

Information for NSW Government sector agencies and government sector senior executives

Section 83B *Government Sector Employment Act 2013*

Requirement to seek guidance from Public Service Commissioner when leaving certain senior executive employment

From 1 July 2023, Band 3 and Band 4 Government Sector Senior Executives (GSSEs) intending to accept an offer of employment in the private sector **must** seek guidance from the Public Service Commissioner (the Commissioner) **before** accepting the offer of employment, in certain circumstances.

Who needs to seek guidance?

The obligations apply to:

- Secretaries of Departments
- other heads of Public Service agencies who are Public Service employees
- other Public Service employees employed in the 2 most senior executive bands (i.e. bands 3 and 4, including any intra-bands)
- other government sector senior executives employed in the 2 most senior executive bands determined under the senior executive bands determination for:
 - the NSW Health Service
 - the NSW Police Force
 - the Transport Service of New South Wales.

These senior executives are now collectively referred to as 'Government Sector Senior Executives' or GSSEs in the GSE Act.

Any Band 3 or 4 senior executive who is acting in a GSSE role and who intends to accept an offer of employment in the private sector, should first seek the Commissioner's guidance if the employment directly relates to their GSSE role or responsibilities.

When does a GSSE need to seek guidance?

A GSSE who intends to accept an offer of employment in the private sector **must** first seek the Commissioner's guidance, if the employment directly relates to any of their current role or responsibilities, or a role or responsibilities they've held during the previous two years.

If a GSSE is unsure as to whether an offer of employment in the private sector directly relates to their current or former role or responsibilities, they are encouraged to take a prudent approach and seek the Commissioner's guidance to ensure compliance with section 83B.

Where practicable, GSSEs are encouraged to seek the Commissioner's guidance as early as possible, but without compromising any ongoing negotiations with the prospective employer.

When is there no requirement to seek guidance?

Section 83B does not apply to people who fall outside the definition of GSSEs, for example, senior executives employed in Band 1 or Band 2 roles, or people excluded from the GSE Act by s.5 of the GSE Act, such as staff of the Audit Office of NSW, Independent Commission Against Corruption or Judicial Commission.

Section 83B does not apply to exiting GSSEs who do not currently intend to accept an offer of employment in the private sector. This means GSSEs who have provided notice of resignation, or who have received notice of termination of their employment, but do not yet intend to accept an offer of employment in the private sector, are not required to seek the Commissioner's guidance.

The obligation to seek the Commissioner's guidance applies to GSSEs while they are still employed as a GSSE. It does not apply to former GSSEs. However, former GSSEs should be aware of their continuing obligations in relation to information or knowledge acquired as a public official. See further information below under "Understanding your obligations".

Section 83B also does not apply to GSSEs whose employment as a GSSE ends before 1 July 2023.

Why has this requirement been implemented?

The *GSE Amendment Act 2022* was passed in November 2022, introducing a range of ethics and integrity-related amendments to the GSE Act, including section 83B.

To address ethical issues in relation to post separation employment, section 83B requires GSSEs to seek guidance from the Commissioner if they intend to accept an offer of employment in the private sector if the employment directly relates to their roles or responsibilities, or a role or responsibilities held during the previous 2 years.

The purpose of the requirement is to ensure that a GSSE, prior to accepting an offer of employment, receives advice regarding:

- (a) the management of actual and potential conflicts of interest
- (b) the use of information or knowledge gained by the GSSE in the course of the GSSE's employment
- (c) any other matters the Commissioner will provide guidance to the GSSE.

It is in the public interest that people with experience in public administration should be able to move to and from other sectors, and that such movement should not be frustrated by unjustified public concern over a particular appointment or unnecessary constraints.

It is equally important that, when a GSSE is taking up an outside appointment or employment, there should be no cause for justified public concern or risk that knowledge or information gained by the GSSE in the course of the GSSE's employment may be used in a way that is contrary to law or to the public interest.

Relevant considerations and matters that may be addressed in the Commissioner's guidance include concerns that:

- a GSSE might be influenced in carrying out their official duties by upcoming employment or the hope or expectation of future employment with a particular firm or organisation, or in a specific sector
- on leaving the NSW Government Sector, a former GSSE might improperly exploit their networks and access to agency contacts
- a former GSSE may inappropriately use information or knowledge gained by the GSSE in the course of their employment as a GSSE
- a particular firm or organisation might gain an improper advantage by employing a former GSSE who, in the course of their official duties, has had access to:
 - information relating to unannounced or proposed developments in Government policy, knowledge of which may affect the prospective employer or any competitors
 - commercially valuable or sensitive information about any competitors.

What is the process for seeking guidance under section 83B?

All formal requests for guidance must be made in writing directly to the Commissioner. Requests for guidance should contain sufficient information to allow the Commissioner to properly consider any issues that may arise as a result of accepting an offer of employment in the private sector. Please complete the [s83B questionnaire](#) and submit your request to the Commissioner via the [NSW Public Service Commission website](#).

