

## Managing information arising out of an investigation

- Balancing openness  
and confidentiality –



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# A. Introduction

## 1. The purpose of the guidelines

There are a range of circumstances where agencies need to conduct investigations. Investigations can be into:

- the conduct of agencies' staff in the context of allegations ranging from fraud or child abuse to bullying or harassment
- the conduct of individuals or organisations within the jurisdiction of agencies exercising policing, regulatory or oversight functions, and
- complaints about the standard or quality of agency service provision, or the implementation of policies, procedures and/or practices.

For some agencies investigations are an every day occurrence while for others they are a relatively rare event. Some agencies have dedicated staff with appropriate qualifications and experience whose primary function is to conduct investigations. Some agencies use qualified and experienced external investigators when the need arises. Other agencies make do and rely on unqualified and inexperienced staff, usually managers, to do the best they can in the circumstances.

To assist agencies within our jurisdiction to conduct 'administrative' type investigations, we have produced various practice guidelines (including *Investigating Complaints – A manual for investigators*, *Protected Disclosures Guidelines*, 6<sup>th</sup> edition, and the *Complaint Handlers Tool Kit*). However, feedback from organisations within our jurisdiction indicates a need for more comprehensive guidance to assist agencies to manage the particularly complex and sensitive issues that can arise in the management of information arising out of an investigation, ie, how to balance the needs of openness and confidentiality.

These guidelines have been developed to assist organisations to manage information arising out of the full range of 'administrative' type investigations. This would include investigations into such things as child protection related allegations ('reportable conduct'), corrupt conduct, grievances and workplace conduct issues, maladministration, protected disclosures, etc.<sup>9</sup>

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<sup>9</sup> The guidelines bring together relevant material from a range of sources, including:

- *Good Conduct and Administrative Practice – Guidelines for state and local government*, NSW Ombudsman, 2<sup>nd</sup> edition, May 2007
- *Investigating Complaints – A manual for investigators*, NSW Ombudsman, June 2004
- *Protection of Whistleblowers – Practical Alternatives to Confidentiality*, Information Sheet, NSW Ombudsman, April 2008
- *Protected Disclosures Guidelines*, 6<sup>th</sup> edition, NSW Ombudsman, February 2009
- Public Sector Agencies Fact Sheet No. 6, *Frankness and Candour*, NSW Ombudsman, June 2004
- Public Sector Agencies Fact Sheet No. 12, *Legal Advice*, NSW Ombudsman, October 2005
- Public Sector Agencies Fact Sheet No. 14, *Natural Justice/Procedural Fairness*, NSW Ombudsman, March 2006
- Public Sector Agencies Fact Sheet No. 18, *Reasons for decisions*, NSW Ombudsman, May 2006
- *Reporting on Progress and Results of Investigations*, NSW Ombudsman, November 2008
- *The NSW FOI Manual*, NSW Department of Premier and Cabinet and NSW Ombudsman, August 2007.

The guidelines address:

- firstly, the various circumstances when information should be disclosed, including why, what, when and to whom (Part B)
- secondly, the circumstances when information should not be disclosed (Part C), and
- thirdly, the mechanisms available to refuse access to documents in the circumstances when information should not be disclosed (Annexures A & B).

Finally, here are also short Annexures at the end of the guidelines looking at:

- recording and storing information obtained during an investigation (Annexure C)
- security of information (Annexure D).

## 2. The principle – balancing openness and secrecy

Information is held by government agencies (both State and local) on behalf of the people of this State, or in the workplace child protection context, by employers. The public have a right to know what has been or is being done or contemplated by government, and it is only reasonable that employees know what information is held about them by their employer, unless there are good and lawful reasons for access to such information be restricted.

An issue that arises in any investigation where there is a complainant, a witness or a person the subject of investigation relates whether and if so what information should be disclosed, to who, when and how. Questions that will need to be answered in such circumstances include:

- what information should or should not be disclosed?
- what information should be provided to complainants, to witnesses and/or to the subjects of the investigation?
- when should such information be provided?
- how should the information be provided?

The basic principle guiding such deliberations is that as much information as possible should be provided to all interested parties.<sup>10</sup> However, implementation of this principle must be subject to reasonable limitations, for example whether it can reasonably be expected that disclosure of particular information could:

- result in unreasonable detrimental impact to any individual
- result in unreasonable detrimental impact to any current or likely future investigation
- prejudice the future supply of information
- substantially adversely affect the management of the agency
- prejudice occupational health and safety, or
- breach secrecy, privacy or confidentiality obligations.

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<sup>10</sup> This is subject to the limitation that where information is obtained in the exercise of a statutory power, that information may only be used by the recipient of the information for the purposes for which the power is conferred and for purposes reasonably incidental to those powers, or for other purposes authorised by statute. In other words, in such circumstances the statute imposes on the recipient a duty not to disclose the information obtained other than for that purpose or for some other statutory purpose.

## B. When should information be disclosed?

### 3. Circumstances when information should be disclosed

There are a range of circumstances where it would or may well be appropriate to disclose information during the course of or arising out of an investigation. These circumstances would include:

- to facilitate an investigation [see 4 below]
- to keep interested parties aware of the progress and results of an investigation [see 5 below]
- to comply with procedural fairness requirements [see 6 below]
- to give reasons for decisions or conclusions [see 7 below]
- to disclose the identity of a complainant, whistleblower or source of information for the purpose of protecting the person from reprisals [see 8 below]
- to comply with an open disclosure policy when things go wrong [see 9 below]
- to comply with legal obligations, eg under the FOI Act or other legislative requirements, under subpoena, for the purposes of criminal or disciplinary proceedings, etc [see 10 below].

### 4. Facilitating the investigation

An integral part of any investigation is the need to disclose information for the purpose of obtaining information. This might be explicit and intentional, eg: disclosing the details of allegations to the subject of the allegations seeing his/her side of the story. Alternatively it may be implicit or even unintentional, eg, every question that is asked in the course of an interview discloses something to the interviewee, be it information the interviewer is aware of or information the interviewer is seeking.

Investigators have the discretion to put various allegations or matters to witnesses for the purpose of getting a response. The only possible limits on this discretion are circumstances where confidentiality or secrecy requirements apply, for example instances where it is important not to disclose information that may identify a complainant.

### 5. Keeping interested parties aware of progress and results of investigations

#### 5.1 How should the interested parties be informed about the progress and results of investigations?

##### 5.1.1 Introduction

When agencies conduct internal investigations into complaints and disclosures, questions often arise about what information can be given to interested parties, including FOI applicants, about the progress and results of the investigation [when a matter is referred to an agency for investigation by the ICAC, specific advice is given to the agency about what information may be disclosed].

While it is not possible to give definitive advice that applies in all other circumstances, it is possible to give the following general guidance.

### 5.1.2 Who – Who has a legitimate interest in receiving information?

When considering who has a legitimate interest in receiving information concerning an investigation, consideration needs to be given to whether the investigation is either 'evidence focussed' or 'outcome focussed':

- 'evidence focussed' inquiries seek to pursue all lines of inquiry in a way that will meet all legal and procedural requirements, particularly where there is a possibility of criminal or disciplinary action, or a finding of wrong conduct against an individual which could significantly affect the person's reputation, interests, etc, ie, where a person is the subject of the complaint/disclosure
- 'outcome focussed' inquiries are primarily directed at quickly identifying and remedying problems. They therefore only seek to obtain sufficient information for a fair and informed judgment to be made about the issues in question, particularly where those issues relate to policies, procedures and/or practices. An outcome focussed investigation may require no more than consideration of the terms of the complaint/disclosure and a study of any relevant documents.

Where an investigation is 'evidence focussed', the parties that could have a legitimate interest in receiving information about the progress and outcome of the investigation might include:

- complainants/whistleblowers
- subjects of complaints/disclosures
- witnesses whose evidence is obtained during the course of an investigation.

Where an investigation is 'outcome focussed', the party with the legitimate interest in receiving such information may only be the complainant/whistleblower.

### 5.1.3 Why – Why should information be provided?

The reasons why information might be given to interested parties about the progress and results of investigations would include:

- to provide procedural fairness to subjects of complaints/disclosures. (see 6 below)
- to give reasons for decisions (see 7 below)
- to better manage complainants/whistleblowers and subjects of complaints/disclosures (for example, see 8 below)
- to meet the legitimate expectations of those involved (for example, see 9 below).

### 5.1.4 How – How should information be provided?

There are various ways in which relevant information on the progress and outcome of an investigation can be provided to interested parties, for example:

- discretionary release, eg:
  - written advice in reports, letters, facsimiles or emails
  - oral advice during or at the conclusion of interviews/hearings, or at the conclusion of an investigation

- under the FOI Act — for example to be able to rely on the protections of that Act where there is a possibility of defamation proceedings being instituted by a subject of the investigation (see 10.1 below).

[Note: The provisions of the *Privacy and Personal Information Protection Act 1998* (PPIP Act) that restrict the disclosure of personal information do not apply to NSW public sector agencies if non-compliance is reasonably necessary for the proper exercise of any of the agency’s investigative functions or its conduct of lawful investigations, or where non-compliance is reasonably necessary to assist another relevant agency exercising investigative functions or conducting a lawful investigation — see clauses 4 and 4A of the *Direction on Processing of Personal Information By Public Sector Agencies in Relation to Their Investigative Functions*.]

#### 5.1.5 What and when – What information should be provided, and when?

The stages at which information might best be provided to interested parties, and the information that could be provided, are set out on the following pages.

	Complainants	Whistleblowers	Subjects	Witnesses
At the outset	<ul style="list-style-type: none"> <li>• acknowledgement of the receipt of the complaint</li> <li>• the timeframe in which they will be advised as to the action to be taken on their complaint</li> <li>• the name and contact details of a person who they can contact about what is happening with their complaint</li> <li>• what action would be taken on their complaint (at an appropriate time)</li> </ul>	<ul style="list-style-type: none"> <li>• acknowledgement of receipt of the disclosure</li> <li>• the timeframe in which they will be advised as to the action to be taken on their disclosure</li> <li>• the name and contact details of a person who they can contact about what is happening with their disclosure</li> <li>• a request not to discuss their disclosure with any person,</li> <li>• particularly any person who may be involved in the investigation</li> </ul>	N/A	N/A
After a decision is made	<ul style="list-style-type: none"> <li>• general information as to what is proposed to be done in relation to the complaint</li> <li>• the likely timeframes for the actions proposed</li> <li>• the nature of the complainant’s likely involvement in the actions to be taken</li> </ul>	<ul style="list-style-type: none"> <li>• the action that is to be taken on their complaint</li> <li>• the likely timeframes for any investigation</li> <li>• a further request that they do not discuss their disclosure with any person</li> </ul>	<ul style="list-style-type: none"> <li>• the broad substance of any allegations against them (where the investigation could lead to findings and/or recommendations that could detrimentally impact on the person)</li> </ul>	

11 It is important to consider whether secrecy is required for the effective investigation of a complaint. This impacts on the need to advise the complainant of the importance of confidentiality/secrecy and on the timing of advice as to what action is to be taken.

	Complainants	Whistleblowers	Subjects	Witnesses
	<ul style="list-style-type: none"> <li>what information would be provided to them and at what stages during the course of the investigation</li> <li>the name and contact details of a contact person within the agency who will be responsible for the handling of their complaint, etc</li> <li>the need to keep this information confidential (where appropriate)<sup>11</sup></li> </ul>		<ul style="list-style-type: none"> <li>how the complaint/disclosure will be dealt with</li> <li>the opportunities that will be made available to them to put their case, or to show cause, whether in writing, at a hearing or otherwise</li> <li>if the name of the person who made the disclosure is known or likely to become known (with the whistleblower's agreement) the name of the whistleblower and that it is a criminal offence and also a disciplinary matter to take detrimental action against a whistleblower</li> </ul>	
During the course of an investigation	<ul style="list-style-type: none"> <li>the on-going nature of the investigation</li> <li>the progress so far</li> <li>the reasons for any delay</li> <li>when it is anticipated the investigation will be completed</li> <li>the need to keep this information confidential (where appropriate)</li> </ul>	<ul style="list-style-type: none"> <li>the on-going nature of the investigation<sup>12</sup></li> <li>the progress so far and any reasons for any delay</li> <li>advance warning if their identity is to be disclosed to the subject of the investigation, either directly or indirectly</li> <li>a further request not to discuss their disclosure with any other person</li> </ul>	<ul style="list-style-type: none"> <li>the on-going nature of the investigation</li> <li>the progress so far</li> <li>the reasons for any delay</li> <li>when it is anticipated the investigation will be completed</li> </ul>	the nature of the allegations relevant to the evidence they will be asked to provide (where appropriate) whether or not their evidence will be kept confidential and how it is intended it be used whether their involvement will be on-going, and if so the nature and likely timing of this involvement a request or direction that this information and their involvement be kept confidential (where appropriate) <sup>13</sup>

<sup>12</sup> This may be in response to a specific request for information, or otherwise from time to time at the discretion of the investigator during the course of an investigation.

<sup>13</sup> Where witnesses only have a peripheral involvement in an investigation, the content and timing of any information provided to them will depend on the particular circumstances of the case.

	Complainants	Whistleblowers	Subjects	Witnesses
Prior to the completion of an investigation	N/A	N/A	<ul style="list-style-type: none"> <li>the grounds of any proposed adverse comment in respect of the subject</li> <li>any case the subject may need to make, answer or address</li> <li>the opportunity that is to be made available for them to put their case (eg, a time period for written submissions or the date of a hearing)</li> </ul>	N/A
At the completion of an investigation	<ul style="list-style-type: none"> <li>the general outcome of the investigation</li> </ul>			

## 5.2 Why should information be given to complainants?

### 5.2.1 Managing expectations

It is very important to manage complainants' expectations from the outset to ensure they are realistic. Unmet expectation is a prime source of frustration and anger for complainants.

To address this issue, complainants should be told at an early stage what they can expect in the way of progress reports, feedback and other opportunities (if any) to be involved in the handling of their complaint and any associated investigation. For example, it is important to explain to complainants either the reasons why no action, or action that does not meet their expectations, is to be taken on their complaint, or what action is proposed to be taken in relation to the complaint – whether internal investigation, referral to some outside body or some other action.

The nature of the information that should be given to complainants, and when, is discussed in the Table at 5.1.5 above.

### 5.2.2 Providing feedback on progress

The most common source of criticism or complaint about the conduct of an investigation is that the investigator did not give sufficient and ongoing feedback to the complainants. Complainants should be kept up to date regularly and advised, in general terms, of progress in investigating or otherwise dealing with their complaints and the time frames that apply. It is important to reassure complainants that their complaint is being taken seriously.

The agency should nominate an individual (either a Protected Disclosure Co-ordinator, a relevant senior manager, or the person responsible for investigating or otherwise dealing with the complaint) to be the point of contact with the complainant for the purposes of the investigation or other action. This person should be responsible for providing information to the complainant and for answering any questions or concerns the complainant may raise.

In relation to whistleblowers, the *Protected Disclosures Act* requires whistleblowers be notified, within six months of their disclosure date, of the action taken or proposed to be taken in respect of the disclosure (s.27). Normally that notification should be written and, if not, the notification procedure used and the reasons for it should be comprehensively recorded on the case file (see Part B in the Ombudsman's *Protected Disclosures Guidelines*, 6th edition).

### 5.2.3 Reporting on outcomes

It is important to inform the complainant of the outcome of the investigation or other action. If the outcome does not meet the complainant's expectations, it is important they be given a full explanation of the reasons for the outcome. Complainants should be told that any new or further information that they may make available will be carefully assessed, and they should also be informed of any appeal process that may be available.

It is important to provide whistleblowers with sufficient information to demonstrate that adequate and appropriate action was taken, or is proposed to be taken, in respect of their disclosure. Without such information it would be difficult for the whistleblower to make a proper assessment of whether the outcome warrants a subsequent disclosure to an MP or journalist as provided for in s.19 of the *Protected Disclosures Act*.

The results of the *Whistling While They Work* research project on this issue are most informative. They indicate that whistleblowers who are best informed of the outcomes of investigations are the most likely to think those outcomes are satisfactory. Fear that nothing is being done is all that is sometimes needed to trigger a crisis in confidence for a whistleblower that might lead to a range of outcomes that are not in the interests of either the whistleblower or the organisation. As noted in that report:

*“When whistleblowers feel they are being kept in the dark, they are unlikely to jump to the conclusion that the outcome of their report is satisfactory, or remain confident that the disclosure has been valued by the organisation.”<sup>14</sup>*

## 5.3 Why should information be given to persons the subject of an investigation?

### 5.3.1 Managing expectations

Just as it is important to manage the expectations of complainants (see 5.2.1 above), it is equally important to manage the expectations and anxieties of people the subject of an investigation. Where people the subject of an investigation are unaware of the process to be followed or of the general progress of an investigation, this can add to the natural anxiety that results from such circumstances.

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<sup>14</sup> *Whistleblowing in the Australian Public Sector*, editor AJ Brown, 2008 ANU E Press, at p.118.

While it may not be appropriate to provide such information in some circumstances (eg, in relation to investigations into allegations of criminality or corruption, or information that may identify a confidential informant or whistleblower), in most cases this should not detrimentally impact on the ability of an agency to conduct an effective investigation.

### 5.3.2 Informing the subjects of complaint about an investigation and keeping them aware of progress

It is necessary to consider whether secrecy is required for an effective investigation. This will impact on when it will be appropriate to notify the subject(s) of the complaint/disclosure that allegations have been made, and the nature of the allegations.

While the person the subject of an investigation should be informed of the substance of the allegations against them and proposed adverse comment, this does not require that all the information in the investigator's possession supporting those allegations be disclosed to that person. Indeed it may damage the effectiveness of the investigation to show the investigator's hand completely by offering too much information too early to the person the subject of the complaint/disclosure.

The types of information that should be given to the subjects of an investigation, and when, are discussed in the Table at 5.1.5 above.

### 5.3.3 Providing procedural fairness

In all but the most exceptional circumstances, any person the subject of an investigation has the right to be informed as to the substance of the allegations.

If an investigation is to proceed through to a report to some person or body other than the investigator, the person who is the subject of the complaint has the right to be informed as to the substance of any adverse comment to be made in respect of them. They should be given a reasonable opportunity to put their case, either orally or in writing, to the person carrying out the investigation.

While the content or timing of a complaint/disclosure will often effectively disclose the identity of the complainant/whistleblower, provided allegations can be put fairly and completely to the subject of an allegation, procedural fairness does not require that the identity of a complainant/reporter be disclosed. Further, the NSW ADT has indicated in a number of decisions in relation to FOI applications that it is open to agencies responsible for enforcing the law to withhold information relating to the identity of informants.<sup>15</sup>

The issue of procedural fairness is discussed in more detail below.

## 6. Complying with procedural fairness requirements

### 6.1 When does procedural fairness apply?

At every stage of an investigation the requirements of procedural fairness (ie natural justice) should be considered.

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<sup>15</sup> Eg, *Mauger v General Manager, Wingacaribee Shire Council* [1999] NSW ADT 35, *BY v Director General, Attorney General's Department (No 2)* [2003] NSW ADTR 37).

There is a presumption that the rules or principles of procedural fairness must be observed in exercising statutory power that could affect the rights, interests or legitimate expectations of individuals in a direct or immediate way. The test being whether the exercise of the power may display, defeat or prejudice a person's rights, interests and expectations.<sup>16</sup> It would be wise to assume that the rules apply in such circumstances, whether or not the power being exercised is statutory.

In cases where no clear statutory direction exists, the High Court has determined that where a decision-making process involves different steps or stages before a final decision is made, the requirements of procedural fairness are satisfied if 'the decision-making process, viewed in its entirety, entails procedural fairness'.<sup>17</sup>

If action being taken will not directly affect a person's rights or interests, there is no obligation to inform the other person of the substance of any allegations or other matters in issue. For example, if an investigator is merely collecting information to make a report to the management of an agency so that action can be taken, there is no obligation to notify the subject of the complaint. However, if an investigation will lead to findings and recommendations about the matter, the investigator should provide natural justice to the person against whom allegations have been made. Similarly, the person who ultimately makes a decision on the basis of the investigation report must also provide natural justice by allowing the person adversely commented upon to make submissions regarding the proposed decision and sanction.

In rare cases there may be an overriding public interest in short-circuiting certain procedural fairness requirements. This will normally be in situations that involve serious risks to personal safety or where substantial amounts of public funds may be at risk. In these cases, expert external advice should always be sought and documented.

There will be some circumstances (eg if the matter is one that has been or is to be referred to the ICAC, DoCS or the police), where the person who is the subject of the allegations should not be told about any fact finding investigation.

There may be certain other circumstances where the provision of such information should be delayed (for example where reasonable concerns are held about the possibility of evidence being tampered with, collusion between witnesses, or intimidation of witnesses). The point at which the people who are the subject of the allegations should be informed will depend on the type of conduct at the centre of the complaint.

Reasons for any decision involving procedural fairness considerations should always be recorded in case the investigation becomes the subject of complaint to one of the accountability agencies at a later stage, or the result of the disciplinary inquiry is taken on appeal to any relevant tribunal or court.

## 6.2 What are the rules of procedural fairness?

Any person who decides any matter without hearing both sides, though that person may have rightly decided, has not done justice. Any person whose rights, interests or legitimate expectations will be affected by a decision or finding is entitled to an adequate opportunity of being heard. In order to properly present their case, the person is entitled to know the grounds on which that decision or finding is to be taken.

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<sup>16</sup> *Kioa v West* (1985) 159 CLR 550.

<sup>17</sup> *South Australia v O'Shea* (1987) 163 CLR 378 at 389, *Ainsworth v Criminal Justice Commission* (1991) 175 CLR 564 at 579.

However, the courts emphasise the need for flexibility in the application of the rules of natural justice, depending on the circumstances of each individual case. Depending on the circumstances which apply, natural justice may require a decision-maker to:

- inform any person:
  - whose interests are or are likely to be adversely affected by a decision, about the decision that is to be made and any case they need to make, answer or address
  - who is the subject of an investigation (at an appropriate time) of the substance of any allegations against them or the grounds for any proposed adverse comment in respect of them
- provide such persons with a reasonable opportunity to put their case, or to show cause, whether in writing, at a hearing or otherwise, why contemplated action should not be taken or a particular decision should or should not be made
- consider those submissions
- make reasonable inquiries or investigations and ensure that a decision is based upon findings of fact that are in turn based upon sound reasoning and relevant evidence
- act fairly and without bias in making decisions, including ensuring that no person decides a case in which they have direct interest
- conduct an investigation or address an issue without undue delay.

