

## Legal advice

### Acting in the public interest

Unlike their private sector colleagues, but just like other public servants, lawyers who are public officials have a duty to act in the public interest.

The public sector exists to serve the public and is therefore accountable to the public. This takes various forms, including being bound by administrative and freedom of information laws and having their decisions open to scrutiny by bodies such as the Ombudsman, Independent Commission Against Corruption (ICAC) and the Administrative Decisions Tribunal. Public sector agencies should therefore act as model citizens, just as they should be model litigants. They should act within the letter and spirit of the law by complying with legal obligations, only making decisions that they have the power to make, exercising those powers reasonably and in accordance with the law, and accepting liability for actions for which they are clearly responsible.

In order to do this, agencies will sometimes need to seek guidance and advice from a lawyer. Agencies retaining private sector lawyers need to ensure they are explicitly aware that the agency is obliged to be a model litigant, a model citizen and to act in the public interest as well as in accordance with any other standards set for all public sector agencies and their employees.

### Seeking and following legal advice

It is good practice for an agency to seek legal advice in the following circumstances:

- when making important decisions concerning the organisation (eg, in dismissing an employee or entering into a contract)
- when exercising a power that, if not exercised properly, is likely to be subject to judicial review or criticism from a watchdog
- where there is a risk that the agency does not have the power to undertake the action proposed
- where some event has happened and it is unclear whether this may have put the agency under some legal obligation or liability, or whether the agency has any legal remedies available to it (eg, agencies may need advice on their obligation to report conduct they have observed to organisations with enforcement or watchdog functions such as ICAC, the Department of Community Services, the Environment Protection Authority or the Australian Securities and Investment Commission).

The agency will then be able to make a more informed decision and demonstrate that it has tried to act in a lawful way. According to the principles of administrative law, in the exercise of discretionary powers, the agency must not simply follow its legal advice. It must make the final decision independently, by considering all the relevant factors, including the legal advice.

To ensure the quality of its decision-making, agencies should seek legal advice from an independent source rather than relying on legal advice provided by any interested party.

Legal advice or the process of seeking legal advice would be being misused if the agency:

- used it as a delaying or avoidance tactic where the agency or official wants to offset blame for a controversial decision
- gave the legal officer a partial or misleading briefing to increase the chances of receiving legal advice that favours a particular position
- refused to determine contentious questions solely because there is an appeal or other formal mechanism by which the matter could be determined.

### Releasing legal advice to the public

Public sector agencies should be transparent in the way they perform their functions. Only in this way can they be properly held to account for their actions and decisions. Generally the public has a right to know why an agency has done what it has done.

Secrecy leads to a risk that power will be abused. In practice, this means that generally, requests for information about an agency's operations should be responded to openly and accurately.

In NSW, the *Freedom of Information Act 1989* creates a statutory scheme that gives the public legal rights to agencies' documents. Under the Act the public has a right to apply to a public sector agency for access to their documents. One of the objects of the Act is to extend, as far as possible, the rights of the public to obtain access to information held by the Government.

The Act sets out exemption categories which provide grounds on which agencies may refuse access to documents. One of these categories is that the documents are the subject of legal professional privilege (also known as client legal privilege). However, nowhere does the Act say that documents of any exemption category must not be released.

### When should legal advice be released?

#### When it might help someone understand why a decision was made

In some cases, providing access to the legal advice used by an agency in taking certain action or making a decision may help those who are affected to understand why the agency did what it did. Sometimes the person may be persuaded that the agency's conduct was not contrary to law or, even if the person believes the legal advice to be incorrect, that it was reasonable for the agency to rely on the advice. This should reduce the number of dissatisfied people the agency has to handle, in the form of complaints or possibly even people taking legal action.

Proper accountability also demands that an agency provide reasons for its decisions, to demonstrate that it has exercised its decision-making power lawfully and reasonably.

It is inappropriate for an agency to explicitly state that a decision was based 'on legal advice' but refuse to release the details of that advice.

A good example might be where an agency informs someone that their application for consent or approval has been rejected on the basis of legal advice that their proposal is not legally permissible, but refuses to tell the person why.

If the agency is concerned about sensitive information in the document containing the legal advice, it can release only those parts of the document that explain the basis for its decision. Alternatively, it could paraphrase the legal advice received.

One situation where an agency may be justified in refusing access to legal advice on which it has based a decision is where legal proceedings are reasonably contemplated.

### When releasing the information makes the agency more accountable

Generally, it would serve a positive public purpose to release documents that:

- contain information likely to contribute to positive and informed debate about issues of serious public interest, or reveal significant reasoning behind decisions made by the agency that affect or will affect a significant number of people
- set out only factual or technical matters
- show how agency policy affecting the rights or interests of members of the public, was created
- are reports of finalised investigations or inquiries, or inspections carried out by public officials arising out of events or circumstances that have resulted in damage or injury to the member of the public seeking access to the report
- show how an agency has dealt with a complaint made by the person seeking access
- contain the best or only evidence of matters that affect the rights or interests of the person seeking access
- will assist or allow proper inquiry into possible deficiencies in the conduct of the agency or its staff (eg. by exposing or removing suspicion of significant impropriety) or will otherwise significantly contribute towards the public accountability of the agency or its staff.

### Further information

For further information see also *Good Conduct and Administrative Practice – Guidelines for state and local government*, NSW Ombudsman, August 2003.

### 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.