Guidance will generally be provided within 2 business days of receipt of a completed questionnaire, where possible. For more complex requests, guidance may require additional time to be finalised. In these circumstances, the PSC will keep the GSSE informed of the timeframe for guidance.

The Commissioner may ask you for further information about your request in order to provide guidance and this may extend the time required to provide guidance. You can update your personal information at any time by contacting the PSC.

If preferred, an initial informal and confidential discussion can be arranged with the Commissioner before submitting a completed Questionnaire. To schedule a convenient time, please contact the Commissioner's office via the [NSW Public Service Commission website](#) or by calling (02) 9272 6000.

How will PSC manage your information?

Any personal information you provide to us will be treated as private and confidential and managed in accordance with the [Privacy and Personal Information Protection Act 1998](#) (PPIP Act). The information will be used and disclosed for the purpose of providing guidance to you, or a directly related purpose, as well as to assess the effectiveness of the guidance provided. The information may be used for an additional purpose with your consent and will also be used and disclosed to meet legal responsibilities or as otherwise required or authorised by law.

Should you accept the proposed private sector employment, and the Commissioner considers it to be in the public interest, the Commissioner may, with your consent, provide a copy of the guidance to the person exercising employer functions in respect of your current or former role (as the case requires) for their awareness to best manage any conflicts of interest or other identified issues.

Statistical information of a general, de-identified nature in relation to guidance provided by the Commissioner under section 83B may be publicly disclosed by the PSC.

Thinking of leaving the government sector? General considerations

Understanding your obligations

Your obligations as a public official do not cease when you leave the government sector.

When leaving the government sector, you should ensure you understand your continuing obligations under the GSE Act, the [Code of Ethics and Conduct for NSW Government Employees](#), any supplementary code of conduct from your agency, any other relevant policies set by your agency, as well as the obligations in your employment contract.

You should also understand your continuing obligations under other legislation, including in relation to information or knowledge acquired as a public official, intellectual property created during your employment in the government sector, and maintaining Cabinet confidentiality.

Depending on the agency you work for, there may be additional obligations you need to comply with after you leave the government sector. You should speak to your HR business partners to gain an understanding of any additional obligations you may have.

Any substantial breach of the requirements of the GSE Act or applicable rules under the GSE Act may amount to misconduct for which proceedings and actions may be taken or continued despite ceasing to be an employee and/or constitute corrupt conduct for the purpose of the *Independent Commission Against Corruption Act 1988*.

Conflicts of interest

The risk of breaching your obligations as a current or former public official increases where there is an actual or potential conflict of interest between your current or former role or responsibilities as a public official and your employment in the private sector. Failing to identify and appropriately deal with ethical issues arising from conflicts of interest can be a significant risk when moving between the public and private sectors. GSSEs need to be aware of these risks and understand how to manage them.

Conflicts of interest can arise where there is any conflict between the GSSE's public duty and private interests, where the private interests could improperly influence the performance of their duties as a public official and compliance with their obligations (including obligations to their prospective or current private sector employer).

Private interest refers to the interests that arise from your non-work or post-separation life that could give you a financial or other material benefit or result in disadvantages to the public interest or to other people. Importantly, private interests can include the interests of your close connections, including family connections, and/or the interests of associates.

Different types of post-government sector employment carry different risks. Examples of higher risk situations may include when a GSSE has accepted a role:

- at an organisation they had a close working relationship with (for example, a supplier or professional services firm)
- in an industry they previously regulated
- with an organisation they previously were in negotiations or dispute with

- as a lobbyist.

Conflicts of interest may also arise where GSSEs intending to leave the sector are involved in government procurement decisions or contract negotiations with their intended private sector employer. The risk is particularly heightened where a GSSE, with a view to entering the private sector, makes a decision or enters into a contract that favours a potential private sector employer.

Failing to appropriately identify, disclose and manage conflicts of interest can be a form of corrupt conduct. Former public officials can be found to have engaged in corrupt conduct where they have:

- misused information acquired in the course of performing their official functions in their private sector role
- improperly managed their relationships and contacts within the government sector
- engaged in conduct that adversely affects, or could adversely affect, either directly or indirectly the honest and impartial exercise of official functions by any public official, any group or body of public officials or any public authority.

One way former GSSEs can manage conflicts of interest arising from their government sector employment is to avoid higher risk roles in the private sector, and ensure they are not involved in any decision-making processes that could be connected to their previous roles within the government sector.

If you find yourself in a situation which raises a conflict of interest, you should consider how best to manage the conflict of interest. If any matter with your private sector employer falls within your former roles and responsibilities as a GSSE, you should declare the conflict of interest and consider how best to manage the conflict having regard to your obligations as a former GSSE.