While persons the subject of investigation should be informed of the substance of the allegations against them and any proposed adverse comment, this does not require that all the information in the investigator's possession supporting those allegations be disclosed to such people, that person. Indeed it may damage the effectiveness of the investigation to show the investigator's hand completely by offering too much information too early to the person the subject of complaint.

The reason that the substance of all allegations and grounds for adverse comment should be put to the person whose rights, interests or legitimate expectations are affected is that this allows such people the opportunity:

- to deny the allegations
- to call evidence to rebut the allegations
- to explain the allegations or present an innocent explanation, and/or
- to provide mitigating circumstances.

The actual investigation is one stage of the decision-making process. The preparation of an investigation report containing findings based on the investigation and possibly recommendations is a further stage in the decision-making process. Finally, a determination is made on the basis of the investigation report.

Arguably each of these steps could prejudice the individual affected, and courts have demonstrated a general trend towards extending the circumstances in which procedural fairness is found to apply.

Certainly the right to be informed as to the substance of allegations or adverse comment, and the opportunity to be heard, must be given before any final decision, determination, memorandum, letter or the like is made.

The point in time at which the person the subject of the complaint is informed of the allegations will depend on the circumstances of each case. In the absence of clear statutory direction regarding the provision of procedural fairness, the Ombudsman suggests that the following basic principles be followed:

- If, on the face of it, a complaint does not disclose a case to answer, it will be appropriate to wait until a fact finding inquiry has determined that there may indeed be a case to answer before the person the subject of that complaint is informed about the allegations (in cases where the complaint is baseless and is not pursued this will save the person suffering unnecessary stress).
- In circumstances where a complaint alleges wrongdoing, but the identity of the alleged wrongdoer(s) is unknown, no-one should be notified of the allegations in that complaint unless and until they are a clear suspect.
- If the person who is the subject of the complaint is to be interviewed, it is appropriate to delay informing him or her of the substance of the allegations until the interview if it appears that evidence could be tampered with or witnesses approached. An investigator should be circumspect about informing the person where there is a risk that:
  - documents may be destroyed
  - records may be modified
  - post-dated records may be produced
  - collusion will take place, particularly where more than one person is involved
  - a vital witness is in a position to be pressured or influenced (for example, a subordinate of the person under investigation).
- In other cases a person may be informed of the allegations prior to being interviewed
- In rare circumstances (such as where the matter has been or is to be referred to ICAC, DoCS or the police), it may not be appropriate to provide any information to the person the subject of the allegations.

There are also no hard and fast rules governing how and when a person must be informed of the substance of any adverse comment in respect of them. Certainly, no final decision can be made affecting a person's rights, interests or legitimate expectations without first providing him or her with an opportunity to respond to any adverse comment. If an investigator's report contains adverse comment and is provided to a more senior officer for a final decision then, subject to any statutory procedural fairness requirements, the person must at the very least be given an opportunity to respond to those adverse comments. This must be done prior to any decision being made.

However, the Ombudsman recommends that this right to be informed of the substance of any proposed adverse comment be afforded prior to presenting the investigation report to the final decision-maker. Because of the general expansion of the notion of procedural fairness and the range of interests protected, this should be done as a matter of best practice.

If an investigation report contains any adverse comment about someone, that person should be made aware of the substance of the grounds for all proposed adverse comments to be made against him or her. If this information has been put to the person the subject of complaint during the interview process it is not necessary to do this before finalising the report and handing it over to management or making it public. However, if the person has only been informed of certain of the grounds, he or she must be made aware of the other grounds being relied on. Similarly, if the grounds for adverse comment have changed significantly since the interview, then these must be communicated to the person prior to finalising the report.

### 6.3 How should a person be able to respond to allegations or proposed adverse comment?

In most cases it will be sufficient to offer the person an opportunity to put their case in writing, but there will be occasions where procedural fairness requires that the person be able to make oral representations.

There are no firm rules on this issue, and the ultimate decision will often reflect a balancing exercise between a range of considerations.

Generally speaking, where the credibility of the person is in issue it is more likely that oral representations should be accepted, since this offers the investigator a better opportunity of assessing the credibility of a person.

The existence of conflicting evidence and the possible significance to the individual of the outcome of the investigation are further factors which tend to favour allowing the individual to make a case in person. On the other hand, if the evidence is incontrovertible, the argument for oral representations is diminished.

### 6.4 How should procedural fairness be afforded in disciplinary investigations?

Investigators should be aware of any statutory procedural fairness requirements that may apply to their investigations. If during the disciplinary process a person is not afforded procedural fairness, such as an opportunity to respond to the allegations against them, a challenge is likely to be mounted on the lawfulness of any adverse decision.

If a statutory scheme for the investigation of breaches is not followed, the subsequent decision will almost certainly be set aside should the matter be taken on appeal. By comparison, a failure to follow policy guidelines will generally not result in a subsequent decision being set aside as unlawful<sup>18</sup> unless such an approach results in failure to accord procedural fairness.<sup>19</sup> The courts will insist upon the provision of procedural fairness except where legislation shows by 'express words of plain intendment' that Parliament intended to infringe such a fundamental principle.<sup>20</sup>

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<sup>18</sup> *Matkevich v New South Wales Technical and Further Education Commission (No 3)* (unreported) CA 40050/95.

<sup>19</sup> *Hill v Green; Jarvis v Buckley; Wood v Buckley; Young v Buckley* [1999] NSWCA 477.

<sup>20</sup> See *Hill v Green* case.

## 7. Giving reasons to explain decisions or conclusions

### 7.1 The principle

Another circumstance where it may well be appropriate to disclose information in the context of an investigation is to give reasons for decisions relating to that investigation.

The giving of reasons is one of the basic principles of good administration and is often a requirement of procedural fairness. Members of the public are entitled to an explanation as to why there has been an exercise of power that was adverse to or otherwise directly affected their interests.

### 7.2 The purpose of reasons

The reasons given for decisions or conclusions should be sufficient to enable the recipient to understand why that particular decision was made and not any of the other potential decisions that could have been made. The giving of reasons also serves a number of other vital purposes, including:

- transparency
- accountability, and
- quality control.

#### 7.2.1 Transparency

In relation to transparency, if given appropriate reasons, a person affected by a decision is better able to see:

- the facts and reasoning that were the basis for the decision
- that the decision was not made arbitrarily or based on mere speculation or suspicion
- to what extent any arguments they put forward have been understood, accepted or formed a basis for the decision
- whether they have been dealt with fairly
- whether or not they should exercise any rights of objection, review or appeal
- the case they will have to answer or counter should they wish to exercise any right of objection, review or appeal that may be available.

A person affected by a decision is also better able to adjust his or her position to ensure that if the discretion is exercised again he or she is more likely to succeed or will not be adversely affected.

#### 7.2.2 Accountability

In relation to accountability, decision-makers who are required to give reasons have a greater incentive to base their decisions on acknowledged facts, and supervisors and managers are better able to see if legal requirements, agency/government policies and standard practices have been complied with.

Another benefit that flows from the giving of adequate reasons is that people or bodies with an external review role are in a better position to assess the decision, for example whether it was reached lawfully, based on relevant considerations, or based on the merits of the case.

### 7.2.3 Quality

In relation to quality, decision-makers who are required to give reasons have a greater incentive to rigorously and carefully identify and assess the relevant issues, and to properly justify recommendations and decisions. Other decision-makers are then able to apply decisions to future cases by using the reasons as guidance for the assessment or determination of similar issues.

It is particularly important that reasons be given to adequately explain decisions or conclusions which are likely to detrimentally affect the rights or interests of individuals or organisations to any material extent.

### 7.3 Scope of reasons

It is not necessary for reasons to address each and every issue raised by an applicant/complainant/ party to proceedings. In discharging a duty to give adequate reasons: '*... it is not necessary for a decision-maker, whether judicial or administrative, to address, specifically and in detail, each and every issue raised by the applicant*'<sup>21</sup>; '*It is not necessary that reasons address every issue raised in proceedings; it is enough that they deal with the substantial issues upon which the decision turns*'<sup>22</sup>; '*...it is clear law that the reasons need not, ... descend to a point-by-point account of the evidence, and all the conflicts, nor a point-by-point recitation and then analysis of every point made in submissions*'.<sup>23</sup>

## 8. Disclosing identities to protect complainants and whistleblowers<sup>24</sup>

It is sometimes in the best interests of a complainant or whistleblower that their identity is made known, either selectively or generally, so that adequate steps can be taken by management to ensure they are protected from reprisals.

The long held and widespread view is that the best protection that can be provided for an internal complainant, a whistleblower, a police informant or other complainants who fear reprisals, is confidentiality. This is often the first thing such people themselves will ask for. The reason is obvious. If no one knows who was the source of a complaint or disclosure, the source cannot suffer reprisals.

The results of the research undertaken as part of the *Whistling While They Work* research project found that the level confidentiality maintained in respect of a whistleblowing incident was not a significant predictor of mistreatment:

*“Contrary to expectations, the level of confidentiality maintained in respect of the whistleblowing incident ... failed to emerge as a significant predictor of mistreatment... The fact that confidentiality did not emerge as a clear protective factor confirms that while it could be important, in most circumstances it is either simply unachievable or plays no protective role. For example, even if only a few people ever know the whistleblower’s identity, this usually includes the people most directly concerned. This result has significant implications for the strategies that agencies use*

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<sup>21</sup> *Mentink v Albietz* [1999] QSC 9.

<sup>22</sup> *Total Marine Services Pty Limited v Kiely* [1998] 51 ALD 635 at 640.

<sup>23</sup> *KO and KP v Commissioner of Police, NSW Police (GD)* [2005] NSW ADTAP 56.

<sup>24</sup> Based on the Ombudsman’s *Protected Disclosures Guidelines*, 6<sup>th</sup> edition, March 2009 (at pp.44-45).

*to try to control reprisal risk and, in particular, the need for agencies to be ready with other intervention strategies at the point that confidentiality ceases to be practical.<sup>25</sup>*

There are three main things that may be kept confidential:

- the fact of a disclosure has been made
- the content of the disclosure, and
- the identity of the whistleblower.

In the context of whistleblowing in particular, the experience of the Ombudsman is that confidentiality seldom seems to be effective, either in practice or as a protection for the whistleblower. Most occasions where it has been a successful strategy are in the limited circumstances where secrecy has been maintained about BOTH the identity of the whistleblower AND the fact that any disclosure has been made. Where people in a workplace know a disclosure has been made, it is human nature that they will speculate about the source of the disclosure, and in most cases will make assumptions as to the identity of the source. These assumptions are often correct, however in practice there can be an even worse outcome when the assumption is incorrect!

In some cases it may be possible to keep the fact of a complaint or disclosure and the identity of the source of the complaint or disclosure confidential and still handle the complaint or disclosure effectively. Certainly this would provide the most effective protection for the source.

In practice, however, two main problems arise with expecting confidentiality alone to protect the source of a complaint or disclosure from retribution.

Firstly, an organisation may not be able to realistically guarantee confidentiality. It is often difficult to make even preliminary inquiries into allegations without alerting someone in the organisation to the fact that allegations have been made. Further, to ensure procedural fairness, anyone who is the subject of allegations should be given an opportunity to answer them.

Once it is known that a complaint or disclosure has been made, it is human nature to be at least curious about who was the source, and it is often not difficult to surmise who made it. Sometimes the complainant or whistleblower has already telegraphed his or her concerns about an issue, raised those concerns informally or in a different venue such as by way of grievance procedures, or has simply made clear his or her intention to make such a complaint or disclosure.

A further complication arises in those cases where people find out that a disclosure has been made and incorrectly assume that the source is a person who did not actually make it. A system for protecting complainants and whistleblowers should also aim to prevent this kind of behaviour taking place.

Secondly, even if the agency is able to take all measures to ensure confidentiality, there is no way it can be certain those measures have succeeded. Human error and indiscretion cannot be discounted. The agency may not be aware or be able to predict that certain information they think can be revealed (eg, allegations that certain systems are failing) is sufficient to identify the source. The issue may be directly related to another issue that has impacted the

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<sup>25</sup> *Whistleblowing in the Australian Public Sector*, editor AJ Brown, 2008 ANU EPress at p.149 [see also p.151 - 152 and 221-222].

source personally, or someone may have simply seen the source approaching a disclosure officer to report his/her concerns.

In these circumstances, if the source subsequently suffers detrimental action in reprisal for a complaint or disclosure, it would be open to suspect this was a result of the person finding out and taking retribution. However, this may be difficult to prove.

Where it is determined that confidentiality is possible and appropriate to protect a source and to ensure any investigation is effective, as a general rule only people who need to know should be told about a complaint or disclosure. Consideration should also be given to the capacity of those who might be told about the disclosure to cause, directly or indirectly, detrimental action towards the whistleblower or to take actions detrimental to the success of any investigation (such as tampering with evidence or improperly influencing witnesses).

The PD Act provides that a whistleblower can waive, in writing, their right to confidentiality. It also provides that procedural fairness (natural justice) may require an investigating authority to disclose identifying information to the person who is the subject of the investigation if that is considered necessary in order to investigate the matter effectively, or that it is otherwise in the public interest to do so. If these provisions apply, the basis on which the investigator formed the opinion to disclose identifying information should be documented. The investigator should also notify the whistleblower of any intention to disclose this information.

If a whistleblower's identity is to be disclosed (where this is necessary under any of the grounds set out in s.22 of the PD Act), he or she should be informed first. Further advice on this issue in relation to whistleblowing is set out on pages 46-49 of the Ombudsman's *Protected Disclosures Guidelines*, 6<sup>th</sup> edition, March 2009.

Depending on the circumstances, confidentiality requirements in other legislation may also apply, for example under the *Public Sector Employment and Management Act*, *Police Act*, *ICAC Act* or *PIC Act*.

## 9. Open disclosure when things go wrong

Another reason why it may be relevant to release information arising out of an investigation is to ensure proper accountability.

When something goes wrong, it is important that those affected are told what went wrong, what will be done to remedy the situation, and what steps will be taken to prevent similar incidents occurring in the future. This type of accountability is fundamental to good administrative practice.

As well as assisting those affected to understand what has happened, it is important that public officials and public sector agencies acknowledge responsibility for any errors or harm they may have caused. This should be accompanied by an appropriate apology and an explanation about how that harm can be remedied or prevented in the future. It is also important that access to relevant information after something has gone wrong is timely and as easy as possible for those affected. Such explanations are often reassuring, and can assist those affected by a mistake to get closure.

Set out in the box below is an example of an Open Disclosure Policy.

## The NSW Health Open Disclosure Policy

'Open disclosure' is a principle that has been adopted in the health care system in NSW, around Australia and internationally. Open disclosure ensures that patients and their support persons are properly informed when things have gone wrong or there are complications in the provision of their health care. In NSW the principle of open disclosure is enshrined in the *Open Disclosure Policy* and guideline published by NSW Health and is intended to inform the way that incidents are managed and complaints are handled within the NSW health care system. Open Disclosure is defined in the *Open Disclosure Policy* as:

*"The process of providing an open, consistent approach to communicating with the patient and their support person following a patient related incident. This includes expressing regret for what has happened, keeping the patient informed, and providing feedback on investigations, including the steps taken to prevent a similar incident occurring in the future. It is also about providing any information arising from the incident or its investigation relevant to changing systems of care in order to improve patient safety."*

The guidelines indicate that where a complaint is made, it should be acknowledged within 3 calendar days, parties should be informed of the progress of complaints within 21 calendar days and complaints are to be finalised within 35 days. The policy indicates that where complaints are investigated, all parties are to be informed of the investigation results.

NSW Health's *Complaint Management Policy* (at Part 5.5) requires that *"the outcome and recommendations are clearly communicated to the consumer, staff and management and integrated into quality improvement systems through appropriate implementation and subsequent review of effectiveness"*. The Policy also states that when advising complainants of the outcome of their complaint, the final response letter should, among other things:

*"Address each of the points the complainant has raised with a full explanation or give reason(s) why it is not possible to comment on a specific matter.*

*Give specific details about the investigation, ie sources of information, what was discovered, etc.*

*Give details of the action taken as a result of the complaint."*

The *Complaint Management Guidelines* indicate that at the end of the investigative stage of a complaint:

*"...the parties to a complaint are advised about the outcome. This may be achieved by providing a copy of the investigation report or it may be more appropriate to communicate the report's information in a letter format. Where a number of individuals have been identified, it is essential for privacy considerations that the reports to individuals will only contain those aspects of the complaint that deal directly with them. The report will therefore need to be abridged, and a covering letter explaining why an edited version has been provided, for each individual respondent."*

## 10. Complying with legal obligations

### 10.1 What does the *Freedom of Information Act* require?

#### 10.1.1 Information held by government

The main mechanism in NSW to enable members of the public to obtain access to information held by government is established under the *Freedom of Information Act 1989* (the FOI Act). The purposes of the Act include enabling members of the public to effectively participate in the development and implementation of laws and public policy, promoting accountability and promoting good government. To achieve its purposes, the Act gives the public a legally enforceable right to be given access to an agency's documents unless there are good and proper reasons to refuse access.

Given the clear objects of the FOI Act and the fact that none of the exemption provisions in the Act is mandatory, FOI decision-makers should have proper and compelling reasons for any decision to rely on an exemption clause to refuse access to documents. In assessing FOI applications, FOI decision-makers should ask themselves: *"Is there any good and proper reason in the public interest why these documents should not be released?"* In making this assessment, it is not appropriate for FOI decision-makers to be influenced by a desire to protect their agency, Minister or the government from public scrutiny or the embarrassment that could flow from disclosing certain information (see s.59A of the FOI Act).

Where someone the subject of the investigation who wants to gain access to documents relating to the complaint and the investigation, access to such information involves the balancing of two competing principles:

- There is the interest of the person under investigation to know the allegations made against him or her, and the nature of the evidence gathered that both supports and contradicts those allegations.
- There is also the need to ensure the integrity of the investigation. By revealing critical evidence, the investigation might be prejudiced. Moreover, there may be circumstances where it is not in the best interests of the investigation for information to be disclosed that identifies whistleblowers, informants or witnesses.

The decision about which of these public policy considerations should prevail is not always one that is open to the investigator to make. As a threshold issue the investigator should be aware of any statutory rights of access that the person the subject of the complaint may have.

The FOI Act confers on a person a legally enforceable right to be given access to an agency's documents. Similarly, a statutory right of access exists under the *Privacy and Personal Information Protection Act 1998*. Section 14 of that Act provides that:

*a public sector agency that holds personal information must, at the request of the individual to whom the information relates and without excessive delay or expense, provide the individual with access to the information.*<sup>26</sup>

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<sup>26</sup> The equivalent provision of the *Health Records and Information Privacy Act 2002* in relation to 'health information' is cl.7(1) of Schedule 1.

If a request to inspect documents related to the investigation is made under the FOI Act a document may be exempt from release if it contains matter the disclosure of which would or could, for example:

- involve the unreasonable disclosure of information concerning the personal affairs of any person (clause 6). However, this exemption cannot be used where the information concerns the person by, or on whose behalf, an application for access to the document is being made
- reasonably be expected to prejudice the investigation of a possible contravention of the law (clause 4(1)(a))
- reasonably be expected to enable the existence or identity of any confidential source of information, in relation to the enforcement or administration of the law, to be ascertained (clause 4(1)(b))
- reasonably be expected to prejudice the effectiveness of any method or procedure for the conduct of tests, examinations or audits by an agency, and would on balance be contrary to the public interest (clause 16(a)(i))
- reasonably be expected to have a substantial adverse effect on the management or assessment by an agency of the agency's personnel, and would on balance be contrary to the public interest (clause 16(a)(iii)), or
- disclose matter relating to a protected disclosure (clause 20(d) of Schedule 1 of the FOI Act). It is important to note that this exemption is framed in very wide terms (ie 'relating to') and goes further than merely the name of the person who made the disclosure and the actual information which is the subject of the disclosure.

These exemptions are outlined and discussed in detail in Annexure A to these guidelines.

#### 10.1.2 Information held by the private sector relating to relevant employment proceedings:<sup>27</sup>

The coverage of the FOI Act has been extended to the private sector, by providing rights of access to information held by non-government agencies in a very discrete context. Section 43 of the *Commission for Children and Young People Act 1998* (the CCYP Act), entitles a person to apply for access to and/or correction of information about relevant employment proceedings taken by the person's employer, where those proceedings involve alleged child abuse or sexual misconduct by the person, or acts of violence committed by the person in the course of employment.

The CCYP Act provides that where a person has been the subject of any relevant employment proceedings, the person is entitled:

- to apply for access under the FOI Act to any documents of an agency containing information about those proceedings (s.42(1), CCYP Act), and
- to apply for the amendment of the agency's records relating to information about relevant employment proceedings, on the basis that the information is, in the person's opinion, incomplete, incorrect, out of date or misleading (s.43(3), CCYP Act).

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<sup>27</sup> From *The NSW FOI Manual*, August 2007 (pp. 137-138).

The provisions of s.43 effectively extend FOI to cover all employers that hold information concerning relevant employment proceedings against current or former employees (extending to disciplinary proceedings completed within the period of five years immediately before the commencement of s.39 of the CCYP Act).

Any provision of the FOI Act relating to fees and charges payable by applicants does not apply to applications for access to such documents (s.43(2), CCYP Act).

Where an employer is under a duty to notify the Commission for Children and Young People of the name and other identifying particulars of any employee against whom relevant disciplinary proceedings had been completed by the employer (s.39(1), CCYP Act), the employer is under a further duty to retain records of the information that has been notified. That duty applies despite any other requirement relating to the disposal of records (such as any regulations applying to records of disciplinary proceedings with respect to public sector employees (s.39(5), CCYP).

In assessing applications for access to any documents containing any information about relevant employment proceedings, while the presumption should be that documents the subject of such an FOI application should be released, any of the exemption clauses in Schedule 1 of the FOI Act may apply.

