious maladministration in this definition:

1. The conduct relates to a matter of administration.
This means that there must be a link between the relevant action or inaction and the exercise of a power, function or duty of an agency or public official.
2. The conduct is:
 - (a) unlawful
 - (b) unreasonable, unjust, oppressive or improperly discriminatory, or
 - (c) based wholly or partly on improper motives.
3. The action or inaction is serious. This means only that it must be more than trifling or trivial.

Some examples of serious maladministration include:

- an agency contravenes legal procurement processes when engaging contractors
- senior staff fail to deal with multiple reports of toxic materials in government-owned properties over a period of time
- an agency implements policies and procedures which are contrary to its governing legislation and result in misuse of powers
- agency procedures are unfairly discriminatory.

Important note: The Ombudsman is the integrity agency with primary responsibility to investigate serious maladministration in most agencies in the NSW public sector. The Law Enforcement Conduct Commission (LECC) has jurisdiction to investigate serious maladministration in the NSW Police Force and the NSW Crime Commission. However, there are some bodies and individuals that are excluded from the jurisdiction of the Ombudsman and the LECC, including Parliament and Members of Parliament and courts and judges.

Serious and substantial waste of public money

A 'serious and substantial waste of public money' is not defined in the PID Act.

A serious and substantial waste of public money includes any uneconomical, inefficient or ineffective use of resources, whether authorised or unauthorised, and which results in a loss of public funds or resources.

When addressing any complaint of serious and substantial waste, the Audit Office will have regard to the nature, scale and materiality of the waste.

Examples of waste include:

- misappropriation or misuse of public property
- the purchase of unnecessary or inappropriate goods and services
- incurring costs which might otherwise have been avoided
- programs not achieving their objectives and therefore the costs being clearly ineffective and inefficient
- failure to maintain public property in a way that results in far greater expense being incurred in the future.

Waste can result from such things as:

- not following a competitive tendering process
- having poor or no processes in place when administering large amounts of public funds
- the absence of appropriate safeguards to prevent the theft or misuse of public property
- purchasing procedures and practices which fail to ensure that goods and services are necessary and adequate for their intended purpose
- purchasing practices where the lowest price is not obtained for comparable goods or services without appropriate justification.

Important note: A disagreement with the merits of intended government outcomes and policy objectives is not a serious and substantial waste of public money. This category of serious wrongdoing is concerned with the effective and efficient deployment of public resources toward government-determined objectives – not with the merit of those objectives themselves.

A public official may complain to the Auditor-General that there has been a serious and substantial waste of government money by an auditable entity or an officer or employee of an auditable entity (including a government officer).

Government information contravention

A government information contravention is a failure, other than a trivial failure, by an agency or public official to exercise functions in accordance with the:

- *Government Information (Information Commissioner) Act 2009*
- *Government Information (Public Access) Act 2009 (GIPA Act)*, or
- *State Records Act 1998 (SR Act)*.

Examples of a failure to exercise functions under the GIPA Act include:

- having a policy of charging a fee for open access information, which should be free of charge, either purposely or due to a lack of understanding of the rules around open access
- intentionally overlooking documents that should clearly be included in response to an access application
- destroying, concealing or altering records to prevent them from being released
- knowingly making decisions that are contrary to the GIPA Act
- directing another person to make a decision that is contrary to the GIPA Act.

Examples of a failure to exercise functions under the SR Act include:

- intentionally disposing of records that must be retained under the SR Act
- systemic issues with an agency's record-keeping system that means information is not being stored appropriately.

Important note: The Information Commissioner is the integrity agency that generally investigates government information contraventions in the NSW public sector.

Privacy contravention

A privacy contravention is a failure, other than a trivial failure, by an agency or public official to exercise functions in accordance with the *Privacy and Personal Information Protection Act 1998* or the *Health Records and Information Privacy Act 2002*.

Examples of a privacy contravention include:

- **Personal information**

- a public official unlawfully accessing a person's personal information, for their personal use or for another non-work-related matter, on a database that is used by an agency to retain customer information
- an agency having poor data management processes in place which leads to the disclosure of the personal information about a person, or group of persons, to another agency or entity without a lawful reason
- an agency's poor email practices resulting in repeated failures by staff of the agency to ensure emails containing personal information go to the correct recipient.

- **Health information**

- unlawfully accessing someone's health information on an agency database and then disclosing this to a third party
- agencies which legitimately retain health information, failing to properly ensure that access to those records is restricted to the appropriate part of the business
- agencies that retain health information for one purpose disclosing it internally to another section of the agency for it to be used for another purpose.

Important note: The Privacy Commissioner is the integrity agency that generally investigates privacy contraventions in the NSW public sector.

Local government pecuniary interest contravention

A local government pecuniary interest contravention means the contravention of an obligation in relation to a pecuniary interest, imposed by:

- the *Local Government Act 1993 (LG Act)*, or
- a code of conduct adopted by a council under section 440(3) of the LG Act.

A pecuniary interest is an interest that a person has in a matter because they have a reasonable likelihood, or expectation, of appreciable financial gain or loss to themselves or someone within their family.

The LG Act places specific obligations on councillors, council delegates, council staff and other people involved in making decisions or giving advice on council matters to act honestly and responsibly in carrying out their functions. Generally, those obligations are to lodge disclosure of interests returns, lodge written declarations and disclose pecuniary interests at council and council committee meetings.

Allegations or complaints concerning possible breaches of the pecuniary interest provisions of the LG Act are to be made to the Department of Planning and Environment (**Department**) via the Office of Local Government (**OLG**) for assessment and any necessary action. Potentially, the OLG may be required to formally investigate the matter and then refer a report of the investigation to the Pecuniary Interest and Disciplinary Tribunal.

Examples of local government pecuniary interest contraventions include:

- a senior council staff member recommending a family member for a council contract and not declaring the relationship
- a general manager holding an undisclosed shareholding in a company competing for a council contract
- a councillor participating in considering a development application for a property in which they or their family have an interest.

Important note: The LG Act confers powers and responsibilities on the 'Departmental Chief Executive', currently the Secretary of the Department. The OLG is a business unit within the Department that advises the Minister for Local Government and exercises delegated functions of the Secretary of the Department under the LG Act. A Deputy Secretary oversees the OLG and reports to the Secretary.