Depending on the circumstances, the best approach may be to exclude or limit the conflict by, for example, excluding yourself from meetings or discussions, advising on any bids for future Government business, submitting contracts or tenders on their behalf or conducting procurement, recruitment, project management, purchasing, regulating, or confining your involvement to an advisory role with no decision-making authority or financial delegation for a period of time. Consideration should also be given to advising both your current and prospective employers of such recusal to ensure transparency.

You may wish to consider whether there could be a perceived conflict of interest and whether you should take any action to manage that perception.

Find out more on [post-separation employment](#) and [conflicts of interest](#) from the Independent Commission Against Corruption.

Managing information or knowledge

Confidential or secret information obtained by a senior executive during their employment must not be disclosed without lawful authority.

Conduct of a public official, or a former public official, that involves the misuse of information acquired in the course of the official's functions may amount to misconduct and/or constitute corrupt conduct, whether or not the misuse is for the official's benefit or for the benefit of any other person, including their private sector employer. Criminal and disciplinary proceedings may also be brought for misuse of official information.

GSSEs need to be aware of the conditions in their employment contract around the use of information gained in the course of their employment. Relevant conditions will usually include, for example:

- During their employment, the GSSE will not disclose, without lawful authority, any confidential or secret information acquired as a consequence of the employment
- On termination of employment the GSSE will not, without lawful authority, disclose or make use of any confidential or secret information acquired by the GSSE as a consequence of their employment
- Subject to any written agreement to the contrary between the parties, all intellectual property developed by the GSSE in the course of their employment is the sole property of the employer.

GSSEs should also be aware of their duties of confidentiality under legislation such as the *Privacy and Personal Information Protection Act 1998*, *Health Records and Information Privacy Act 2002*, *State Records Act 1998*, and *Government Information (Public Access) Act 2009*.

Personal or health information to which they have had access to in the course of the exercise of their official functions must not be intentionally disclosed or used, other than in connection with their official functions. These obligations continue to apply post-separation. Improperly disclosing or using personal or health information may amount to an offence under the *Privacy and Personal Information Protection Act 1998* or *Health Records and Information Privacy Act 2002*.

There is also a duty of confidentiality under the *State Records Act 1998* not to directly or indirectly make a record of, or divulge information acquired in the exercise of functions under that Act. Please refer to your agency's record management policy for guidance on your recordkeeping and records management responsibilities. When leaving the government sector, GSSEs must ensure they have complied with their recordkeeping responsibilities, including by ensuring that all records are kept secure against unauthorised access, alteration, loss or destruction. Failing to do so could be considered an offence under the *State Records Act 1998*.

Pursuant to the *Government Information (Public Access) Act 2009*, a person who destroys, conceals, or alters any record of government information for the purpose of preventing the disclosure of the information as authorised or required under that Act, is guilty of an offence.

To manage any risks of inadvertently misusing information, GSSEs may find it helpful to distance themselves from former colleagues for a period of time.

Lobbying

Ethical lobbying is a legitimate activity and an important part of the democratic process. Lobbyists can help individuals and organisations communicate their views on matters of public interest to the government and opposition and, in doing so, improve outcomes for the community as a whole.

All government officials, including GSSEs, must comply with [Premier's Memorandum M2019-02-NSW Lobbyists Code of Conduct](#) published on the Department of Premier and Cabinet's website, as amended from time to time. M2019-02 prohibits lobbying in certain circumstances. While you remain a GSSE, you are not to have lobbying contact with unregistered third-party lobbyists, and you are to observe special precautions when meeting with any lobbyist who has been placed on the Lobbyist Watch List.

Schedule 1 to the [Lobbying of Government Officials \(Lobbyists Code of Conduct\) Regulation 2014](#) prescribes the ethical standards to be observed by all individuals and organisations who seek to influence government policy or decision making.

All individuals or bodies carrying on the business of lobbying Government officials on behalf of another individual or body must comply with the requirements of the [Lobbying of Government Officials Act 2011](#) and the [Lobbyists Code of Conduct](#).

A “third-party lobbyist” must comply with additional requirements set out in the Lobbyists Code of Conduct, for example, they must disclose to NSW Government officials they lobby (before a meeting or a communication):

- that they are a third-party lobbyist
- the names of any individuals they have engaged to undertake the lobbying
- the name of the individual or body whose interests the lobbyist is representing
- details of foreign principals whose interests the lobbyist is representing, including their name and the foreign country or jurisdiction.

In addition, third-party lobbyists must not lobby on a matter that relates to the functions of a NSW Government board or committee of which they (or the individuals they engage to undertake the lobbying for them) are members.

Even where these obligations are complied with, there are higher risks where a former public official's lobbying directly relates to a matter within their former role or responsibilities as a public official. For this reason, it is recommended that public officials avoid lobbying in relation to such matters after they cease to hold public office.

Find out more about lobbying rules, including the [NSW Lobbyists Code of Conduct](#) from the NSW Electoral Commission.