## 10.2 What is required under other legislation?

An investigator should also be aware of any other statutory rights of access to documents that may exist. For example, an officer the subject of a disciplinary inquiry under the *Public Sector Management (General) Regulation 1996*, or any person acting on the officer's behalf, is entitled to inspect the department's papers, correspondence, reports or other documents relating to the matter at such time as may be arranged with the person conducting the inquiry (clause 26 (2)). It is open to question whether this entitlement is an exception to the confidentiality requirements imposed on agencies under the *Protected Disclosures Act 1994*.

Different considerations apply where documents are subpoenaed by a court. There are only limited grounds for objecting to production of documents pursuant to a subpoena, and if confronted with a subpoena, legal advice should be sought.

Agencies can be required to disclose information by a subpoena issued by a court or tribunal with jurisdiction to do so.

Agencies may also be required to disclose information by an oversight or regulatory body exercising compulsory powers under statute, for example under the:

- *Ombudsman Act*, ss.18 & 19
- *ICAC Act*, ss. 11, 21-23
- *Children and Young Persons (Care and Protection) Act 1998*, s.248(1)(b).



## C. When should information not be disclosed?

### 11. When information should not be disclosed

When considering whether or not information should be released to the parties to an investigation, or the public generally, the starting point should not be whether there is an exemption clause in the FOI Act that can be claimed. The starting point should be questions of principle – are there good and proper reasons that require confidentiality.

In this part of the Guidelines consideration is given to a range of circumstances where it would or may be inappropriate to disclose information during the course of or arising out of an investigation. These circumstances would include:

- to minimise detrimental impact on individuals [see 12 below]
- to minimise detrimental impact on current or future investigations [see 13 below]
- to minimise prejudice to the future supply of information to the agency or government [see 14 below]
- to minimise or prevent substantial adverse impact on the management or assessment of an agency's personnel [see 15 below]
- to minimise prejudice to occupational health and safety [see 16 below]
- in various specific circumstances, eg, in relation to complaints by third parties [see 17.1 below]; disciplinary proceedings [see 17.2 below]; child protection [see 17.3 below]
- to maintain confidentiality, including complying obligations under the *Protected Disclosures Act* [see 18.2 below]
- to comply with privacy requirements [see 18.3 below]
- to comply with secrecy requirements [see 18.4 below].

These circumstances are addressed in exemption provisions in Schedules 1 and 2 to the FOI Act (discussed on Annexures A and B to these Guidelines) and in a small number of cases in specific secrecy provisions in legislation. However, in all cases what is required is a critical analysis of the likely detrimental outcome of disclosure, not just automatic reliance on an exemption clause that might be available.

### 12. Minimising possible detrimental impact of disclosure on individuals

Circumstances where it may not be appropriate to disclose information in the course of or arising out of an investigation would include where this could reasonably be expected to have detrimental impact on individuals involved in the investigation. Such circumstances might include where it can reasonably be expected that disclosure could have:

- detrimental impacts on the subjects of disclosure, such as:
  - harassment / victimisation / ostracism (in the workplace or in the community)
  - damage to reputation (in the workplace or in the community)
  - action for a breach of privacy
  - action in defamation

- detrimental impacts on any complainants, victims or witnesses:
  - harassment / victimisation / ostracism (in the workplace or in the community)
  - damage to reputation (in the workplace or in the community)
  - action for a breach of confidence or breach of privacy.

While the needs and concerns of the complainant must be appropriately addressed, it is equally important to be sensitive to the impact that a complaint may have on the persons the subject of that complaint. Unnecessary disclosure of the identity of people, or of the subject matter of the complaint, might do considerable damage to them, even if the subsequent investigation totally exonerates them.

It is of course important to maintain a balance. Persons the subject of complaint should be given, at an appropriate stage, the chance to hear the substance of the allegations against them and to answer them. Procedural fairness requires no less. But the process needs to be handled sensitively.

If disclosure of information could reasonably be expected to have an unreasonable detrimental impact on individuals, should an FOI application be lodged for relevant documents, the relevant exemption clauses in Schedule 1 to the FOI Act are discussed in Annexure A (including clauses 4, 6, 13 and 20(1)(d)).

### **13. Minimising possible detrimental impact of disclosure on current or future investigations**

Another circumstance where it may not be appropriate to disclose information in the course of or arising out of an investigation would include where this could reasonably be expected to have a detrimental impact on current or future investigations. Such circumstances might include where it can be reasonably expected that disclosure could:

- prejudice the current investigation (the significance of any likely prejudice could be affected by the seriousness of the matters under investigation, for example whether the investigation relates to or involves matters concerning workplace grievances, general workplace conduct issues, disciplinary issues, criminality, or child protection related issues)
- prejudice other current investigations by the agency, police, ICAC, Ombudsman or other watchdog body, DoCS, etc
- prejudice likely future investigations by the agency, police, ICAC, Ombudsman or other watchdog body, DoCS, etc.

In relation to the confidentiality of workplace investigations, the Appeal Panel of the ADT has stated that: *"It is clearly in the public interest to protect the confidentiality of investigations into issues arising in the workplace..."* The Appeal Panel went on to say: *"It is important, we think, to uphold the confidentiality of workplace investigations of the present kind. In that regard we accept that were formal proceedings taken against the agency and its insurer in the relevant jurisdiction that it may, as a matter of procedural fairness, be necessary to release some or all of any statements relied upon to the person adversely affected. These are decisions to be taken at that stage of the process. At this point, where a contest of that kind has not arisen, and in the absence of any statutory or similar obligation on the agency or, more particularly, the agency's insurer, it would, we think, impair the effective conduct of investigations to allow*

*this material* [being records of interview conducted by an investigator, formally prepared signed statements, and letters and statements authored by their makers] *to be released under FOI.*"<sup>28</sup>

If disclosure of information could reasonably be expected to have an unreasonable detrimental impact on current or future investigations, should an FOI application be lodged for relevant documents, the relevant exemption clauses are discussed in Annexure A (clauses 4, 13 & 16) and Annexure B.

#### 14. Minimising prejudice to the future supply of information

Another important circumstance where detrimental impact could arise is where disclosure of information could reasonably be expected to prejudice the future supply of information to the agency or to government.

In deciding whether to release information it is relevant to consider whether disclosure of information in question could reasonably be expected to prejudice (ie: impair or damage) the ability of the government or an agency to obtain similar information in the future. The issue here is not whether disclosure could prejudice the future supply of information from the particular informant/source of the information that is to be disclosed. The focus of the provision is the effect that disclosure of information would have on the future ability of the government or a particular agency to conduct similar types of investigations or obtain similar types of information.

As mentioned in Annexure A below in relation to clause 13 of Schedule 1 to the FOI Act, in assessing whether disclosure could reasonably be expected to prejudice the future apply of information to an agency, a distinction can be drawn between supply of information from persons who are obliged to answer questions and persons where cooperation is entirely voluntary. Examples of the former category would be employees directed by management to answer questions; employees answering questions or supplying information in the course of exercising management or investigatory responsibilities, ie, in the exercise of their official responsibilities; where statutory powers are or can be used to compel disclosure; or where persons must disclose information if they wish to obtain some benefit from government. The cases have held that where such circumstances apply, disclosure of information could not reasonably be expected to prejudice the future apply of information.

The cases in a range of jurisdictions have consistently supported an interpretation of the relevant exemption clauses in FOI legislation that protect the identity of informants,<sup>29</sup> on the basis that the "*state has a significant interest in ensuring that confidential information flows to law enforcement and administrative agencies.*"<sup>30</sup>

In a recent decision of the NSW Supreme Court, the judge noted that:

*"When a person speaks with the police in respect of a criminal offence and reveals sensitive matters that person expects that statements made will only be used for the purpose of the Court proceedings and not otherwise. There are limits on what can be published. There is a strong public interest in criminal offences being reported to the police and the sources of information not drying up. If victims of crime thought that*

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<sup>28</sup> *P v Greater Western Area Health Service (GD)* [2007] NSWADTAP 57.

<sup>29</sup> *Mauger v General Manager, Wingecarribee Shire Council* [1999] NSWADT 35 at 34.

<sup>30</sup> *Vranic v Director General, Department of Community Services* [2001] NSWADT 129 at 53 and *Re McEneiry and Medical Board of Queensland* (1994) 1 QAR 349 at 371.

*statements made in the course of a criminal investigation revealing their personal affairs, or some of them, could be released to an applicant under the FOI Act, those sources of information may well dry up or at least there could be a reduction in the flow of information available to the police... On the other hand there is a strong public interest in access to information held by a government agency.*"<sup>31</sup>

If disclosure of information could reasonably be expected to prejudice the future supply of information, should an FOI application be lodged for relevant documents, the relevant exemption clauses are discussed in Annexure A (clauses 4, 13 & 16).

## **15. Minimising or preventing substantial adverse effect on the management or assessment of an agency's personnel**

It may not be appropriate to disclose information in the course of or arising out of an investigation where this could reasonably be expected to have a substantial adverse effect on the management or assessment by an agency of its personnel (ie, in relation to the activities of agencies connected with their human resource management functions). For example, this would be relevant in relation to investigations conducted by or on behalf of an agency into allegations/complaints by staff about workplace conduct issues, grievances and the like in circumstances where "...disclosure would discourage staff from communicating details of workplace bullying or poor performance if they believed their identity may be made known."<sup>32</sup>

If disclosure of information could reasonably be expected to have a substantial adverse effect on the management or assessment of an agency's personnel, should an FOI application be lodged for relevant documents, the relevant exemption clause is discussed in Annexure A (clause 16).

## **16. Minimising prejudice to occupational health and safety**

Another circumstance where it may not be appropriate to disclose information is where this "...would make it more difficult for an [agency] to comply with statutory obligations to provide its employees with a workplace that is free from harassment and intimidation".<sup>33</sup> For example, where disclosure of information could reasonably be expected to prejudice the future supply of such information to the agency because employees would be far less inclined to report such incidents if they did not believe their reports would be kept confidential.

If disclosure of information could reasonably be expected to unreasonably prejudice occupational health and safety, should an FOI application be lodged for relevant documents, the relevant exemption clause in the FOI Act is discussed in Annexure A (clause 16).

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<sup>31</sup> *Gene Simring v Commissioner of Police, NSW Police* [2009] NSWSC 27, at [69].

<sup>32</sup> *TW v TX* [2005] NSW ADT 262 at 26, and also see *Chief Executive Officer, State Rail Authority v Woods (No 2) (GD)* [2003] NSWADTAP 39 at 41 and 78(e).

<sup>33</sup> *TW v TX* [2005] NSWADT 262 at 32.

## 17. Specific circumstances where the issue of confidentiality can arise

### 17.1 Complaints by third parties<sup>34</sup>

When a person writes to an agency complaining of the actions of another person, eg a neighbour, the complaint is often made on the basis that the complainant believes that a legal requirement is being breached and that the agency should take action. Any action taken by the agency in such circumstances could often affect the rights, interest, status or reputation of the person about whom the complaint was made. The Ombudsman is of the view that in such circumstances procedural fairness would require that, where explanations are sought from the person who has been complained about, information should be given to that person, at least as to the substance of the complaint.

Where the person complained about makes an FOI application for the letter or record of complaint it may well be appropriate for the agency to disclose it. At the same time, the letter or record of complaint may disclose matters personal to the complainant or his or her family or other residents from which the identity of a complainant is apparent. Depending on the circumstances, such a disclosure may amount to an unreasonable disclosure of personal affairs.

Where the documents applied for contain information concerning the personal affairs of a person, s.31 of the FOI Act requires the agency to consult with the complainant or other person before such information is released. It would generally be appropriate to disclose the letter of complaint to an FOI applicant where it is possible to do so without prejudicing the supply of information about breaches of the law to the agency, detailing the identity or the personal affairs of the complainant or any other person, or incurring a risk to the complainant or any other person.

It is a separate and more contentious question as to whether or not information disclosing the identity of the complainant should be obliterated or disclosed to the person the subject of the complaint.

Generally speaking, the Ombudsman is of the view that a strong argument can be made out for the non-disclosure of the identity of a complainant where:

- the complaint was clearly made in good faith and discloses a contravention or possible contravention of the law, for the purpose of enabling or assisting the agency to enforce or administer the law, OR
- it is clear that the life or physical safety of the complainant could reasonably be expected to be endangered, OR
- there are facts in relation to the complainant, other than the mere fact that a particular person has made a complaint, which would amount to an unreasonable disclosure of information concerning personal affairs.

However, the Ombudsman believes that disclosure of information that identifies a complainant may be appropriate in certain circumstances, for example where:

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<sup>34</sup> From *The NSW FOI Manual*, August 2007, pp 175-177

- the agency has a public policy of disclosing the identity of complainants; or
- the agency is of the opinion that the identity of a complainant should be disclosed in the particular circumstances that apply, or
- the identity of the complainant has already been disclosed in a publicly available document, such as a council business paper or the minutes of a council meeting, or
- the complaint is merely an objection to council about a development application, or
- the complaint does not relate to the enforcement or administration of the law, or
- the complaint is clearly malicious or not made in good faith,<sup>35</sup> or
- the complainant was notified at the time of making the complaint that the identity of complainants is routinely disclosed on request, or to FOI applicants, or
- the complainant was consulted about the FOI application and did not object, or
- there are no facts disclosed in the complaint, or notified by the complainant, which would amount to an unreasonable disclosure of personal affairs, other than the fact that a particular person has made a complaint.

Exemption clauses in the FOI Act that may be relevant in the circumstances outlined above are discussed in Annexure A (clause 4(1)(a), (b) and (c) and clause 6).

## 17.2 Disciplinary proceedings

In considering what might amount to an 'unreasonable disclosure' of 'personal affairs' in the context of disciplinary proceedings, the following matters may be relevant:

- the extent to which the behaviour being investigated was public knowledge;
- the applicant's interest in the matter – was the applicant involved in some way (an informant, the subject of alleged disciplinary breaches, etc);
- whether the investigation is complete; and
- the outcome of the investigation – no disciplinary action taken or disciplinary action taken, the results of which would be widely known within the agency or otherwise made public.

It would generally be open to the subject of a disciplinary investigation to argue that the release of disciplinary material would constitute 'unreasonable disclosure of his/her personal affairs', particularly if no action had been taken against him/her.

In terms of an application received from the subject of the disciplinary investigation him or herself, it has been said that a person should "*be able to fully discover and understand the **process** by which he or she has been seriously disadvantaged in their [sic] employment*".<sup>36</sup> (emphasis added)

Under procedural guidelines issued by the Public Employment Office under the *Public Sector Employment and Management Act 2002*, prior to making a finding of misconduct, all relevant documents containing allegations against an employee must be provided to the employee in the interests of natural justice. This must occur after the investigation but before the making of a finding.

Exemption clauses in the FOI Act that may be relevant to disciplinary proceedings are discussed in Annexure A (clauses 4, 6, 13, 16 and 20(1)(d)).

<sup>35</sup> A view endorsed by the ADT in *Mauger v General Manager, Wingecarribee Shire Council*.

<sup>36</sup> *Connolly v Chief Executive, Roads and Traffic Authority* [2000] NSW ADT 64.

### 17.3 Child protection information<sup>37</sup>

Government agencies that have any responsibility for the overall protection of children often receive complaints or reports concerning the welfare of children.

There is clearly a pre-eminent public interest in the mental and physical protection of children. Therefore, while it is still essential that each application under the FOI Act is considered on its merits, the Ombudsman's view is that it would generally not be unreasonable to claim, given the high priority which must be given to encouraging the receipt by the appropriate government agencies of such information, that

- the information was given in an implicit (if not explicit) relationship of confidentiality
- the information if disclosed could reasonably be expected to prejudice its future supply
- disclosure of the information would on balance be contrary to the public interest.

For example, the Ombudsman would take the view that the Departments of Community Services and Education & Training should not be hindered from receiving information about children who are, or may be, at risk at home or elsewhere, or whose psychological or physical welfare is threatened in school or school-related situations. Consequently, the Ombudsman accepts that complaints made or information given about such incidents should generally be considered as being made in confidence. The identity of complainants/informants would also usually be covered by the exemption.

This issue has been addressed by the NSW ADT in the following terms:

*"51 It is abundantly clear that the decision to deny the applicant access to the document(s), which would have identified the person(s) who complained to the Department, was the correct and preferable decision.*

*52 If for no other reason, it was correct because the source of the information given to the Department was given confidentially, and related to the enforcement and administration of child welfare legislation. [Schedule 1, clause 4(1)(b).]*

*53... The state has a significant interest in ensuring that confidential information flows to law enforcement and administrative agencies. In relation to criminal law enforcement and child welfare law enforcement, informants will frequently require anonymity before they will divulge information of crucial importance to the authorities. Confidential informers are, almost by definition, persons who have the confidence of or insider knowledge about the person(s) concerning whom they are able to give information. If identified as the source of information to the authorities not only is their capacity to garner information likely to be diminished or destroyed, but they may face retribution, even serious violence.*

*54 Law enforcement and child protection agencies are dependent to a large degree upon the resources and assistance of the community to maintain the peace and to ensure the safety of individual members of the community. Were persons who are willing to give information confidentially to the authorities to become aware that such information was made available to the subjects themselves, it would inevitably lead to a*

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<sup>37</sup> From *The NSW FOI Manual*, August 2007, pp 177-178

*drying-up of the flow of information to agencies. This in turn would lead to the jeopardising of the welfare of individuals and the community as a whole.*

*55 The mere fact that information is given does not, of itself, make it confidential. There must be an express or implied promise of confidentiality...*

*56 This is a case where the public interest in maintaining the confidentiality of the informant's identity outweighs the applicant's personal interest in that information. For that reason, if for no other, the application must fail."*<sup>38</sup>

Information notifying government agencies of possible or definite instances of sexual, physical or psychological abuse of children may also be covered by the secrecy provisions of the agencies' own statute/s (eg ss.29 and 254 of the *Children & Young Persons (Care and Protection) Act 1998*) and, therefore, possibly also by clause 12 of Schedule 1 of the FOI Act.

Where it is abundantly clear that information has been submitted in bad faith, that is, where information was clearly false and was known by the informant to be false at the time he/she provided it, it may be that the weight of public interest would swing towards disclosure of, at least, the informant's identity.

Exemption clauses in the FOI Act that may be relevant are discussed in Annexure A (clauses 12 and 13(a) and (b)).

## **18. Maintaining confidentiality**

### **18.1 What are the obligations generally to maintain confidentiality?**

Good public administration requires that a proper balance be drawn between the need on the one hand for government to be transparent and accessible to the public, and the need on the other hand to protect the integrity of official information and to prevent the unauthorised disclosure of personal or other wise sensitive information.

While the Ombudsman has long supported a positive approach by agencies to the disclosure of information (often referred to as "*open government*"), we have also recognised that there are circumstances where effective public administration or the privacy rights of individuals requires confidentiality/secrecy.

In the public sector, various statutory or contractual confidentiality requirements will or may apply to the conduct of investigations and their outcomes. Unauthorised disclosure of confidential information will also generally be proscribed by the agency's code of conduct.

Confidentiality serves a number of important functions. Preserving the confidentiality of the identity of the person making the complaint and the person the subject of the complaint minimises the risk of harm to these parties.

Another important function of confidentiality is to ensure the integrity of the investigation. If a potential witness feels that they are unable to trust the discretion of the investigator, they will be more reluctant to come forward with relevant information. Where material uncovered in an investigation is kept confidential there is less risk of contamination of evidence. Accordingly, any witnesses interviewed in the course of an investigation should be advised not to discuss

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<sup>38</sup> *Vranic v Director General, Department of Community Services* [2001] NSW ADT 129 at 51.

the matter with other witnesses or other third parties. Before interviewing any witness, investigators need to ask whether they have discussed the matter with anyone else.

In the absence of any statutory protections or defences at common law, investigators should be aware that a failure to maintain confidentiality – by publishing details of the complaint or any material uncovered in the course of an investigation – may expose them to proceedings in defamation.

Where it is important to maintain confidentiality, should an FOI application be lodged for relevant documents, the relevant exemption clause is discussed in Annexure A (clause 13).

### 18.2 What are the obligations to comply with confidentiality requirements under the *Protected Disclosures Act*?

The *Protected Disclosures Act 1994* requires investigators, public agencies and their staff to whom a protected disclosure is referred, not to disclose information that might identify or tend to identify the person who made the disclosure (s.22). This is a broad requirement and should be interpreted liberally (further advice on this issue can be found in the Ombudsman's *Protected Disclosures Guidelines*, 6th edition).

This requirement has clear implications with respect to who should be told about a protected disclosure. As a general rule tell only those who need to know about the disclosure in order to ensure that the investigation is effective. Always consider the capacity of those who might be told about the disclosure to cause, directly or indirectly, detrimental action towards the whistleblower. Impress on those who are told, their strict legal requirement to maintain confidentiality.

The *Protected Disclosures Act* provides that a whistleblower can waive (in writing) their right to confidentiality. It also provides that:

- natural justice (procedural fairness) may require identifying information to be disclosed to a person a subject of the investigation
- the investigating authority, public authority or public official may consider identifying information must be disclosed to investigate the matter effectively, or that it is in the public interest to disclose identifying information.

If an investigator considers that any of these provisions apply, he or she should document the grounds on which this opinion was based.

As discussed in Part A 8 above, there may be circumstances where it is important to disclose the identity of a whistleblower as part of management action to ensure the protection of that person.

In relation to disclosures made under the *Protected Disclosure Act*, should an FOI application be received for relevant documents, the relevant exemption clause is discussed in Annexure A (clause 20(1)(d)).

### 18.3 What are the obligations to comply with privacy requirements?

The *Privacy and Personal Information Protection Act 1998* (PIIP Act) and the *Health Records and Information Privacy Act 2002* (HRIP Act) set out standards for the collection, storage, use

and disclosure of personal information held by public sector agencies and of health information held by both public and private organisations in NSW.

Subject to various exemptions and exclusions from the definition of personal information, the PPIP Act makes it an offence for a public official to intentionally disclose personal information about another person to which the official has or had access in the exercise of his or her official functions, otherwise than in connection with the lawful exercise of his or her official functions (ss.62 and 63)<sup>39</sup>.

Both Acts contain a range of exemptions that apply to law enforcement agencies and investigative agencies.

Both Acts also provide specific exemptions for certain law enforcement agencies (for example the NSW Police Force, NSW Crime Commission, Police Integrity Commission and ICAC) from all information protection principles and health privacy principles in both Acts, except where those organisations are exercising an administrative or educative function. A recent decision of the Appeal Panel of the ADT has clarified that these law enforcement agencies have the benefit of a 'blanket exemption' from the operation of the provisions of both Acts, except when exercising their administrative or educative functions.<sup>40</sup>

The Privacy Commissioner has issued a range of public interest directions under the PPIP Act and/or HRIP Act. Those particularly relevant to investigations include:

- *Direction relating to requests made by the Ombudsman under s.13AA of the Ombudsman Act 1974* – this direction allows public sector agencies to cooperate with the Ombudsman when the Ombudsman is conducting preliminary inquiries under s.13AA of the *Ombudsman Act*
- *Direction relating to the Processing of Personal Information by NSW Public Sector Agencies in relation to their Investigative Functions* – this direction covers most NSW state agencies
- *Direction relating to Child Protection Watch Team trial* – this direction applies to agencies participating in the child protection watch team trial
- *Direction relating to the Information Transfers between NSW public sector agencies* – this direction covers most NSW state agencies.

While the PPIP Act and HRIP Act do not affect the operation of the FOI Act, privacy issues are dealt with in clause 6 of Schedule 1 to the FOI Act. This clause is discussed in Annexure A.

#### 18.4 Maintaining secrecy

Some legislation contains specific secrecy requirements which are not overridden by the provisions of the FOI Act. Example of such a provision would be ss.29 and 254 of the *Children and Young Persons (Care and Protection) Act 1988*.

Where such a secrecy provision applies, should an FOI application be received for relevant documents, the relevant exemption clause is discussed in Annexure A (clause 12).

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<sup>39</sup> The equivalent provisions in the *Health Records and Information Privacy Act 2002* in relation to 'health information' are ss.68 and 69.

<sup>40</sup> *Commissioner of Police, NSW Police Force v YK (GD)* [2008] NSWADTAP 78.

# ANNEXURE A

## The basis on which disclosure of information can be refused

### - SCHEDULE 1, FOI ACT -<sup>41</sup>

#### Introduction

Exemption clauses in Schedule 1 to the FOI Act that may be particularly relevant include:

- clause 4 – *Documents affecting law enforcement and public safety*
- clause 6 – *Documents affecting personal affairs*
- clause 9 – *Internal working documents*
- clause 10 – *Documents subject to legal professional privilege*
- clause 13 – *Documents containing confidential material*
- clause 16 – *Documents concerning operations of agencies*
- clause 20(d) relating to documents containing matter the disclosure of which would disclose matter relating to a protected disclosure within the meaning of the *Protected Disclosures Act 1994*.

Each of these clauses is discussed in detail below. Depending on the circumstances, other exemptions contained in the FOI Act may also be available.

Agencies should bear in mind that (in the absence of a Ministerial Certificate) they have discretion as to whether they refuse access to exempt documents.

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<sup>41</sup> The material in Annexure A sets out the views of the NSW Ombudsman, based on, but expanding and updating, the relevant sections of *The NSW FOI Manual*, published jointly by the Department of Premier and Cabinet and the NSW Ombudsman, August 2007.

## Clause 4 – Documents affecting law enforcement and public safety

Clause 4 of Schedule 1 to the FOI Act relevantly provides:

*“(1) A document is an exempt document if it contains matter the disclosure of which could reasonably be expected:*

- (a) to prejudice the investigation of any contravention or possible contravention of the law ... whether generally or in a particular case, or*
- (b) to enable the existence or identity of any confidential source of information, in relation to the enforcement or administration of the law, to be ascertained, or*
- (c) to endanger the life or physical safety of any person, or...*
- (d) to prejudice the effectiveness of any lawful method or procedure for preventing, detecting, investigating or dealing with any contravention or possible contravention of the law...*

*(2) A document is not an exempt document by virtue of subclause (1):*

- (a) if it merely consists of:*
  - (i) a document revealing that the scope of a law enforcement investigation has exceeded the limits imposed by law, or*
  - (ii) a document containing a general outline of the structure of a programme adopted by an agency for dealing with any contravention or possible contravention of the law, or*
  - (iii) a report on the degree of success achieved in any programme adopted by an agency for dealing with any contravention or possible contravention of the law, or*
  - (iv) a report prepared in the course of a routine law enforcement inspection or investigation by an agency whose functions include that of enforcing the law (other than the criminal law), or*
  - (v) a report on a law enforcement investigation that has already been disclosed to the person or body the subject of the investigation, and*
- (b) if disclosure of the document would, on balance, be in the public interest. ...”*  
(emphasis added)

### *Purpose of exemption*

The purpose of this exemption is to ensure that confidential documents and information should not be released where such release would have an adverse effect on the ability of public authorities to carry out law enforcement functions, or may compromise the safety of any person. The clause also recognises that certain documents may be exempt if their release may prejudice the process of justice or lead to damage to personal or public property.

### *‘Law’*

In this exemption, the term ‘law’ is used in a broad sense referring to the policing of criminal laws or civil obligations.<sup>42</sup> It is not limited to criminal law only and extends to laws of many kinds, including civil and regulatory laws. Child welfare laws, taxation laws, public health and safety legislation, and laws regulating business fall within the definition of ‘law’.

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<sup>42</sup> *Watkins v Chief Executive, Road Traffic Authority* [2002] NSWADT 11, at 39.

The exemptions in clause 4 may apply to documents resulting not only from the detection and punishment of violations of the law, but also documents relating to the prevention of violations of the law or enforcement of the law through civil or regulatory proceedings.

The term 'enforcement or administration of law' in clause 4(2)(b) is not so broad as to encompass all activities of government. Cases in the NSW ADT suggest that the term 'enforcement or administration of law' in clause 4(1)(b) should be construed narrowly. In particular, it has been said that it is those activities which pertain to the 'policing of criminal law or civil obligations'.<sup>43</sup> In this respect, the 'law' can be a law of the Commonwealth, of a State or Territory (including New South Wales).

*'Could reasonably be expected'*

The meaning of the phrase 'could reasonably be expected' is considered in general terms in the *NSW FOI Manual* (at 10.4.25 – 10.4.32).

*Prejudice to investigation* [clause 4(1)(a)]

'Prejudice' is not a term of legal art, and means to impede or derogate from.<sup>44</sup>

The President of the ADT, O'Connor DCJ, has noted:

*"It is critical that investigations be conducted in a confidential way until any charges are laid and evidence in support produced publicly. Up to that point those who give information to law enforcement authorities are entitled to assume the confidentiality of the process. Strict confidentiality during the investigative process offers protection both to witnesses and persons adversely implicated by allegations. Breaches of the confidentiality of the process can cause great harm to the reputations of those named and adversely affect the conduct of any legal proceedings."<sup>45</sup>*

Paragraph (a) may apply where the release of documents would result in a premature and unnecessary end to an investigation of a breach, or possible breach, of the law, or if disclosure would forewarn a suspect of the direction of the investigation and the evidence available against them. It is not necessary to be able to point to any actual breach of the law – it is enough that some breach may have occurred.

The fact that this exemption applies both 'generally' and 'in a particular case' means that it could apply to unspecified contraventions, which have occurred or may occur in the future. The fact that criminal charges are not pending in respect of certain people named in the documents is not relevant if there is evidence that the material may well be relied on by the agency in a future prosecution.<sup>46</sup>

It is unlikely that the exemption can apply if the investigation has closed. However, if the investigation is merely suspended or dormant rather than closed, the exemption may apply provided the expectations that the investigation may revive is more than speculative or theoretical.<sup>47</sup>

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<sup>43</sup> See eg *Watkins v Chief Executive, Road Traffic Authority* [2001] NSW ADT 11 (at 37-39) and *BY v Director-General, Attorney-General's Department (No 2)* [2003] NSW ADT 37 at 43-51).

<sup>44</sup> *Sobh v Police Force of Victoria* [1994] 1 VR 41 at 324.

<sup>45</sup> *Maugher v General Manager, Wingecarribee Shire Council* [1999] NSW ADT 35 at 45.

<sup>46</sup> *DZ v Commissioner of Police, New South Wales Police Service* [2002] NSW ADT 274 at 61-62.

<sup>47</sup> See, eg *Doulman and CEO of Customs* [2003] AATA 883.

## *Existence or identity* [clause 4(1)(b)]

Paragraph (b) may be used if it could reasonably be expected that the release of documents would result in either a confidential source of information being ascertained or the identity of the person supplying the information being confirmed. In relation to this paragraph, Robinson MA in the ADT stated:

*"I accept that the clear purpose of the sub-paragraph is to maintain a public willingness to provide government agencies who have a law enforcement function with relevant information, without, at the same time creating in those informants a fear of unwanted disclosure of their identity or of reprisals for supplying information (Ingram v General Manager, Sutherland Shire Council [2000] NSW ADT 69 at 27) and that the exemption is directed towards protecting the flow of information from the public rather than in relation to the contents of the document (BY v Director General, Attorney General's Department (No. 2) [2003] NSW ADT 37 at 37)."*<sup>48</sup>

The President of the ADT, O'Connor DC, noted that "[e]xternal review tribunals and Commissioners in other jurisdictions have consistently supported an interpretation of the law enforcement exemption which protects the identity of informants."<sup>49</sup>

In some cases, keeping confidential the fact of the *existence* of a confidential source may be as important as maintaining confidentiality in the *identity* of the source to whom anonymity has been promised.<sup>50</sup> It should be noted that in certain circumstances an agency may be able to 'refuse to confirm or deny the existence of documents' which fall within this exemption.

In relation to identity, the exemption applies only if there is a reasonable expectation that the identity of the confidential source will be ascertainable from the contents of the document. This may be because the information in question could only have been obtained from one person, or from a very small group of people, even if the document does not otherwise name or otherwise contain identifying information about the informant. On the other hand, if the informant's identity is not apparent on the face of the document and the information is of a general nature, then it is unlikely to lead to the identification of the source.<sup>51</sup>

Whether information could reasonably be expected to result in the identification of an informant may depend upon the relevant pool of potential persons to whom such general information might apply. So, for example, disclosing the gender of an informant would, by itself, be unlikely to result in his or her identification.

Decision-makers may also take into account the potential 'mosaic effect' of information from various documents. The ADT has held that the exemption could apply where the applicant (together or with others) undertakes a systematic approach to the making of a number of FOI applications with the ultimate aim of putting the pieces together and discovering the identity of a source, even though the identity is not ascertainable from any single document. This is a rare example of where the motive of the applicant may be a relevant consideration.<sup>52</sup>

Decision-makers must also bear in mind that a person's identity can in some circumstances be ascertained from their handwriting, or from the document's letterhead or other features.

<sup>48</sup> In *Schultz & ors v Commissioner of Police, NSW Police Service* [2003] NSW ADT 86.

<sup>49</sup> In *Mauger v General Manager, Wingecarribee Shire Council* [1999] NSW ADT 35 at 34.

<sup>50</sup> *Department of Health v Jephcott* (1985) 62 ALR 421.

<sup>51</sup> *Bartlett and Secretary, Department of Social Security* [1998] AATA 717.

<sup>52</sup> *Salern v Commissioner of Police, New South Wales* [2002] NSWADT 40.

It is important to note that this exemption aims to protect the source of the information, rather than the information itself. This means that the exemption may continue to apply even if the information supplied is out of date or incorrect, or even if the informant has been untruthful “...the legislation is clearly designed to protect the identity of informers and does not differentiate between the good, the bad or the indifferent.”<sup>53</sup> There is however, some dispute as to whether the exemption will continue to apply if the agency is satisfied that the informant has acted maliciously in giving false information.<sup>54</sup>

‘Confidential source of information’ [clause 4(1)(b)]

A source of information is confidential if information is provided under an express or implied pledge of confidentiality.<sup>55</sup> Generally, whether information was supplied on an implicit understanding of confidentiality requires an evaluation of the relevant circumstances, including:

- the nature of the information conveyed
- the relationship of the informant to the person informed upon
- whether the informant stands in a position analogous to that of a police informer
- whether it could reasonably have been understood by the informant and the recipient that the appropriate action could be taken in respect of the information conveyed while still preserving the confidentiality of its source
- whether there is any real (as opposed to fanciful) risk that the informant may be subject to harassment or other retributive action or could otherwise suffer detriment if the informant’s identity were to be disclosed, and
- any indications on the part of the informant to keep his or her identity confidential.<sup>56</sup>

In relation to whether interviews with witnesses that were conducted under the understanding that the matter would possibly proceed to court could be said to disclose a confidential source of information, the Commonwealth AAT has stated:

*“... the question seems to be ... whether the statements were made because of an express or implied pledge of confidentiality and the onus is on the respondent to establish that matter on the balance of probabilities. If statements were made in the expectation that the person would be called as a witness in criminal proceedings, that seems to us to indicate that there was no implied pledge of confidentiality. ... While the authorities relied on ... establish that informers are confidential sources, they also show that, as Cooke P said in Commissioner of Police v Ombudsman:*

*‘It is elementary that before trial on indictment the accused is entitled to peruse the depositions taken ... or the written statements of witnesses admitted ...’*

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<sup>53</sup> *Richardson and Commissioner for Corporate Affairs* (1987) 2 VAR 51.

<sup>54</sup> *Odisho v Chief Executive, Roads and Traffic Authority* [2001] NSWADT 49.

<sup>55</sup> *Department of Health v Jephcott* (1985) 62 ALR 421.

<sup>56</sup> *Re McEneiry and Medical Board of Queensland* (1994) 1 QAR 349, at 371.

*If that is so, and it seems to be (see cl 1A Schedule 2 Magistrates Court Act 1989 Vic)) then witness statements intended to be used in a prosecution are not obtained in circumstances such as to show that the makers of the statements were confidential sources.*

*If there were any evidence that statements from particular sources were induced by the investigating officers promising that the person would not be called as a witness, a decision-maker would be bound to have regard to that evidence in deciding whether the person was a confidential source.”<sup>57</sup>*

Where the applicant already knows the identity of the informant is irrelevant, since release under the FOI Act is considered to be publication to the world.<sup>58</sup>

*‘Enforcement or administration of the law’* [clause 4(1)(b)]

This clause covers not only police informants but may also apply where individuals supply confidential information to other government agencies involved in law enforcement.<sup>59</sup>

It is unclear, however, the extent to which the clause extends beyond the enforcement of criminal law. The ADT has held that the reference to ‘enforcement or administration of the law’ should be given a narrow meaning which requires the documents to *‘be concerned with the process of the endorsement of legal rights or duties’*. This means that paragraph 4(1)(b) can only be applied to information that pertains to the activities of agencies that relate to law enforcement. The ADT provided the following comments:

*“The language of the exemption is directed at establishing for FOI purposes an exemption comparable with the ‘police informer’ privilege in courts, with the reference to ‘or administration of the law’ reflecting the extension of the privilege to informers not only to police agencies, but also in some analogous situations... A further reason for reading the elements of clause 4(1)(b) as being directed at documents which have a connection with the activities of agencies by way of ‘law enforcement’ is to give a rational operation to clause 4(2)(a)(iv) and (v) and (b).”<sup>60</sup>*

Similarly, the President of the ADT indicated that cl 4(1)(b) was directed toward the *‘protection of criminal justice and emergency services functions’*.<sup>61</sup>

*‘Endangerment of life or physical safety’* [clause 4(1)(c)]

If agencies intend to withhold material on the basis that life or physical safety may be endangered there must be a reasonable apprehension that such harm is likely to occur.<sup>62</sup> The test to be applied is an objective one.<sup>63</sup> However, while a person’s subjective fear of harm is not of itself decisive, the Victorian Appeals Tribunal has held that if the person’s fear is both genuinely and reasonably held then the exemption will apply.<sup>64</sup>

<sup>57</sup> *Alistair Peter Scholes and Australian Federal Police* [1996] AATA 347 (at 86).

<sup>58</sup> *DZ v Commissioner of Police, New South Wales Police Service* [2002] NSWADT 274.

<sup>59</sup> *Taylor v Chief Inspector, RSPCA* [1999] NSWADDT 23.

<sup>60</sup> *Watkins v Chief Executive Roads and Traffic Authority* (2000) NSWADT 11.

<sup>61</sup> *BY v Director General, Attorney General’s Department (No 2)* [2003] NSW ADT 37.

<sup>62</sup> *State Electoral Office v McCabe* [2003] NSWADTAP 28.

<sup>63</sup> *Centrelink v Dykstra* [2002] FCA.

<sup>64</sup> *O’Sullivan v Victoria Police* [2005] VCAT 532.

The reference to 'any person' includes members of government agencies. The fact that a person feels aggrieved at the behaviour of government officials (whether that grievance is reasonable or not) and is prone to intemperate verbal abuse does not of itself mean that there is a reasonable expectation that the person would commit acts that would endanger the physical safety of those government officials.<sup>65</sup> The Commonwealth AAT observed that bad relationships between people 'are not inevitably accompanied by physical harm'.

#### *Prejudice to investigative etc procedures* [clause 4(1)(e)]

This exemption applies where an agency is of the view that disclosing documents may mean that its procedures and strategies for detecting possible breaches of the law may become less effective or ineffective, for example by alerting applicants to possible means of frustrating relevant methods or procedures.

The exemption does not necessarily require that the procedure be covert or secret. However, prejudice is less likely to occur by disclosure where the effectiveness of the procedures does not depend upon them remaining secret, for example where they are 'the obvious course of action' or are otherwise overt.<sup>66</sup>

#### *Limitations on the exemption* [clause 4(2)]

Clause 4(2) lists certain situations where the exemptions in clause 4(1) do not apply. This is where:

- the document consists of one or the five categories of documents described in clause 4(2)(a), and
- the public interest in disclosure outweighs the public interest in non-disclosure.

Only if the documents fall within one of the categories in clause 4(2)(a) does the public interest test arise – a public interest test does not otherwise apply to documents falling within the scope of clause 4(1). These five categories deal with situations where the information is of a kind such that its release would be unlikely to cause any prejudice to the investigatory functions of an agency, or which reveals that an agency has itself breached the law in its investigation.

The wording of this public interest test is different to the wording of the public interest tests in other clauses of Schedule 1. The test in clause 4(2) requires that the documents not be released unless the decision-maker is satisfied that release is in the public interest. In contrast, the public interest tests in other clauses of Schedule 1 require that the documents be released unless the decision-maker is satisfied that release is contrary to the public interest.

#### *Application to investigations*

In some cases agencies have relied on clause 4 to refuse access to documents relating to investigations without considering whether there was likely to be any adverse effect on the process of justice or a risk to public safety or property if the documents were released.

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<sup>65</sup> *State of Queensland v Albietz* (1996) 1 QdR 215.

<sup>66</sup> *Re T and Queensland Health* [2994] QAR 386.

Documents relating to an investigation should generally be released if:

- the investigation has been finalised, **and**
- the subject matter was not sensitive, or
- the investigation dealt with subjects that have changed or have ended, or
- there is no evidence of likely prejudice to the process of justice, and/or
- there is no evidence of possible danger to the public or property.

However, as noted by the ADT:

*“Strict confidentiality during the investigative process offers protection both to witnesses and persons adversely implicated by allegations. Breaches of confidentiality of the process can cause great harm to the reputations of those named and adversely effect the conduct of any legal proceedings.”<sup>67</sup>*

Examples of documents to which clause 4 might apply include:

- a document disclosing the existence of evidence on which the police (and presumably any other body conducting an investigation relating to a breach of the law) propose to rely would be exempt if disclosure of the document could lead to the evidence being destroyed by the offender – an act which would prejudice the investigation
- if it can be shown that release of documents to a person in relation to an agency’s investigation of that person may result in the destruction of vital evidence or the person leaving the jurisdiction, such documents would be exempt under paragraph (a)
- a file disclosing the making of an audit check on a person to whom a grant of Commonwealth or State funds has been made and who is suspected of misusing those funds would also be exempt, if there were a reasonable belief that disclosure would prejudice the investigation
- a document identifying a complainant to a public authority may be exempt under clause 4(1)(c) if the person who has been complained about has a record of or reputation for violence
- the effectiveness of procedures for monitoring standards of cleanliness in shops and restaurants, etc may be affected if documents containing information on the procedures to be adopted (not the standards themselves) were disclosed.

It is important to note that clause (4)(2)(a)(v) provides that a document is not an exempt document by virtue of subclause (1) if it merely consists of a report on a law enforcement investigation that has already been disclosed to the person or body the subject of the investigation. However, inadvertent release does not provide a ground for FOI release<sup>68</sup> and whether or not an FOI applicant already knows the identity of the informant is irrelevant because release under the FOI Act is release to the world.<sup>69</sup>

If the agency that received and investigated a complaint has formed a judgement that the complainant knew the allegations to be false and made them with a malicious motive, then disclosure may be appropriate, particularly if that would help the subject of the disclosure clear his or her name. However, as noted in *The NSW FOI Manual*, this issue is in some dispute and:

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<sup>67</sup> *Mauger v General Manager, Wingecarribee Shire Council* [1999] NSWADT 35 at 45.

<sup>68</sup> As above, at 50.

<sup>69</sup> *DZ v Commissioner of Police, New South Wales Police Service* [2002] NSWADT 274 at 68-69.

*“Until that issue is authoritatively resolved, agencies should assume that the fact that an informant may have been motivated by malice is irrelevant, and the exemption still applies.” (at 11.5.40)*

## Clause 6 – Documents affecting personal affairs

Clause 6 of Schedule 1 to the FOI Act provides:

*“(1) A document is an exempt document if it contains matter the disclosure of which would involve the **unreasonable** disclosure of information concerning the personal affairs of any person (whether living or deceased).*

*(2) A document is not an exempt document by virtue of this clause merely because it contains information concerning the person by or on whose behalf an application for access to the document is being made.” (emphasis added)*

### *Definition*

The term personal affairs cannot be precisely or substantively defined. In “*Perrins case*” the former President of the NSW Court of Appeal, Justice Kirby, stated:

*“In its context the words ‘personal affairs’ mean the composite collections of activities personal to the individual concerned.”<sup>70</sup>*

### *Purpose of exemption*

This exemption is designed to protect the privacy of individuals. It sets in place controls to prevent the indiscriminate release of information about individuals. Deputy President Hennessey of the ADT has commented:

*“The purpose of the personal affairs exemption is to allow the public interest in personal privacy to be balanced against the public interest in people having open access to information held by government. Privacy is an important right enshrined in various international human rights instruments including the International Covenant on Civil and Political Rights, Article 17. Access to information held by government, reflected in the principles of openness, accountability and responsibility of government, is also a fundamental principle which the FOI Act seeks to enshrine”<sup>71</sup> .*

An important aspect of the right to privacy is the right to control information concerning oneself. The Act recognises this by stating that the exemption cannot be used to stop an applicant obtaining information about himself or herself (clause 6(2)).

The former President of the NSW Court of Appeal, Justice Kirby has stated that:

*“The general object of the clause is to protect private information of third parties who may be referred to in agency documents but who may be unaware that their private affairs stand subject to exposure by a claim for access made under the Act”<sup>72</sup>.*

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<sup>70</sup> *Commissioner of Police v District Court of NSW and Perrin* (1993) 31 NSWLR 606 at para 625.

<sup>71</sup> *Gilling v Hawkesbury City Council* (1999) NSWADT 43 at 33.

<sup>72</sup> *Commissioner of Police v District Court of NSW and Perrin* (1993) 32 NSWLR 606.

## *Applying the exemption*

The following two criteria must be fulfilled to fall within this exemption:

- 1) the documents must contain information concerning a person's 'personal affairs',  
and
- 2) the disclosure of that information must involve 'unreasonable' disclosure of that information.

If the person whose personal affairs are involved does not consent to the documents being released, then that is one factor which suggests that it would be unreasonable to disclose the documents. However, there may be matters of public interest tending in favour of disclosure which outweigh the invasion of privacy concerned, so as to make it reasonable to release the documents without the person's consent.

If a decision is made to release the document, the person must be told of that decision and advised of his/her rights to internal and external review. The document must not be released until after such review, or after the expiration of the time period for conducting such review has passed.

The Personnel Handbook published by the Department of Premier and Cabinet contains guidelines on the release of personnel information to people employed under the *Public Sector Employment and Management Act 2002* (at 5-3.3, 5-3.4.3 – 5.3.4.5 & 5-3.4.9).

### *'Personal affairs'*

In determining whether information concerns a person's 'personal affairs' the source of the information is not relevant. It does not matter whether the information was obtained from the person concerned or from any other source.

It also does not matter whether the information is secret or confidential. 'Personal' does not mean 'private'.<sup>73</sup> Even if the information is widely known or rumoured in the press or otherwise, this does not affect its status as being information concerning a person's 'personal affairs' (although it may be relevant to the second limb of the test, as to whether the release of the information would constitute 'unreasonable disclosure').

Without attempting to set out a comprehensive list of matters that may be relevant to an investigation, in assessing FOI applications it can be assumed that, in the absence of special circumstances to the contrary, information concerning the following matters could constitute the 'personal affairs' of a person in terms of the first part of the test in clause 6:

- *Identification*
  - Information about a natural person from which, or by use of which, the person can be identified.
  - Name and former name. Although a person's name, in isolation, is not generally part of their personal affairs,<sup>74</sup> the ADT has held that it is a question of fact in every case as to whether the name of a person, in the context in which it appears, amounts to their personal affairs.<sup>75</sup>

<sup>73</sup> *Colakovski v Australian Telecommunications Corporation* (1991) 29 FCR 429.

<sup>74</sup> *Commissioner of Police v District Court of NSW and Perrin* (1993) 31 NSWLR 606 (*Perrins case*).

<sup>75</sup> *Hennessey DP in Dawson v Commission, Health Care Complaints Commission* [1999] NSW ADT 57 – see [12.3.20] below.

- Private address and telephone number, particularly when linked with the person's name<sup>76</sup> but not necessarily where the address of a place to which a statutory licence relates happens also to be the licensee's residential address, without more.<sup>77</sup>
- Date and place of birth.
- Family
  - Family details, domestic arrangements, marital status and personal relationships, status of children.<sup>78</sup>
- Health
  - Medical condition, medical and psychiatric history, diagnoses and treatment.<sup>79</sup>
- Social
  - Private behaviour, personality, reputation.<sup>80</sup>
- Financial
  - Financial obligations, liabilities.<sup>81</sup>
  - Property and other assets.
- Employment
  - Employment applications.
  - Reports relating to a person's promotional prospects.
  - Personal records of employees, for example sick leave, staff transfers, high duties, promotions, annual leave, and so on.
  - Where an employee complains to management about the conduct of another employee, the complaint would concern the "*personal affairs*" of the complainant (ie, "...if an employee is complaining in their personal capacity about the conduct of another employee, the information will generally concern the complainant's personal affairs"),<sup>82</sup> as well as the personal affairs of the other employee (ie "...where information relates to allegations of inappropriate conduct of an employee then the name of the employee concerned and the allegations have been found to concern the personal affairs of the employee...")<sup>83</sup>
  - Salary details.

<sup>76</sup> Eg *Gilling v Hawkesbury City Council* [1993] NSWADT 43; *Thompson v The Lord Howe Island Bord* [2003] NSWADT 193.

<sup>77</sup> See *Humane Society International Inc v National Parks and Wildlife Service and ors* [2000] NSWADT 133.

<sup>78</sup> *Eg Re Forrest and Department of Social Security and Wilks* (1991) 23 ALD 131.

<sup>79</sup> *Eg Department of Social Security v Dyrenfurth* (1988) 80 ALR 533.

<sup>80</sup> *Eg Re Toomer v Department of Primary Industries and Energy* (1990) 20 ALD 275.

<sup>81</sup> *Eg Department of Social Security v Dyrenfurth* (1988) 80 ALR 533.

<sup>82</sup> *Chief Executive Officer, State Rail Authority v Woods* [2003] NSWADTAP 25 at para 26.

<sup>83</sup> *Harbinson v NSW Department of Education and Training* [2009] NSWADT 56, at 37; *Humane Society International Inc v National Parks and Wildlife Services* [2000] NSWADT 133 at 21.

- Education
  - Reports generated by educational institutions concerning the academic progress of a student, test scores, including scores of aptitude or vocational tests, or counselling reports.
- Criminal records
  - Criminal records and certain police records about an individual.

*Information not concerning personal affairs*

Information concerning the following matters would ordinarily not concern the personal affairs of a person (but may still be exempt under some other clause of Schedule 1):

- the affairs of a corporation – it appears that a corporation cannot have ‘personal affairs’ for the purposes of the FOI Act.
- information kept in statistical or anonymous form, from which information relating to a particular person could not be isolated or the person identified.
- a person’s name where it appears in a normal routine agency document – that is, where the names of public officials appear in documents which contain nothing of a nature personal to them, but are documents that concern the performance of their duties and responsibilities and the affairs disclosed are properly characterised as those of the agency concerned.<sup>84</sup> Deputy President Hennessy of the ADT has stated:

*“What matters is the nature of the information interpreted in its context. The information in question [in this case] does not relate to their family or personal relationships, their financial or health status or any other matter personal to them. It relates to their identity and competence as a professional person. For these reasons the information does not concern their personal affairs”.*<sup>85</sup>

The Appeal Panel of the ADT has held that “...where a document deals with the conduct or performance of an employee as part of the exercise of management responsibilities, the document does not concern the ‘personal affairs’ of the author.”<sup>86</sup> In another case the ADT stated that “...if a supervisor, manager or investigator produces a document in the course of exercising supervisory, management or investigation responsibilities, the information in that document, so far as it relates to them, will not generally concern their personal affairs.”<sup>87</sup>

*Unreasonable disclosure*

After a decision has been made that the information sought concerns a person’s personal affairs, it must then be decided by the agency whether the disclosure of the information would involve ‘unreasonable disclosure’ of that information.

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<sup>84</sup> See *Commissioner of Police v District Court of NSW and Perrin* (1993) 31 NSWLR 607 and *University of Melbourne v Robinson* (1993) 2 VR 177 at 187.

<sup>85</sup> *Gulliver v General Manager, Maitland City Council* (1999) NSWADT 67 at 24.

<sup>86</sup> *Chief Executive Officer, State Rail Authority v Woods* [2003] NSWADTAP 25.

<sup>87</sup> *TW v TX* [2005] NSWADT 262, referring to the decision of the Appeal Panel of the ADT in *Chief Executive Officer, State Rail Authority v Woods* [2003] NSWADTAP 25.

If the person about whose personal affairs information is contained in the document does not consent to its disclosure then it is more likely that it will be unreasonable to disclose the document.

The mere fact that a person does not consent to the release of personal affairs information is itself a factor which will tend against disclosure, having regard to the public interest in every individual's right to privacy. Any particular reasons given by the person (or which are otherwise apparent to the agency) as to why he or she objects to the disclosure must also be taken into account.

The appropriate approach to be adopted was discussed in the Commonwealth AAT in the following terms:

*"Whether disclosure is 'unreasonable' requires, in my view, a consideration of all the circumstances, including the nature of the information that would be disclosed, the circumstances in which the information was being obtained, the likelihood of the information being information that the person concerned would not wish to be disclosed without consent, and whether that information has any current relevance."*<sup>88</sup>

#### *Countervailing public interest considerations*

Even if a person does not consent to disclosure, the release of the document may not be unreasonable if the provision of access to the community of information held by government ((the applicant's right to know) so outweighs the protection of individual privacy that it would not be unreasonable to disclose the information even against the relevant person's wishes.<sup>89</sup>

In undertaking such an assessment, agencies should consider the comments of Judge Cooper in the NSW District Court:

*"Thus, if exemption were claimed under Clause 6 of Schedule 1 (a document containing matter the disclosure of which would involve the unreasonable disclosure of information concerning the affairs of any person), compliance with section 28(2)(e) would necessitate a considerable amount of detail to justify the unreasonableness of the disclosure particularly as the concept of unreasonableness encompasses a value judgement. It would require the setting out of those facts which form the basis of that value judgement in order to comply with the obligation to state 'The findings on material questions of fact underlying those reasons.'"*<sup>90</sup>

#### *Deleting exempt matter*

It should always be remembered that even if a document contains personal information the disclosure of which would be unreasonable, it may be possible to disclose the document with the personal information deleted.

Access to a document in full cannot be denied merely because it contains information about an individual's personal affairs. Instead, if possible, material that is exempt under clause 6 can be deleted and access given to the remainder of the document, in accordance with s.25(4)(a):

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<sup>88</sup> *Re Chandra and Minister for Immigration and Ethnic Affairs* (1984) 6 ALN 257 at [51].

<sup>89</sup> For a discussion of the way in which public interest considerations are relevant to determining whether disclosure may be 'unreasonable', see [10.4.23-10.4.24] in *The NSW FOI Manual*.

<sup>90</sup> *Simos v Wilkins*, per Cooper J, unreported, NSW District Court, No.187 of 1996.

*“Quite clearly where invasion of privacy is concerned, deletion of names and other identifying particulars or references might quite simply render the document no longer privacy invasive.”*<sup>91</sup>

This so called ‘censorship power’ is the power to release documents with information deleted so that privacy is no longer invaded (s.25(4)(a)).

### *Consultation procedures*

Clause 6 should be read in conjunction with s.31 relating to consultation procedures.

An agency must not decide to release documents until after it has taken such steps as are reasonably practicable to obtain the views of the person whose personal affairs information is contained in the documents the subject of the FOI application (s.31). Where the person is deceased, the agency must consult with the person’s closest living relative who is at least 18 years of age (s.31(5)).

Where an agency believes that disclosure of documents containing information relating to a person’s personal affairs is clearly unreasonable, then there is no requirement to consult. However, even if the agency is of that view, it is not precluded from obtaining and taking into account the views of the person concerned. Such consultations may also provide further weight to the agency’s view that disclosure is unreasonable. This approach needs to be balanced against the time available for decision-making and extra processing costs to the applicant.<sup>92</sup>

### *Application to investigations*

In trying to determine whether information can be categorised as falling within the meaning of ‘personal affairs’, a lot depends on the context.

Based on the cases to date, it would appear that the types of complaints, allegations, disclosures, statements, etc that are likely to be categorised as concerning the ‘personal affairs’ of their author/source would include:

- a private citizen’s complaint to an agency about treatment by a public official<sup>93</sup>
- a public official’s complaint to management relating to privately held concerns about treatment by a colleague<sup>94</sup> (ie, in their personal capacity as opposed to reports made in the course of the exercise of official responsibilities)
- statements given by witnesses relating their personal experiences with the subject of an investigation, and their reactions to those experiences<sup>95</sup>
- the contents of complaints or allegations made to an external complaints agency<sup>96</sup>

The circumstances where it would be unlikely that information would be categorised as concerning a person’s ‘personal affairs’ would include:

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<sup>91</sup> *Simons and the Victorian Egg Marketing Board (No. 1)* (1985) 1 VAR 54.

<sup>92</sup> The requirements for consultation are set out in more detail in Chapter 4 of *The NSW FOI Manual*.

<sup>93</sup> *Chief Executive Officer, State Rail Authority v Woods (GD)* [2003] NSWADTAP 25 at 26.

<sup>94</sup> As above at para 27.

<sup>95</sup> *Re Hutchinson and Department of Human Services (1997)* 12 VAR 422 and *Chief Executive Officer, State Rail Authority and Woods (GD)* [2003] NSWADTAP 25 and 30.

<sup>96</sup> *Re Stewart and Department of Transport (1993)* 1 QAR 227 and *Re Perton and Attorney General’s Department (1992)* 5 VAR 302 and 319.

- information identifying the person in reports made in the course of the exercising of official responsibilities
- the names of public officials appearing in documents which contain nothing personal to them but concern the performance of their duties and responsibilities (ie, the affairs disclosed are those of the agency concerned).<sup>97</sup>
- “*a person’s opinion about the work performance of another arising from the position, office and public activity which the person occupies... concerns the business or professional relationship, rather than a private or personal relationship with that person.*”<sup>98</sup>
- documents dealing with the conduct or performance of an employee prepared as part of the exercise of management responsibilities.<sup>99</sup>

In general terms, the assessment as to whether information concerns ‘personal affairs’ and its disclosure would be unreasonable must be based on an objective evaluation of all relevant circumstances including, first and foremost, the views of the person whose ‘personal affairs’ would be disclosed, and then:

- the nature of the information that would be disclosed
- the circumstances in which, or the basis on which, the information was obtained by the agency
- whether the information has any demonstrable relevance to the affairs of government
- whether the information has any current relevance
- whether the disclosure of the information would only serve to excite or satisfy the curiosity of the applicant about the person whose ‘personal affairs’ would be disclosed<sup>100</sup>
- the damage likely to be suffered by the person whose ‘*personal affairs*’ would be disclosed, including whether the disclosure of the information would result in some particular unfairness, embarrassment or hardship to a person
- the relationship between the applicant and the person whose personal affairs may be disclosed (where relevant)
- whether, and if so the degree to which, the information affects or concerns the applicant
- the applicant’s motives or intentions in relation to the application, including whether the applicant intends to use the information for purposes that are illegal, malicious or otherwise not in the public interest<sup>101</sup>
- whether or not the information is already in the public arena (although the fact that information is in the public arena and no longer private or confidential does not prevent the information from still being categorised as the ‘*personal affairs*’ of an individual but may be relevant to determining whether the disclosure of the information is unreasonable).

It is important that the matters referred to in s.59A not be taken into account in determining whether this exemption applies. This is, it does not impinge on the reasonableness or otherwise of disclosure that the documents may cause embarrassment to, or a loss of confidence in, the Government, or that they may be misunderstood or misinterpreted by the applicant.

<sup>97</sup> *Perrin’s case and Gulliver v General Manager, Maitland City Council* (1999) NSWADT 67, etc.

<sup>98</sup> *Robinson v Director-General, Department of Health* [2002] NSWADT 222 at 100.

<sup>99</sup> *Chief Executive Officer, State Rail Authority v Woods* [2003] NSWADTAP 25.

<sup>100</sup> *Director of Public Prosecutions v Smith* (1991) 1 VR 51 the Court noted that the public interest does not mean ‘*that which gratified curiosity or merely provides information or amusement*’, drawing a distinction between ‘*what is in the public interest and what is of interest to know*’.

<sup>101</sup> See for example, *BW v Registrar, New South Wales Medical Board* [2002] NSW ADT 76 – at [46].

Even if a document contains some information that concerns the personal affairs of an individual, if that information can be deleted, the document should still be released.

## Clause 9 – Internal working documents

Clause 9 of Schedule 1 to the FOI Act provides:

- “(1) A document is an exempt document if it contains matter the disclosure of which:
- (a) would disclose:
    - (i) any opinion, advice or recommendation that has been obtained, prepared or recorded, or
    - (ii) any consultation or deliberation that has taken place, in the course of, or for the purpose of the decision-making functions of the Government, a Minister or an agency, and
  - (b) would, on balance, be **contrary to the public interest**.
- (2) A document is not an exempt document by virtue of this clause if it merely consists of:
- (a) matter that appears in an agency’s policy document, or
  - (b) factual or statistical material.” (emphasis added)

### *Purpose of exemption*

The purpose of the exemption is to protect documents concerning the decision-making and policy-making functions of an agency, if their disclosure would be contrary to the public interest. The exemption should not be used as grounds for denying access to documents which relate purely to the administrative functions of an agency.

There is a clearly recognised need for governments to have some degree of confidentiality in order to function smoothly and efficiently. As Gibbs J stated:

*“It is inherent in the nature of things that government at a high level cannot function without some degree of secrecy. No Minister or senior public servant can effectively discharge the responsibilities of his office if every document prepared to enable policies to be formulated was liable to be made public. The public interest therefore requires that some protection be afforded by the law to documents of that kind.”<sup>102</sup>*

The provision is designed to protect the pre-decisional processes – those leading to a decision – but only if, on balance, it is contrary to the public interest to release the information. It is not designed to protect pre-decisional processes regarding purely administrative decisions, or the basis for those decisions.

### *The test*

For an agency to claim that documents are exempt under clause 9, all three requirements of the clause must be met. That is:

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<sup>102</sup> *Sankey v Whitlam* (1978) 142 CLR 2.

- 1) the document must disclose:
  - an opinion, advice or recommendation that has been obtained, prepared or recorded, or
  - a consultation or deliberation that has taken place,in the course of, or for the purpose of, the decision-making function of the Government, a Minister or an agency, and
- 2) there must be a public interest in non-disclosure which outweighs the public interest in disclosure, **and**
- 3) the document must not merely consist of matter that appears in the agency's policy document or comprises factual or statistical material.

### *Scope of exemption*

Clause 9 is intended to protect the decision-making functions of the government, a Minister, or an agency where effective administration would be impeded by the loss of confidentiality.

The need to maintain some degree of confidentiality is generally recognised. The issues frequently in dispute are the degree of confidentiality which should be applied and the length of time that the exemption in clause 9 should apply to documents.

Clause 9(1) contains descriptive terms which are particularly wide and will normally incorporate a vast range of documents consisting of information which is opinion, advice or recommendations, or documents which record consultations or deliberations leading to or for the purpose of decision-making functions.

The provision of clause 9(1)(a) are fairly self-explanatory in describing the nature of the information which may be exempt under the clause. It is the opinion of the Ombudsman that documents concerning the mere internal administrative decisions of an agency, such as documents recording an agency's housekeeping and day-to-day functioning, would not be covered by clause 9(1)(a). It is documents relating to the decisions made by the agency, in performing the functions for which it was created, that are the target of the first part of clause 9.

The exemption should not be used as a class to cover all such documents. Judge Smyth, in the first District Court hearing of an FOI case, *Wilson v Department of Education*, stated that:

*"It is clear to me that there would be certain documents within clause 9 which would contain matter which would be against the public interest to disclose, and in my view where a claim is made under clause 9 the obligation on the Court is to consider each such document and to make a value judgement as to whether that particular document is one which would be against the public interest to disclose."* (emphasis added)

It should be noted that a document may be an 'internal' working document even if it was created by someone outside of the agency, such as an external consultant.<sup>103</sup>

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<sup>103</sup> *General Manager, WorkCover Authority of NSW v Law Society of NSW* [2006] NSWCA 84.

### *Matter in the nature of opinion, etc*

A document which records 'opinions, advice or recommendations' may be exempt under clause 9.

The public interest considerations surrounding the desirability of ensuring 'frank and candid' opinions, advice and recommendations are discussed further below.

### *Decision-making functions*

The reference to 'decision-making functions' appears to be a reference to those functions which an agency has been established to perform.

The Commonwealth AAT<sup>104</sup> has expressed the view that the expression 'deliberative process' is wide enough to include any of the processes of deliberation or consideration involved in the functions of an agency. The deliberative processes would therefore be its thinking processes, eg, the processes of reflection on the wisdom and expediency of a proposal, a particular decision or a course of action. Deliberations on policy matters would come within this description. Decision-making and policy-making processes are also protected. This would include keeping secure advice and recommendations which help the deliberative process occur.

### *Public interest*

There should be no presumption that just because a document fits the description in clause 9(1) disclosure of it would necessarily be contrary to the public interest under clause 9(2). Such an interpretation would be inconsistent with the strong public interest in disclosure about government decision-making processes which derive from s.5 and the second reading speech.

While the fact that the decision-making process is still on foot is a public interest factor against disclosure, once the final decision has been made it is unlikely that such documents should continue to be exempt unless special circumstances exist.<sup>105</sup> Even if it is assumed that giving access to the content of internal working documents prior to a final decision being made may inhibit the free flow of ideas and options, as noted by Deputy President Hennessy in the ADT "...once a decision becomes final or operative it would be much more difficult to establish that disclosure would be contrary to the public interest."<sup>106</sup>

There may be cases in which the public interest in confidentiality will continue after a decision has been made, however, the agency will need to provide clear and compelling reasons as to why it is contrary to the public interest to release such documents.

Whether documents providing preliminary advice concerning an agency's decision-making functions are exempt in accordance with clause 9 would include an assessment of various factors, for example:

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<sup>104</sup> *Waterford and Department of the Treasury* (No. 2) (1984) 1.

<sup>105</sup> *General Manager, WorkCover Authority of NSW v Law Society of NSW* [2006] NSWCA 84; see also the High Court's decision in *Sankey v Whitlam* and also the Federal AAT in *Lianos v Department of Social Security* (19856) 2 AAR 503, both cases concerning public interest immunity rather than FOI.

<sup>106</sup> *Latham v Department of Community Services* (2000) NSWADT at p 58.

- the level of importance of, or public interest in, the decision to be made (the more important the decision the more chance that a claim based on clause 9 would be appropriate)
- the amount of time that has been taken by the agency or the Government to reach a decision (the longer the time the less chance that a claim based on clause 9 would be appropriate), and
- the public interest factors which require non-disclosure (eg, how will the administration of Government be adversely affected by a loss of confidentiality)?

The application of the internal working documents exemption sometimes arises where a person with whom the agency is in negotiations seeks access to documents relevant to the agency's decision-making in those negotiations. 'Informational imbalance' (ie, the fact that only government agencies are subject to FOI) is not by itself a basis for withholding documents. If, however, having regard to the particular circumstances, it is the case that disclosure of the documents would give the relevant third party an unfair advantage in the negotiations to the detriment of the agency (and therefore the public interest objectives which the agency is attempting to secure in the negotiations), then it may be in the public interest that the document be withheld.<sup>107</sup> Where the relevant negotiations have concluded, it is less likely that it would remain contrary to the public interest to disclose the documents. An argument that it is necessary for the documents to remain confidential in order to preserve a general on-going relationship or dialogue with the particular third party will be carefully scrutinised and would need to be established 'as a factual rather than a theoretical proposition'.<sup>108</sup>

The questions of when a relevant negotiation or decision-making process has been concluded is a question of fact and degree. Where there is a process of on-going negotiation or continuous policy formulation, it may be that a particular matter can be considered to be complete once a point of 'intermediate conclusion' has been reached, at which stage the documents in question are no longer relevant to the agency's deliberations or current thinking processes in on-going negotiations.<sup>109</sup>

### *Frankness and candour*

Agencies have on a number of occasions exempted documents on the basis of clause 9 arguing that to release documents containing opinions, views and advice of agency staff would adversely affect open and frank advice provided by the agency personnel. This is based on the assumption that such personnel would be reluctant to furnish such frank views if their opinions were to be made public. The argument that government documents should be given special protection (equivalent to public interest immunity) on the grounds that government employees may be less candid with their advice in the future should documents disclosing their opinions be released has in recent times been held to be largely untenable.<sup>110</sup> The ADT, in a number of decisions has also given short shrift to the frankness and candour argument.<sup>111</sup>

<sup>107</sup> See *General Manager, WorkCover Authority of NSW v Law Society of NSW* [2006] NSWCA 84.

<sup>108</sup> *General Manager, WorkCover Authority of NSW v Law Society of NSW* [2006] NSWCA 84.

<sup>109</sup> *Law Society of NSW v General Manager, WorkCover Authority of NSW* (No 2) [2005] ADTAP 33, affirmed in *General Manager, WorkCover Authority of NSW v Law Society of NSW* [2006] NSWCA 84.

<sup>110</sup> Eg, *Sunderland v Department of Defence* (1986) 11 ADL 258; *VXF v Human Rights and Equal Opportunity Commission* (1989) 17 ALD 491; *Fenster v Department of Prime Minister and Cabinet* (No 2) (1987) 13 ALD 139.

<sup>111</sup> *Simpson v Director-General, Department of Education and Training* [2000] NSWADT 134 at 8; *Bennett v Vice Chancellor University of New England* [2000] NSWADT 8 and 63.

The exception may be in the context of a bona fide operational communications in the course of police investigations.<sup>112</sup>

Given the aims of the FOI Act, the Department of Premier and Cabinet recommends that agencies be circumspect in respect of any possible claim that 'frankness and candour' grounds require the withholding of documents. Although the need to ensure the flow of uninhibited and candid advice is a matter which the Department of Premier and Cabinet believes to be in the public interest, agencies must be satisfied, in each particular case, that such advice would in reality be inhibited by the disclosure of the document, and that the public interest in 'frank and candid' advice outweighs all other public interest considerations that tend in favour of disclosure.

The Ombudsman has expressed strong views in the performance of his external review role when agencies have used the 'frankness and candour' argument as the basis for refusing to provide access to documents under the FOI Act.

The argument put forward has been that the public interest would not be served by releasing the documents because the relevant personnel within the agency would be inhibited in their creation of records by the prospect of potential disclosure. It has also been argued that people will be more guarded about what they say if they are aware that the information could be released to others as they may be concerned about the consequences of public embarrassment or the threat of legal action.

Essentially, to be frank and candid is to be honest, open and sincere. It is not only to tell the truth, but to tell the whole truth. The dictionary definitions of 'frank', 'frankness', 'candid' and 'candour' emphasise being open, unreserved, outspoken, sincere, honest, straight forward, blunt and undisguised.

There is no specific reference in the FOI Act to the 'frankness and candour' argument, or to any equivalent argument.

The Ombudsman is of the view that public officials should always be full and frank in expressing and recording their views, irrespective of whether there may be a risk that documents may be disclosed under FOI (discussed in more detail below). The Ombudsman is also of the view that opinions expressed by public officials should not attract long-term exemption, unless special circumstances exist. In particular, in the Ombudsman's view, the specific circumstances where the exemption might validly be claimed are where documents concern high-level decision-making and policy-making – probably limited to Ministerial decision-making and policy-making. In all cases, the Ombudsman requires that there be supporting evidence to show that there will be a loss of candour in similar deliberative processes if disclosure is made in respect of the particular document in question.

Prior to the introduction of the FOI Act, the only method of access (in the absence of consent) to governmental documents was by subpoena or other compulsory court process. In those days, where a government wished to oppose the production of documents, it was able to rely on the doctrine of 'Crown privilege', or as it became known 'public interest immunity'. As part of that doctrine, an argument was developed that there was a need to permit 'frankness and candour' in the preparation of documents otherwise the efficient workings of government would be disrupted.

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<sup>112</sup> *DZ v Commissioner of Police, NSW Police Service* [2002] NSWADT 274.

This approach to the meaning of the public interest had its high water mark in a judgment of the Commonwealth AAT where the Tribunal noted that arguments available for refusing disclosed documents would include:

*“the higher the office of the persons between whom the communications pass and the more sensitive the issues involved in the communication, the more likely it will be that the communication should not be disclosed...*

*disclosure which will inhibit frankness and candour in future pre-decisional communications is likely to be contrary to the public interest...*

*disclosure of documents which do not fully disclose the reasons for a decision subsequently taken may be unfair to a decision-making and may prejudice the integrity of the decision-making process.”*<sup>113</sup>

The argument that transparency inhibits frankness and candour in decision-making has been considered in numerous judicial and tribunal decisions in a range of relevant jurisdictions.

This argument was considered by the High Court in a 1978 case where Stephen J said:

*“Sometimes class claims are supported by reference to the need to encourage candour on the part of public servants in their advice to ministers, the immunity from subsequent disclosure which privilege affords being said to promote such candour... Recent authorities have disposed of this ground as a tenable basis for privilege.”*<sup>114</sup>

In that same case, Mason J (as he then was) said “...*the possibility that premature disclosure will result in want to candour in Cabinet discussions or an advice given by public servants is so slight that it may be ignored, ...I should have thought that the possibility of future publicity would act as a deterrent against advice which is specious or expedient.*” (emphasis added)

In a 1998 NSW District Court case, Her Honour Judge Ainsley Wallace noted that it seemed to her “... *to be an untenable position to say that the quality of advice given by public servants and indeed the quality of their suggestions on particular issues would be impaired if those advices and suggestions could become public.*”<sup>115</sup> Her Honour held that the frankness and candour argument “...*must be limited to instances in which there is particular evidence which supports the contention that there will be a loss of candour in similar future deliberative processes.*”

The issue has also been considered by the NSW ADT in a case where it was held that for it to succeed there needed to be clear, specific and credible evidence to establish that the inhibition of candour and frankness would diminish the efficiency and quality of the deliberative process to such an extent that it is contrary to the public interest. Deputy President Hennessy stated “... *even if some diminution in candour and frankness is conceded the real issue is whether the efficiency and quality of a deliberative process is thereby likely to suffer to an extent that is contrary to the public interest ... In the absence of clear and specific and credible evidence I would not be prepared to accept that the substance or quality of advice prepared by professional public servants could be*

<sup>113</sup> *Howard and the Treasurer of the Commonwealth* (1985) 3 AAR 169 at 177-178.

<sup>114</sup> *Sankey v Whitlam and ors* (1978) 142 CLR 1 at p 62-63 and 97.

<sup>115</sup> *Helen Hamilton v Environmental Protection Authority* [1998] District Court of NSW, No. 367 of 1997, unreported.

*materially altered for the worse by the threat of disclosure under the FOI Act.*<sup>116</sup>  
(emphasis added)

In the subsequent case, Brittan, A. Judicial Member, stated:

*"It is argued by the university that the document is also exempt pursuant to cl. 13(b) because, in summary, to fail to protect confidential academic commentary would have what has been called a 'chilling effect': academics would be reluctant to express their honest and independent opinions on significant matters within the university if students and others could gain access to the documents. Quite frankly, I have greater confidence in the Australian academic community than that. In any event, there is also a significant public interest in enabling the subjects of government and agency records to correct those records if they are incorrect."*<sup>117</sup>

Various decisions in the Federal sphere have also limited the frankness and candour argument to high level decision-making and to policy-making.<sup>118</sup> In this regard the Commonwealth Administrative Appeals Tribunal<sup>119</sup> said that the fact that a writer of a document would not have put his comments in such frank terms as he did if he had thought that they would be disclosed, is scarcely, of itself, a sufficient ground for a finding that disclosure of the documents would be contrary to the public interest.

In a 1993 case the Queensland Information Commissioner stated that the frankness and candour argument ought to be disregarded unless there was a "*very particular factual basis for the claim that disclosure will inhibit frankness and candour ... and that tangible harm to the public interest will result from that inhibition.*"<sup>120</sup>

The issue has also been looked at in various English cases. For example, in one case Upjohn LJ stated:

*"I cannot believe that any Minister or any high level military or civil servant would feel in the least degree inhibited in expressing his honest views in the course of his duty on some subject, such as even the personal qualifications and delinquencies of some colleague, by the thought that his observations might one day see the light of day. His worst fear might be libel and there he has the defence of qualified privilege like everyone else in every walk of professional, industrial and commercial life who every day has to express views on topics indistinguishable in substance from those of the servants of the Crown."*<sup>121</sup>

In that case, Lord Morris of Borth-y-Gest said that if "*... there was knowledge that it was conceivably possible that some person might himself see a report which was written about him, it might well be that candour on the part of the writer of the report would be encouraged rather than frustrated. The law is ample in its protection of those who are honest in recording opinions which they are under a duty to express.*" (at 36)

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<sup>116</sup> *Bennett v Vice Chancellor of the University of New England* [2000] NSW ADT 8.

<sup>117</sup> *Bennett v Vice Chancellor, University of New England* [2002] NSW ADT 175 at 58.

<sup>118</sup> See for example *Murtagh v Federal Commissioner of Taxation* (1984) 54 ALR 313; *Walker v Federal Commissioner of Taxation* (1994) 95 ATC 2001; *Waterford & The Treasurer (Cth) (No 1)* (unreported), AAT: Dep Pres Todd, 16 May 1985.

<sup>119</sup> *Whitford and Department of Foreign Affairs* [1983] 5 ALD 534.

<sup>120</sup> *Re Eccleston and the Department of Family Services and Aboriginal and Island Affairs* [1993] QAR 60 at p 107.

<sup>121</sup> *Conway v Rimmer* [1968] AC 901.

In the same case Lord Hodson noted that it “...is strange that civil servants alone are supposed to be unable to be candid in their statements made in the course of duty without the protection of an absolute privilege denied other fellow subjects.”

Lord Pearce noted that there “...are countless teachers at schools and universities, countless employers of labour, who write candid reports, unworried by the outside chance of disclosure, but deeply concerned, as no doubt the police are likewise, lest their criticism may be doing less than justice to the subject of their report.”

In a House of Lords case in 1956<sup>122</sup>, Lord Radcliffe remarked that he would have supposed Crown servants to be ‘made of sterner stuff’, and in another case Lord Salmon spoke of the ‘candour’ argument as ‘the old fallacy’.<sup>123</sup>

As can be seen from the cases above even prior to the introduction of the FOI Act, the ‘frankness and candour’ argument was not thought to weigh heavily in the relevant balancing process in relation to the preservation of the public interest.

There is a common law obligation of fidelity on all employees. In this regard there is an implied duty in every contract of employment that the employee will act in good faith and will assist the employer by supplying information known to the employee and concerning the business and operation of the employer’s business. The common law duty to obey the lawful orders of employers includes an obligation to answer questions about how an employee has done his or her work or what they have done during working hours. This seems to imply that honest, open and sincere communication is also required under the common law.

Government policy, which finds its most relevant expression in the codes of conduct adopted for government and by agencies, also supports frankness and candour in the giving of advice.

The *Model code of conduct for NSW public agencies* provides that “*fairness, impartiality and integrity*” are general principles applicable across the public sector. It states that:

*“The people of New South Wales have a right to expect the business of the State to be conducted with efficiency, fairness, impartiality and integrity.”*

*Public employment carries with it a particular obligation to the public interest. It requires standards of professional behaviour from staff that promote and maintain public confidence and trust in the work of government agencies.”*

These principles are reflected in most public sector codes of conduct. Such codes emphasise fairness, honesty, integrity and impartiality, and that information provided by public officials should be clear to the intended audience, accurate, current and complete. As an example, the *Code of Conduct and Ethics for Public Sector Executives* states:

*“3.2 Advice provided by executives to the Minister and Government should be **frank, independent, based on an accurate representation of the facts and as comprehensive as possible.** This includes setting up the advantages, disadvantages, costs and consequences of the available options and, where appropriate, recommending a particular course of action.”* (emphasis added)

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<sup>122</sup> *Glasgow Corporation v Central Land Board* (1956) SC (HL) at p 20.

<sup>123</sup> *Rogers v Home Secretary* (1973) ACT 413.

Codes of conduct also uniformly emphasise that the public must be able to trust public officials to put the public interest above their own private interests.

*The circumstances in which the frankness and candour argument has been held to apply*

There are some limited circumstances in which the Ombudsman may accept the 'frankness and candour' argument. Other than in relation to internal working documents (and then only in appropriate circumstances), the circumstances where it may be reasonable for public officials to expect the protection of confidentiality or secrecy as a pre-condition to being frank and candid would be:

- High level decision-making:

One of the specific circumstances where it could be validly claimed that the 'frankness and candour' argument would be sufficient by itself to justify non-disclosure of information concerns high level decision-making and policy-making, probably limited to Ministerial decision-making and policy-making. However, the courts and tribunals have emphasised that there needs to be supporting evidence that there will be a loss of candour in similar deliberative processes.

In relation to Cabinet documents, there are a variety of arguments that have been put forward in support of confidentiality, particularly in relation to documents disclosing the actual deliberations of Cabinet, not the least of which is the importance of collective Ministerial responsibility in relation to Cabinet decisions.<sup>124</sup>

- Legal professional privilege:

Another significant exception that has been held to apply relates to legal professional privilege. The rationale for legal professional privilege is that it serves the public interest in the administration of justice by inducing a client to retain a solicitor and seek his/her advice and encouraging full and frank disclosure by clients to their lawyers (ie fostering trust and candour between client and lawyer).

*Application to investigations*

While the exemption in clause 9 of Schedule 1 may be applicable to documents created in the course of an investigation, it is unlikely to continue to be relevant once an investigation has been completed and decisions have been made on the findings and recommendations contained in the report.

From the cases it appears that the 'frankness and candour' argument is insufficient by itself to justify refusal to disclose documents under the FOI Act, unless the documents are 'high level' documents, probably only relating to Cabinet documents and Ministerial decision-making and policy documents.

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<sup>124</sup> See the decision of the NSW Court of Appeal in *Egan v Chadwick & Ors* [1999] NSW CA 176 (eg at 43, 56-57).

## Clause 10 – Documents subject to legal professional privilege

Clause 10 to Schedule 1 to the FOI Act provides:

*“(1) A document is an exempt document if it contains matter that would be privileged from production in legal proceedings on the ground of legal professional privilege.*

*“(2) A document is not an exempt document by virtue of this clause merely because it contains matter that appears in an agency’s policy document.”*

### *Purpose of the exemption*

The purpose of this exemption is to ensure that a document cannot be obtained under FOI if it would be protected in legal proceedings.

In 1976 the majority of the High Court provided an authoritative interpretation of the concept of legal professional privilege:

*“The rationale of this head of privilege, according to traditional doctrine, is that it promotes the public interest because it assists and enhances the administration of justice by facilitating the representation of clients by legal advisers, the law being a complex and complicated discipline. This is done by keeping secret their communications, thereby inducing the client to retain the solicitor and to seek his advice, and encouraging the client to make a full and frank disclosure of the relevant circumstances to the solicitor. The existence of the privilege reflects, to the extent to which it is accorded, the paramountcy of this public interest over a more general public interest, that which requires that in the interest of a fair trial litigation should be conducted on the footing that all relevant documentary evidence is available.”<sup>125</sup>*

### *Applying the exemption*

Legal professional privilege can be claimed in relation to communications:

- between a client (or a client’s agent) and a lawyer which:
  - are confidential in nature, and
  - were brought into existence for the dominant purpose of either
    - enabling the client to obtain, or a lawyer to give, legal advice (the “*advice privilege*”) or
    - for use in litigation which is either pending or within the reasonable contemplation of the client (the “*litigation privilege*”), or
- between a client (or a client’s agent, including a lawyer) and a third party (for example a specialist or technical expert) which were brought into existence for the dominant purpose of obtaining legal advice for use in litigation which is either pending or within the reasonable contemplation of the client at the time the communication was brought into existence, and
- there has been no express or implied waiver of the privilege.

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<sup>125</sup> *Grant v Downs* (1976) 135 CLR 674.

In the context of the 'advice privilege', the practical emphasis is on the purpose of the retainer with the relevant adviser. If the dominant purpose of the retainer is the obtaining and giving of legal advice then, although it is theoretically possible that individual communications made under that retainer may fall outside that privileged purpose, in practice this is unlikely and so it is likely that all communications under the retainer will be privileged. If, on the other hand, the dominant purpose of the retainer is some other purpose (eg, the provision of business or policy advice), then communications made under that retainer will usually not be privileged.<sup>126</sup>

### *Communications*

Legal professional privilege is concerned with communications, which may be oral or written, in paper or electronic form. The communications in question relate to "*communications brought into existence by a government department for the purpose of seeking or giving legal advice as to the nature, extent and manner in which the powers, functions, and duties of government officers are required to be exercised or performed.*"<sup>127</sup>

The privilege also applies to such communications brought into existence by external legal advisers to government agencies.

The mere fact that a document has been signed by a lawyer or includes a claim to being subject to 'legal professional privilege' does not make it privileged. The purpose of the communications and the content of the document are crucial considerations.<sup>128</sup>

### *The relevant test*

Legal professional privilege, for the purposes of the FOI Act, is governed by common law rather than by the provisions of the *Evidence Act 1995*.<sup>129</sup> The relevant test is the 'dominant purpose' for which the communication was made or document prepared.<sup>130</sup> The 'dominant purpose' test refers to "*a document which was produced or brought into existence either with the dominant purpose of its author, or of the person or authority under whose direction, whether particular or general, it was produced or brought into existence, of using it or its contents in order to obtain legal advice, or to conduct or aid in the conduct of litigation, at the time of its production in reasonable prospect...the fact that the person...had in mind other uses of the document will not preclude that document being accorded privilege, if it were produced with the requisite dominant purpose.*"<sup>131</sup>

For legal professional privilege to apply under the 'dominant purpose' test, a communication must have been created or brought into existence, ie, made, drawn up, written, or prepared for the 'dominant' purpose of either:

- obtaining or giving legal advice ('advice privilege'), or
- in connection with pending or reasonably contemplated or apprehended legal proceedings ('litigation privilege').

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<sup>126</sup> *DSE (Holdings) Pty Limited v InterTan Inc* (2003) 135 FCR 151 at 160; *General Manager, WorkCover Authority of NSW v Law Society of NSW* [2006] NSWCA 84 at 83 and 84.

<sup>127</sup> Per Brennan J in *Waterford v The Commonwealth* (1987) 163 CLR 54 at 74.

<sup>128</sup> *General Manager, WorkCover Authority of NSW v Law Society of NSW* [2006] NSWCA 84.

<sup>129</sup> *Director-General, Attorney-General's Department v Cianfrano (GD)* [2006] NSWADTAP 26.

<sup>130</sup> *General Manager, WorkCover Authority of NSW v Law Society of NSW* [2006] NSWCA 84.

<sup>131</sup> Barwick CJ in *Grant v Downs*.

The purpose for which a document was created may be inferred from the factual background giving rise to the creation of the document. The apparent purpose for which a document was created may be discovered from an examination of the content of the document.

In a 2008 case, when considering whether an investigation into a complaint that was conducted by an investigator engaged by a solicitor, the Appeal Panel of the NSW ADT noted:

*“There can be little doubt, we think, that [the investigator] was implicated to a degree in a set of relationships that had as their object the giving and obtaining of legal advice. Nonetheless, the Tribunal saw the investigator’s primary or dominant responsibility to be to conduct an investigation into the facts, and to report thereon. Certainly, it had to be conducted within parameters and by a process that would be effective in addressing the statutory requirements [of Part 3A of the Ombudsman Act 1974] and the guidelines issued by the Ombudsman. It is a usual feature of any investigation of significance into complaints of misconduct by employees that legal parameters of one kind or another will be applicable.”*<sup>132</sup>

The Appeal Panel concluded:

*“An investigation into a complaint would have been required of the University, whatever the statutory overlay. In our view, a private investigator’s report would not ordinarily be seen as the kind of report to which legal advice privilege ought attach; nor the associated communications involving interaction with the lawyers.”*

The onus of proving that the privilege can be claimed in relation to a communication is on the party who makes the claim.

Documents may contain both legal advice and extraneous matter, such as matters relating to operational, administrative or policy advice. If it is the case that the document was created for the dominant purpose of legal advice or legal proceedings, then the document is wholly privileged (including any extraneous matters contained in it).<sup>133</sup> On the other hand, a document whose dominant purpose was not legal advice or legal proceedings is not privileged, even if it does contain some legal matters.

## Lawyers

Where the privilege relates to communications with lawyers, ‘lawyers’ can include:

- ‘in-house’ lawyers if:
  - the communication was sent to or received by the in-house lawyer as a professional legal adviser and not in some other capacity
  - the communication is made or given pursuant to or in the course of a relationship of lawyer and client, and
  - the lawyer is entitled to practice as a lawyer (although the holding of a current practising certificate is not necessarily a prerequisite)<sup>134</sup>

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<sup>132</sup> *Macquarie University v Howell (GD)* [2008] NSWADTAP 46 at 58 and 62.

<sup>133</sup> *General Manager, WorkCover Authority of NSW v Law Society of NSW* [2006] NSWCA 84.

<sup>134</sup> *Cth & Air Marshall McCormack, Chief of Air Force v Vance* [2005] ACTCA 35.

- the Crown Solicitor and lawyers attached to that office
- the Director of Public Prosecutions and lawyers attached to that office
- Parliamentary Counsel
- solicitors in private practice, and
- barristers.

What is required is a relationship involving the provision of independent (or arms length) professional legal advice. The mere fact that one party to a communication is a lawyer and the other is a client is insufficient.<sup>135</sup>

### *Clients*

This privilege is that of the client and can therefore only be waived by the client (generally the agency itself).

### *Confidentiality*

Communications in relation to which the privilege is claimed must have been, and remain, confidential. Any disclosure of the communications prior to the FOI determination must have been made in circumstances which did not detract from the confidential nature of those communications.

Legal professional privilege attaches to confidential professional communications between legal advisers and clients undertaken for the dominant purpose of seeking or giving legal advice or in connection with anticipated or pending litigation. The privilege can extend to documents created by others apart from lawyers if brought into existence for the dominant purpose of likely or pending litigation.

### *Pending or contemplated litigation*

For legal professional privilege to apply in relation to pending or contemplated litigation, the communication or document must relate to actual or 'anticipated' proceedings – a question to be answered based on objective criteria.

### *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.

The FOI Act creates a statutory scheme that gives the public legal rights to agencies' documents, subject to exemption categories which provide grounds on which agencies *may* refuse access to documents. However, nowhere does the Act say that documents of any exemption category *must not* be released.

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<sup>135</sup> *McDonald v Commissioner of Police, NSW Police* [2003] NSWADT 111, at 21.

## *Application to investigations*

Even where a valid claim of legal professional privilege could be made out, legal advice should still 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.

Other circumstances where it would serve a positive public purpose to release documents that may technically be covered by the privilege could include, where documents:

- 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 (for example, by exposing or removing suspicion of significant impropriety) or will otherwise significantly contribute towards the public accountability of the agency or its staff.

## Clause 12 – Documents the subject of secrecy provisions

Clause 12 of Schedule 1 to the FOI Act provides:

*“(1) A document is an exempt document if it contains matter the disclosure of which would constitute an offence against an Act, whether or not the provision that creates the offence is subject to specified qualifications or exemptions.*

*(2) A document is not an exempt document by virtue of this clause unless disclosure of the matter contained in the document, to the person by or on whose behalf an application for access to the document is being made, would constitute such an offence.”*

### *Purpose of the exemption*

This exemption is intended to preserve the operation of specific secrecy provisions in other legislation. If a document is specifically protected from disclosure by secrecy provisions, it would be inappropriate for information to be obtained through alternative means such as FOI legislation.

### *Applying the exemption*

The first issue is: what is meant by ‘an offence under an Act’. Where a penalty is provided in legislation for disclosure of information, then an offence is clearly committed if disclosure occurs. However, it is not necessary for there to be a penalty of the relevant Act clearly states that ‘an offence is committed if ...’

The more difficult question arises where the relevant Act contains a prohibition on disclosure but does not expressly state that a contravention constitutes an ‘offence’ or is subject to a penalty. In those circumstances, the Department of Premier and Cabinet and the Ombudsman agree that disclosure of information would probably not be covered by clause 12.

Another question is whether ‘offence against an Act’ includes an offence specified in a regulation. The Department of Premier and Cabinet takes the view that an offence specified in a regulation is an offence against an Act, given that the power to make the regulation is conferred by the Act, which will usually expressly refer to the making of offence or penalty provisions.

The second issue is the manner in which sub-clauses 12(1) and 12(2) are to be read together.

The better view is that clause 12(1) is a general provision, which must be read subject to the more specific provision in clause 12(2). This means that clause 12 only applies if the proposed disclosure of the document would, in fact, constitute an offence under the relevant secrecy provision. If disclosure of the document would fall within an exception to the secrecy provision, then disclosure would not constitute an offence, and the document is therefore not exempt under clause 12.<sup>136</sup>

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<sup>136</sup> See *General Manager, WorkCover Authority of NSW v Law Society of New South Wales* [2006] NSCCA 84.

It is important to note, however, that where there is a qualification stating, for instance, that no offence is committed if information is disclosed under the *Protected Disclosures Act* or 'with the Minister's consent', then it is probably necessary for the disclosure to in fact be a protected disclosure or for consent to actually have been obtained, otherwise an offence will be committed and the secrecy exemption will operate. As for the former Deputy Crown Solicitor has stated "*the qualification or exception must in fact be satisfied and it is not enough that there exists a possibility of satisfying it.*"

The Department of Premier and Cabinet considers that there is some uncertainty as to the possible application of clause 12 in circumstances where the relevant secrecy provision of another Act is subject to a general 'lawful excuse' exception.

The NSW Court of Appeal held that certain documents were not exempt under clause 12 because the relevant secrecy offence contained a 'lawful excuse' exception.<sup>137</sup> The result of this decision appears to be that the clause 12 exemption cannot be invoked if there is a 'lawful excuse' exception in the relevant secrecy provision.

The ADT Appeal Panel took a purposive approach to interpreting clause 12, and held that the effect of a general secrecy provision with a 'lawful excuse' exception was that some, but not necessarily all, of the documents of the agency may still fall within the ambit of clause 12. Whether a particular document would fall within the exemption would depend on whether its 'nature' was such that disclosure would constitute an offence, and this in turn would depend upon consideration of the following factors:

- the degree of direction given by the legislation to the agency as to how the particular kind of information is to be managed and divulged
- the breadth of any powers given to the agency to release the particular kind of information
- the intrinsic sensitivity of the particular information, and
- the likelihood that information of this kind would ever be released to the applicant having regard to the wider circumstances of the relationship between the applicant and the agency, to the extent that they are known (at 144).

#### *General FOI public policy objectives*

Another issue of uncertainty in respect of the application of clause 12 is whether, if a secrecy provision in another Act does in fact apply, it is still necessary to consider the general public policy objectives of the FOI Act. The Appeal Panel of the ADT held that it was not necessary to do so:

*"In the context of documents which are exempt by virtue of clause 12, the general public policy objectives of the FOI Act, for example, to promote open, accountable and democratic government, have been overridden by parliament. Clause 12 creates a class of exempt document with no provision for weighing up the public interest considerations for or against disclosure."*<sup>138</sup>

The Department of Premier and Cabinet advises agencies to adopt the approach indicated by the decision of the Appeal Panel referred to above, ie, if disclosure of the document would constitute an offence under the relevant secrecy provision then the document is exempt and

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<sup>137</sup> *General Manager, WorkCover Authority of NSW v Law Society of New South Wales* [2006] NSWCA 84 at 176-181.

<sup>138</sup> *N (No 4) v Commissioner of Police* [2002] NSWADTAP 10.

that is the end of the matter. There is no requirement to undertake a further public interest analysis.

Although it is arguable that the discretion under s.25(4) remains, the fact that the agency would be committing an offence under the other Act by releasing the document means that it would be most unlikely for it to be appropriate for the agency to exercise that discretion to release the document.

#### *Deletion of secret material*

Another issue is whether an agency is required to apply s.25(4) of the FOI Act to documents covered by clause 12 – that is, whether the agency must consider deleting matters which fall within the secrecy provision in the other Act if it is practicable to do so and if it appears to the agency that the applicant would wish to be given access to a copy of the document with those matters deleted. The Ombudsman and the Department of Premier and Cabinet agree that agencies should consider the potential for deletion of material from documents in accordance with s.25(4) where this is feasible.

From experience, the Ombudsman is concerned that clause 12 provides the opportunity for agencies to exempt a document based on a ‘class of documents’ argument where it is claimed that the clause allows agencies to exempt a document based on the type of document it is rather than what it contains.

#### *Provisions which disapply the FOI Act altogether*

As a final matter it should be noted that, on the proper construction of the relevant secrecy provisions, it may be that the relevant document is excluded from the operation of the FOI Act altogether and is not merely exempt under clause 12. If that is the case, then issues relating to discretion to release (s.25(2)) and discretion to delete exempt material (s.25(4)) will not be relevant.

#### *Application to investigations*

The Ombudsman adopts a narrow interpretation of clause 12 and will closely examine the way in which it is used by agencies. If clause 12 is to be used to exempt documents, the Ombudsman is of the opinion that the agency should have regard to the contents of the document and should not make its determination merely on a ‘class of documents’ basis.

Some of the legislative provisions which have been held to fall within the clause 12(1) exemption would include, for example:

- section 254 of the *Children and Young Persons (Care and Protection) Act 1988*<sup>139</sup>
- section 56 of the *Police Integrity Commission Act 1996*<sup>140</sup>
- section 148(7)(b) of the *Casino Control Act 1992*<sup>141</sup>.

The equivalent effect is achieved by section 9 and Schedule 2 to the FOI Act in relation to relevant documents held by agencies (see Annexure B to this Guideline).

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<sup>139</sup> *Saleam v Department of Community Services* [2004] NSWADT 41.

<sup>140</sup> *N (No4) v NSW Police Service* [2002] NSWADTAP 10.

<sup>141</sup> *St Vincent Welch v Casino Control Authority* [2001] NSWADT 89; but see *Casino Control Authority v Preston* [2003] NSWADTAP 64, where the Appeal Panel held that s.148(7)(b)(iii) of that Act wholly excluded any documents to which it applied from the scope of the FOI Act as opposed to merely bringing them within clause 12).

## Clause 13 – Documents containing confidential material

Clause 13 of Schedule 1 to the FOI Act provides:

*“A document is an exempt document:*

- (a) if it contains matter the disclosure of which would found an action for breach of confidence, or*
- (b) if it contains matter the disclosure of which:*
  - (i) would otherwise disclose information obtained in confidence, and*
  - (ii) could reasonably be expected to **prejudice the future supply** of such information to the Government or to an agency, and*
  - (iii) would, on balance, be **contrary to the public interest.**” (emphasis added)*

### *Foundation for breach of confidence*

In relation to clause 13(a), the words ‘found an action for breach’ refer to a legal action brought in relation to one or more of the following causes of actions:

- breach of a contractual obligation of confidence;
- breach of an equitable duty of confidence; or
- breach of a fiduciary duty of confidence and fidelity.<sup>142</sup>

In practice, it is unlikely that this issue would arise in the context of information being obtained during the course of an investigation into a complaint or disclosure.

### *Disclose information obtained in confidence*<sup>143</sup>

As noted in the ADT in 2000, “[I]n order to be ‘obtained in confidence’ the [agency] must establish that it was ‘communicated and received under an express or inferred understanding that [it] would be kept confidential’...”.<sup>144</sup> However, “...it is not necessary to show that there was an express obligation or understanding that the information was given in confidence. It is sufficient for this to be implied from the circumstances in which the information was obtained or given.”<sup>145</sup>

In relation to clause 13(b), there are three questions to be answered:

- 1) The first question is whether the information was obtained in confidence?

In relation to investigations into alleged ‘improper conduct’ by employees, the ADT has taken the view that on “... *an ordinary understanding, an investigation of allegations of improper conduct by an employee would involve an express or implied mutual understanding that any information would be treated as confidential.*”<sup>146</sup>

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<sup>142</sup> *B and Brisbane North Regional Health Authority* (1994) 1 QAR 279 at 296; *Public Service Assn and Professional Officers Assn, Amalgamated Union of NSW v Director-General, Premier’s Department* [2002] NSWADT 277; *Minister for Immigration and Citizenship v Kumar* [2009] HCA 10.

<sup>143</sup> More detail as to this provision can be found in *The NSW FOI Manual*, August 2007, at 13.5.3 – 13.5.31.

<sup>144</sup> *Bennett v Vice Chancellor, University of New England* [2002] NSWADT 8 at 34 and *Re Maher and Attorney General’s Department* (1985) 7 ALD 731 at 737).

<sup>145</sup> *Vella v Commissioner of Police, NSW Police Force* [2009] NSWADT 68, at 13.

<sup>146</sup> *Macquarie University v Howell* [2008] NSW ADT AP 46, at 77.

In relation to investigations into complaints ‘of a serious kind’, the ADT has said that this “... *factor also points to the [investigation] being expected to be conducted in an environment of strict confidence and information given or received being information obtained in confidence.*”<sup>147</sup>

However, in the same case the Appeal Panel of the ADT noted that “...*it would rarely be the case that an investigation of this kind [ie, into a complaint of misconduct] could be carried out under an absolute guarantee of confidentiality.*”<sup>148</sup>

In this regard, the NSW ADT has distinguished between the investigative stage and the determinative stage saying that it “... *may well be that the information obtained will have to be put to the applicant at some stage, but that in my view does not diminish the importance of there being an earlier stage in the handling of the information to which strict confidentiality applies.*”<sup>149</sup>

The relevant time at which the issue of confidentiality arises is the time the information was obtained, not some later time.<sup>150</sup>

2) The second question is whether disclosure could prejudice the future supply of information to the agency or the government?

A distinction is drawn in the cases<sup>151</sup> between:

- persons who are obliged to answer questions (eg, employees directed by management to answer questions; employees answering questions or supplying information in the course of exercising management or investigatory responsibilities, ie, in the exercise of official responsibilities; where statutory powers are or can be used to compel disclosure; or where persons must disclose information if they wish to obtain some benefit from the government), and
- persons whose co-operation is entirely voluntary (who provide information in a personal capacity, including the expression of privately held concerns about workplace performance issues).<sup>152</sup>

In the first situation, the cases have held<sup>153</sup> that disclosure could not reasonably be expected to prejudice the future supply of such information, whereas in the second situation, depending on the circumstances it may well have that effect.

However, even where employees might be obliged to answer questions, in a 2002 case the Appeal Panel of the ADT has recognised that release of information might inhibit the information provided by those employees:

*“We acknowledge that conscientious employees would ordinarily see it as appropriate and proper for them to cooperate with departmental inquiries. If information of the kind in issue were to be released, it is not likely in our view that all employees would withdraw all future cooperation with similar inquiries. However, there is a likelihood that some might be more inhibited and guarded in the extent of their communication than*

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<sup>147</sup> *Macquarie University v Howell* [2008] NSW ADT AP 46, at 83.

<sup>148</sup> *Macquarie University v Howell* [2008] NSWADTAP 46, at 86 and see also *Chief Executive Officer, State Rail Authority v Woods (No 2) (GD)* [2003] NSWADTAP 39, at 83.

<sup>149</sup> *BY v Director General, Attorney General’s Department (No 2)* [2003] NSWADT 37, at 64.

<sup>150</sup> *Department of Health v Jephcott (1985)* 62 ALR 421 at 425.

<sup>151</sup> For example, the *Re: B* case, *Macquarie University v Howell*, and *Freeman v Macquarie University* [2008] NSWADT 105.

<sup>152</sup> *State Rail Authority v Woods (No 1)* [2008] NSW ADT AP 25.

<sup>153</sup> Eg: *Macquarie University v Howell*, at para 101.

*may have previously occurred; and some might withdraw cooperation completely out of fear (reasonable or otherwise) of adverse repercussions flowing from publicity. To that extent, a relevant prejudice to the future supply of information would arise.”*<sup>154</sup>

Later in that case, the Appeal Panel stated:

*“56 The community’s interests are also served by government having processes which examine and investigate thoroughly allegations that its officials have broken the law or not adhered to proper standards. Government has many ways of investigating allegations of official misconduct. They range from police investigation to special commissions, or they may be undertaken internally (as here) or by an external agency such as the Ombudsman.*

*57 It is typical of all investigative practice that it has at least three components: 1, a preliminary inquiry stage, 2, the undertaking of a formal investigation, and 3, substantive findings with recommendations as to whether any further action should be taken. The recipient of the report then makes a decision whether, and how, to implement the recommendations. If warranted, charges may be laid with the material in support being disclosed to the person charged. It may be that not all the material gathered in the investigation will be made known to the person charged. It may be that none of the material is disclosed; and that instead new material brought to light by the investigation is relied upon. These points are, we recognise, obvious. But they bear repetition in the present context.*

*58 The officers gave evidence, from their experience, of the harm to the public interest that could result if the identity and the contents of the individuals who make statements to an investigator were to be released. They referred to the possibility of reprisals by those who were adversely affected by the information. They referred to the possibility of discrimination in future applications for promotion and the like. These are, in our view, important considerations especially in specialist career services such as teaching where an employee is likely to spend their entire working career. For career service agencies, like the agency in this case, the effective management of long-term continuing relationships is a significant matter.”*

*“62 ... In our view a complainant cannot reasonably hold an expectation that he or she will be given complete access to the final report into their complaints. The agency will be faced with a range of issues when deciding to what degree a complainant should be informed about the contents of an investigation.”*

*“65 The material gathered will not at that stage have been fully tested. It may include material that is damaging to particular individuals. It may include material that is personal to an individual. It may be information with a high intelligence value that should be held in a secure database; its further use and disclosure closely managed. These are judgements which are best made by trained staff in agencies. These difficulties are, we consider, recognised in the broader community.*

*66 There is a plainly-significant public interest placed at stake if the confidential phase of investigations is exposed to public view.”*

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<sup>154</sup> *Director General, Department of Education and Training v Mullett and Randazzo (No 2)* [2002] NSWADTAP 29 at 50; see also *Schubert v Director-General, Department of Environment and Conservation* [2006] NSWADT 296 at 32.

In a celebrated Court of Appeal case (*Perrin's case*)<sup>155</sup>, it was held that the disclosure of the names of police officers involved in the preparation of reports on private persons can not be classified as disclosing information concerning the personal affairs of those persons.

3) The third question is whether disclosure would be contrary to the public interest?

In relation to whether disclosure would be contrary to the public interest, the ADT has said:

*"15...an agency... is required to balance the public interest considerations for and against disclosure and be satisfied that the factors against disclosure outweigh those in favour of disclosure... Or to put it in another way, a balancing of the public interest in favour of disclosure, namely promoting accountability and transparency of governmental operations (see section 5 of the FOI Act), and the public interest in not disclosing information obtained in confidence so as [to] prejudice the agency in fulfilling its functions and obligations in the future."*<sup>156</sup>

*"67 The public interest considerations include the nature of the information that would be disclosed, the circumstances in which it was obtained, the likelihood of the information being information that the person concerned would not wish to have disclosed without consent and the current relevance of the information.*

*68 One public interest consideration in favour of disclosure will always be the general public interest in the publication of government-held documents, in so far as that is conducive to keeping the community informed and promoting public accountability:..."*<sup>157</sup>

The Tribunal went on to agree with the following arguments advanced by the University:

*"70 ... that as a general principle it is in the public interest that material communicated in confidence be protected from release. ... that the public interest in disclosure is outweighed by the fact that Professor Davis, whose administration was the subject of investigation, opposed the disclosure of Document 15, and that the submissions from which the comments were derived for inclusion the draft report were obtained in circumstances where the complainants understood their submissions would remain confidential. ... that disclosure could reasonably be expected to prejudice the future supply of information to the University from voluntary informers and would also prejudice the University's ability to exercise its personnel management functions effectively. ... that the public interest in ensuring that prejudice of these kinds does not occur outweighs any competing public interest in favour of disclosure."*

#### *Application to investigations*

The ADT has said:

*"41...There is, as we see it, reflected in the structure of the FOI Act a special concern with ensuring that the community's interest in effective investigations of allegations of serious misconduct (or of events where serious misconduct is a tenable possibility (as in suspicious deaths)) is not put at risk by having documents generated by that process finding their way, in an uncontrolled way, into the public domain.*

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<sup>155</sup> *Commissioner of Police v District Court of NSW and Perrin* [1993] 31 NSWLR 666.

<sup>156</sup> *Vella v Commissioner of Police, NSW Police Force* [2009] NSWADT 68.

<sup>157</sup> *Freeman v Macquarie University* [2008] NSWADT 105 and *General Manager, WorkCover Authority of NSW v Law Society of NSW* [2006] NSWCA 84 at 146-151.

42 *In our view, it would be quite exceptional for the Tribunal to grant access to material obtained in confidence in connection with a child protection investigation...*

43 *The public interest in the protection of children and the public interest in ensuring that investigations relating to alleged child mistreatment is as thorough as can be achieved clearly favours non-disclosure or documents obtained in confidence in the course of such an investigation.*

44 *Another factor favouring non-disclosure is the availability of other mechanisms which provide oversight to the child protection investigation process. As noted in the earlier decision, allegations of child mistreatment must be notified to an external authority (the Ombudsman), and the external authority must be satisfied as to the adequacy of the investigation and as to the conclusions reached by the investigation.*<sup>158</sup>

In the context of investigations, the focus of the clause 13(b) is on the effect of disclosure on the future ability of an agency to conduct investigations of the type in question,<sup>159</sup> not necessarily to the conduct of the investigation to which the disclosure relates.<sup>160</sup> Further, what is crucial is the capacity in which a complaint or disclosure is “made” (ie, whether voluntary or in an official capacity), not the capacity in which the information was “obtained”.<sup>161</sup>

A valid reason to apply this exemption clause is where disclosure of information could prejudice the future supply of information to an agency or the government. This will be particularly relevant where in the performance of its proper functions an agency needs to be able to rely on the receipt of information from or disclosure of information by people whose cooperation is entirely voluntary, who provide information in a personal capacity. Such people could either be members of the public, or agency employees who provide expressions of privately held concerns about workplace performance or conduct issues concerning other employees (other than when doing so in an official capacity).

The fact that information will have to be put to the applicant for that information at some stage in the process (eg, at the determinative stage) does not diminish the validity of refusing to disclose the information at an earlier stage (eg, the investigation stage).<sup>162</sup>

The ADT has also commented on the use of external investigators, in the following terms:

*“35 In our view, it is usual for external investigators to be engaged on a confidential basis. In our view, it is also usual for the investigator to be left free to give guarantees of confidentiality to the extent the law allows to those who have information of assistance to the investigation. In our view, many people are more likely to co-operate with investigations and be more candid in their communications if they are given guarantees of confidentiality...”*

*36 In our view the Ombudsman’s Guidelines, ... proceed on the basis that ordinarily the kind of child protection investigation that is under notice in this case would be surrounded by confidentiality in the ways we have described.”*

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<sup>158</sup> See *Macquarie University v Howell (No 2) (GD)* [2009] NSWADTAP 19.

<sup>159</sup> See *Macquarie University v Howell (GD)* [2008] NSWADTAP 46 at 97 and the dicta of Young CJ in *Ryder v Booth* [1985] VR 820 at 872.

<sup>160</sup> *TW v TX* [2005] NSWADT 262 at 14.

<sup>161</sup> *Schubert v Director General, Department of Environment and Conservation* [2006] NSWADT 296, at 37.

<sup>162</sup> *BY v Director General, Attorney General’s Department (No 2)* [2003] NSWADT 37 at 64 and *Chief Executive Officer, State Rail Authority v Woods (No 2) (GD)* [2003] NSWADTAP 39 at 20 [57] & [60], 78(f) & 83, *Director-General, Department of Education and Training v Mullett and Randazzo (No 2)* [2002] NSWADTAP 29 at 57 and 66 and *Mauger v General Manager, Wingecarribee Shire Council* [1999] NSWADT 35 at 45.

“48 Complainants and other persons with relevant information will, we think, ... often have greater confidence in an investigator who is not a day-to-day employee of the organisation against whom, in effect, the complaint is made. It may well be, also, that the complaint belongs to a class of complaint with which the organisation has little experience, and it sees itself as benefited in that way by going to an external person with expertise. In our view, the notes that pass between the investigator and the organisation’s instructing hierarchy (such as solicitors or key senior office-holders) should, ordinarily, be protected.”<sup>163</sup>

## Clause 16 – Documents concerning operations of agencies

Clause 16 of Schedule 1 to the FOI Act provides:

“A document is an exempt document if it contains matter the disclosure of which:

(a) could reasonably be expected:

- (i) to **prejudice** the effectiveness of any method or procedure for the conduct of tests, examinations or audits by an agency, or
- (ii) to **prejudice** the attainment of the objects of any test, examination or audit conducted by an agency, or
- (iii) to have a **substantial adverse effect** on the management or assessment by an agency of the agency’s personnel, or
- (iv) to have a **substantial adverse effect** on the effective performance by an agency of the agency’s functions, or
- (v) to have a **substantial adverse effect** on the conduct of industrial relations by an agency, and

(b) would, on balance, be **contrary to the public interest.**” (emphasis added)

### *Purpose of the exemption*

The purpose of the exemption is to protect information concerning specific agency operations relating to tests, examinations, audits, management or assessment of agency personnel, effective performance of the agency’s functions and an agency’s conduct of industrial relations. Protection exists where disclosure of the information would create a reasonable expectation of prejudice to, or a substantial adverse effect on, those operations and would, on balance, be contrary to the public interest.

### *Applying the exemption*

#### *The criteria [subclauses (a) (i) & (ii)]*

The two criteria in this test must be met for an exemption under this clause to be valid. There must be both:

- a reasonable expectation of prejudice to or a substantial adverse effect, and
- a public interest in non-disclosure that outweighs the public interest in disclosure (ie disclosure must be ‘contrary’ to the public interest).

<sup>163</sup> *Macquarie University v Howell (No 2) (GD)* [2009] NSWADTAP 19.

These criteria involve four elements:

- 1) “*could reasonably be expected*”
- 2) to “*prejudice*” or have a “*substantial adverse effect*”
- 3) the effect is on the methods, attainment of objects, management or assessment, effective performance, etc, and
- 4) that disclosure would on balance be contrary to the public interest.

#### *Could reasonably be expected*

To satisfy the exemption, disclosure of information in the above cases must be ‘reasonably expected to prejudice the effectiveness of such tests’, and be ‘contrary to the public interest’.<sup>164</sup>

The focus must be on the future effect on an agency, not on the effect of disclosure on the matter in question.<sup>165</sup>

#### *Substantial adverse effect*

This exemption applies only where disclosure of documents would have a ‘substantial adverse effect’ on the management of assessment of personnel, the effective performance of functions or the conduct of industrial relations.

Parts (iii), (iv) and (v) of paragraph (a) to this clause require a reasonable expectation of substantial adverse effect.<sup>166</sup> Combined with the public interest requirement in this clause, it creates a test which requires the existence of a significant degree of gravity, seriousness or significance. For a document to be validly exempted from disclosure under this clause, there must be a reasonably held expectation of a clearly adverse effect that would be substantial. Further, the public interest in non-disclosure must outweigh the public interest in disclosure.

#### *‘Prejudice’*

The word ‘prejudice’ has been considered in various Federal Court and tribunal decisions. It is similar to, but imposes a lower threshold than, the words ‘substantial adverse effect’.<sup>167</sup>

#### *Contrary to the public interest*

In relation to the ‘public interest’ requirement in this clause, what is required is a balancing of interests for and against disclosure.

The Commonwealth AAT has held, in relation to the similarly worded Commonwealth FOI Act provision, that the grounds enumerated in the first part of the exemption should ordinarily be enough to make the document an exempt document on the basis that satisfaction of these grounds would make disclosure prima facie contrary to the public interest.<sup>168</sup>

In some circumstances, it may not be enough for the applicant to rely on the general right of access and the objectives of the Act.

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<sup>164</sup> The meaning of ‘could reasonable be expected’ is discussed at [10.4.25-10.4.32] in the NSW FOI Manual.

<sup>165</sup> *TW v TX* [2005] NSWADT 262 at 14; and *Robinson v Director-General, Department of Health* [2002] NSWADT 222 at 63.

<sup>166</sup> In this context the meaning that should be given to ‘substantial’ and ‘substantial adverse effect’ is discussed [10.4.33-10.4.35] of the NSW FOI Manual.

<sup>167</sup> *James and Australian National University* (1984) 2 AAR 327 at 341).

<sup>168</sup> See *Hazeltine and Australian National Parks and Wildlife Service* No. A86/74 (11.2.87) and *Re Mann and the Australian Tax Office* (1985) 3 AAR 261).

Notwithstanding the above decision of the AAT, the Ombudsman is of the view that the wording of the public interest test in paragraph (b) (ie whether it is, on balance, contrary to the public interest to exempt a document) implies that public interest considerations will favour disclosure of a document unless compelling reasons can be offered as to why a document should be exempt. Such a view is in line with the view that the FOI Act favours disclosure of documents.<sup>169</sup> The possibility of criticism of an agency's actions or decisions is not a relevant consideration as to whether documents should be withheld from release.

The specific part of clause 16 which is relied upon must be referred to in the determination. Further, it is not sufficient to briefly state that there is a public interest argument against disclosure – the notice of determination must show both sides of the argument, and show why disclosure would 'on balance' be contrary to the public interest.

### *Frankness and candour*

A 'frankness and candour' argument is sometimes raised in relation to this exemption clause. This issue is discussed on some detail above in relation to the clause 9 exemption clause.

### *Tests, examinations or audits [clause 16(a)(i) & (ii)]*

'Tests' would include all kinds of personnel tests including intelligence, aptitude, psychological and personality tests. 'Examinations' would include academic examinations of all kinds and also professional, technical and trade examinations conducted by agencies.

It is not clear whether physical examinations (eg, public searches or bags at sporting grounds) would be covered under this exemption, although they may well be covered by other exemptions such as those relating to law enforcement (ie, clause 4).

Guidelines and standards for carrying out tests and examinations of physical substances or of machinery and equipment would be exempt where prior knowledge or procedures for testing would defeat the objects or purposes of the tests.

The term 'audits', although used primarily for financial audits, could also cover examinations of non-financial aspects of an organisation's activities eg compliance or efficiency audits.<sup>170</sup>

The Ombudsman and the Department of Premier and Cabinet are of the view that audit reports of external consultants should be released unless disclosure would be contrary to the public interest.

### *Management or assessment of personnel [clause 16(a)(iii)]*

This exemption in clause 16(a)(iii) may apply where, for instance, it is necessary to obtain candid comments from officers of an agency on their work and on their colleagues. As it may be unlikely that honest comments would be provided if confidentiality cannot be assured, the exemption is aimed at protecting such disclosures. For example, in a 2005 case the ADT accepted a department's submission "...that disclosure would discourage staff from communicating details of workplace bullying or poor performance if they believed their identity may be made known. That could reasonably be expected to have a substantial adverse effect

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<sup>169</sup> For example a decision of the Office of the Queensland Information Commissioner in *Re Eccleston and the Department of Family Services and Aboriginal and Islander Affairs* (Decision No 93002, 30 June 1993; (1993) 1 QAR 60).

<sup>170</sup> See the decision of the Appeal Panel of the ADT in *Director General, Department of Education and Training v Mullett and Randazo* (No.2) [2002] NSWADTAP 29.

on the management or assessment by an agency of the agency's personnel and would, on balance, be contrary to the public interest."<sup>171</sup>

If disclosure is likely to adversely impact upon an agency's ability to manage its staff, then the exemption may apply. For example, in a Commonwealth AAT decision in relation to a large Commonwealth corporation, it was said that:

*"In any organisation, especially one as large as that of the respondent, free and confidential communication by staff to superior officers concerning personal problems and management difficulties appears to be essential to the smooth running of the organisation. Personal difficulties can arise between different staff members who are incompatible or who make life difficult for others... The management of such a large organisation as that of the respondent would be seriously hampered if there were no channels of confidential communication."*<sup>172</sup>

The public interest test may be used, however, to argue that information should be released in order to demonstrate that there was no discrimination or bias in appointments and that the merit principle was applied in selection procedures.

Staff reports, ie reports prepared in the course of staff reporting and assessment schemes, and documents such as selection committee reports are often made available to those who are the subject of reports and assessment under existing procedures. Similarly, existing procedures generally allow staff access to their personnel files. The FOI Act expressly provides that it is not intended to cut down the availability of information under any other administrative scheme or Act (s.5(4)).

However, in certain cases, public disclosure of information contained in staff reports involving assessment of, or comment on, the subjects of the report may have an adverse effect on staff management interests and would therefore be exempt under this section. For example, the deliberations involved in the ranking of applicants may depend on opinions expressed by members of Selection Committees or referees, and to disclose those opinions may prejudice the selection process.

A staff report that is exempt under these provisions is exempt even in relation to the person who is the subject of the report. He or she would probably not be entitled to access under FOI.

Staff reports that contain information about the personal affairs of another person (ie a selection committee report on a number of candidates) may also be exempt on the basis that to disclose it would involve an unreasonable disclosure of the personal affairs of another person (ie, under clause 6). However, as with any other exemption, material can be deleted to make the document not exempt and, therefore, available. For instance, factual material in a staff report need not be withheld.

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<sup>171</sup> *TW v TX* [2005] NSWADT 262 at 26; and see also *Livingstone and anor v State Rail Authority of New South Wales* [2002] NSWADT 25 at 18.

<sup>172</sup> *Re Hocknell and Australian Telecommunications Corporation* (1991) 23 ALD 446, at 447-448 in reference to the Commonwealth FOI Act equivalent of clause 16.

## *Industrial relations* [clause 16(a)(v)]

The conduct of industrial relations negotiations may often require a substantial amount of confidentiality, to enable parties to industrial negotiations to canvass options for settlement of disputes without precipitating a more public discussion. However, this will not necessarily be the case. In one matter<sup>173</sup> the Commonwealth AAT considered whether certain documents were exempt on the grounds that their disclosure may have a 'substantial adverse effect on the conduct of industrial relations'. The documents, referred to as 'bids' from district managers, were considered by Telecom as part of its decision about the allocation of staff resources. The Tribunal held that, although disclosure of the documents to the union might increase the level of industrial dispute or decrease the ability of Telecom to reach its desired goal in a dispute, release of the documents would not have a 'substantial adverse effect' on the conduct of such industrial relations by Telecom.

## *Application to investigations*

In relation to investigations, this clause might be relevant to:

- financial and non-financial audits of an organisation's activities (including compliance or efficiency audits and audits of financial records conducted as part of a broader investigation into allegations of misconduct, etc)
- investigations into allegations of workplace bullying, discrimination or bias
- investigations into allegations of poor performance.

Even if an investigation might fall within the scope of the clause, in any case where it is intended to rely on the clause it will be necessary to show that:

- there is a reasonable expectation of prejudice or substantial adverse effect (as applicable) and
- disclosure would on balance be contrary to the public interest.

## **Clause 20(1)(d) – Protected disclosures**

Clause 20(1)(d) of Schedule 1 to the FOI Act provides:

*"(1) A document is an exempt document if it contains matter the disclosure of which would disclose:*

*...*

*(d) matter relating to a protected disclosure within the meaning of the Protected Disclosures Act 1994 ..."*

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<sup>173</sup> *McCarthy and Australian Telecommunications Commission* (1987) 3 ALD 1; and see also *Livingstone and anor v State Rail Authority of New South Wales* [2002] NSWADT 25 at 23, 26-27.

The Appeal Panel of the ADT has held that while the phrase “relates to” in s.22 of the *Protected Disclosures Act* (PD Act) should be given a wide interpretation (not its “widest possible meaning”), “the context will determine the matters to which it extends”.<sup>174</sup> The Appeal Panel went on to say:

*“56 There is nothing in the PD Act that suggests or requires an investigation of a protected disclosure to be conducted confidentially... The Tribunal’s reasons for concluding that the majority of the Report should be disclosed were that much of the later version of the Report was already in the public domain, a significant period of time has passed since the Report was produced and the University has had ample opportunity to be introspective. The Tribunal made no error in the way in which it took account of the object of the PD Act.”*<sup>175</sup>

In an earlier case the Appeal Panel said:

*“26 There is nothing in the PD Act that requires an investigation of a protected disclosure to be conducted confidentially. The fact that proper investigation is mentioned in section 3(1) of the PD Act as one of the means by which the object of the Act is to be achieved, does not mean that the content of those investigations is intended to be kept confidential. The confidentiality guideline in the PD Act applies only to the identity of the person making the disclosure. Despite that fact, the exemption in the FOI Act applies to any matter relating to a protected disclosure regardless of whether the information would identify or tend to identify the person who made the disclosure. The breadth of the exemption cannot be explained by the objects of the FOI Act, one of which is to extend, as far as possible, the rights of the public to obtain access to information held by the Government: FOI Act, section 5(1)(a). However, even when read in context, the term “relating to” is a broad one. It cannot be read down to apply only to information concerning the identify of an informer.”*

*“41... Section 3(1)(c) of the PD Act relating to the investigation of protected disclosures is not an object of the PD Act. It is merely a means by which the object is to be achieved. That provision does not justify keeping details of investigations confidential, especially given that the confidentiality guideline in section 22 applies only to information that might identify or tend to identify a person who has made a protected disclosure. Making the details of investigations public may well encourage agencies to conduct a thorough and objective assessment of the protected disclosure. In that sense disclosure would promote openness and accountability. Even without taking into account any of Mr McGuirk’s assertions in relation to corruption or improper treatment, the preferable decision is to disclose the details of the investigation.”*<sup>176</sup>

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<sup>174</sup> *McGuirk v University of New South Wales* [2008] NSWADTAP 41, at 26.

<sup>175</sup> As above at para 56.

<sup>176</sup> *McGuirk v University of New south Wales (GD)* [2008] NSWADTAP 17.

### *Application to investigations*

An agency can validly refuse to release information relating to a protected disclosure – both the disclosure itself and information relating to how it is being or has been dealt with. This exemption is not qualified by and should not be read in conjunction with the exceptions in s.22 of the *Protected Disclosures Act*.

It is not relevant whether the applicant knows the identity of the person who made the disclosure because release of that information is considered to be release to the whole world.<sup>177</sup>

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<sup>177</sup> *Robinson v Director General, Department of Health* [2002] NSWADT 222.

# ANNEXURE B

## The basis on which disclosure of information can be refused

### - SCHEDULE 2, FOI ACT -

Section 9 of the FOI Act provides that any body or office specified in Schedule 2 to the Act is, in relation to such of its functions as are specified in that Schedule, exempt from the operation of the FOI Act. Further, the definition of “*exempt document*” in s.6 of the Act includes:

*“a document that contains matter relating to functions in relation to which a body or office is, by virtue of section 9, exempt from the operation of the Act”.*

Schedule 2 of the FOI Act includes the following list of functions of various investigative/integrity type bodies, that are exempt from the operation of the FOI Act:

- The Office of the Auditor-General – investigative, audit and report functions.
- The Independent Commission Against Corruption – corruption prevention, complaint handling, investigative and report functions.
- The Office of the Ombudsman – the complaint handling, investigative and reporting functions of that office.
- The Legal Services Commissioner – the complaint handling, investigative, review and reporting functions of that office.
- The Health Care Complaints Commission – complaint handling, investigative, complaint resolution and reporting functions (including any functions exercised by the Health Circulation Registry)
- The Police Integrity Commission – corruption prevention, complaint handling, investigative and report functions.
- The office of the Privacy Commissioner – the complaint handling, investigative and reporting functions of that office.
- The New South Wales Crime Commission – investigative and reporting functions.
- The President of the Anti-Discrimination Board – complaint handling, investigative and reporting functions in relation to a complaint that is in the course of being dealt with by the President
- The Department of Local Government (including the Director-General and other Departmental representatives) – complaint handling and investigative functions conferred by or under an Act on that Department).

### *Application to investigations*

In the hands of a person or body listed in Schedule 2 to the FOI Act, documents containing information relating to any function of that person or body listed in the Schedule are exempt from the operation of the FOI Act (ie, the Act does not apply).

In the hands of another party (ie, a person or body not listed in Schedule 2), documents containing information relating to any function of a person or body listed in Schedule 2 are exempt documents under the FOI Act (ie, the agency has a discretion to claim the exemption or to release the document).

# ANNEXURE C

## Recording and storing information obtained during an investigation

### *Obligations under the State Records Act*

Agencies are obliged to make and keep full and accurate records of their activities (s.12(1), *State Records Act*). Public officials should help their agency meet this obligation by creating and maintaining full and accurate records of the work in which they are involved and of the decisions they make, including the reasons for those decisions. They should ensure the routine capture of these records into recordkeeping systems, such as file systems, in the course of their duties.

Public officials responsible for or in possession of public records must ensure that they are kept secure against unauthorised access, alteration, loss or destruction.

In the context of an investigation it is essential to make contemporaneous notes of all discussions, phone calls and interviews. File notes should be legible, include relevant dates/times, clearly identify the author of the note, and contain a file reference in case the note becomes detached from the main file. Every person who has been told about the complaint in the course of an investigation should be able to be identified from these records.

### *Recordkeeping*

All information, including original documents and other evidence to be examined during the investigation, should be promptly placed on a central case file which is maintained in a locked cabinet. It is essential to prevent unauthorised access to the case file, especially by anyone the subject of the complaint or their associates.

All documents should be stored in a manner that maintains their original condition. Do not staple, fold, excessively handle or in any way mutilate the documents. Place documents in a resealable bag or envelope with an identifying label on the bag, not on the document. Avoid storing documents in plastic bags because they sweat and could become damaged.

### *Outsourced investigation*

Where an investigation is 'outsourced' to a private contractor/consultant, a condition of the contract of engagement should be that all documents created for the purpose of the investigation (particularly all records that support any facts referred to in an investigation report) become and remain the property of the agency. Applications can be made under the FOI Act for access to such documents (it is of course a separate issue as to whether they should be released).

## *Confidentiality*

Confidentiality requirements demand that strict security should surround the conduct of any investigation into a complaint, particularly those relating to the conduct of an individual.

Whistleblowers in particular are, often justifiably, highly anxious about the prospect of leakages of information about their disclosure. Demonstrating to them that the investigator takes a very serious view of security can often allay that anxiety. Maintaining confidentiality is particularly crucial in handling whistleblower cases.

## *Running sheets*

A valuable practice for investigators to develop is to maintain a 'running sheet' particularly for investigations where there are a number of tasks to be performed or investigations involving more than one investigator or team of investigators. Placed on the inside cover of the investigation file, a running sheet is essentially a chronology of events that have taken place in the investigation. At a minimum, running sheets provide a record that can easily be audited of who did what and when. They are particularly useful where:

- an investigation is long running, complicated, involves a range of issues or comprises several strands
- there is more than one investigator, or
- there is a transition in staff during the course of the investigation and a new investigator takes over the conduct of that investigation.

A running sheet may contain several columns with such headings as date, task, event, responsibility, timeframe, completed, notes, etc.

The importance of preserving a record of information obtained during an investigation is reinforced by the provisions of the *State Records Act 1998*, which require:

- that each public office make and keep full and accurate records of the activities of the office, and
- the safe custody and proper preservation of state records.

## *Practical tip*

As an investigator it is crucial that a paper trail of your actions in an investigation is created. This will serve as a protection at a later stage if the methodology or conclusions become the subject of a complaint to an outside agency. The following basic rules help to ensure that the investigation is transparent (and therefore accountable):

- Don't make any decision that can't or won't be defended.
- Document all investigative actions.
- Document the reason for deciding against completing any identified tasks in the investigation plan.
- Document any action (or any inaction) taken which is contrary to accepted best practice.

# ANNEXURE D

## SECURITY OF INFORMATION

Public officials are obliged to protect the integrity and maintain the security of official information for which they are responsible. In this regard they must only use official information in the legitimate exercise of their official functions and not for personal purposes.

The use of official information for personal advantage, the release of official information at the whim of particular public officials, or the selective leaking of official information for an improper purpose, undermines the integrity of government and can cause unnecessary harm to individuals. Such conduct is conduct which could be investigated pursuant to the *Ombudsman Act* and may constitute corrupt conduct or criminality (eg: a breach of ss.62-63, PPIP Act).

Official information should only be released by public officials with proper authority and in accordance with established agency policies and procedures in the following circumstances:

- where it is necessary for the purpose of properly discharging the agency's functions
- in accordance with statutory rights of individuals to be given access to information (for example under the FOI Act, PPIP Act or HRIP Act)
- in accordance with government policy (for example Premier's Memorandum No.2000-11 setting out guidelines for the disclosure of information in government contracts with the private sector)
- in accordance with the rules of enforceable orders of a court or tribunal
- in accordance with a requirement made by a body with the statutory power to require production of documents or statements of information (for example under the *Ombudsman Act* or *Independent Commission Against Corruption Act*).