



Public
Service
Commission

**Guideline: Inquiries
into the administration
and management of
government sector
agencies**

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1 Introduction

This guideline sets out a principles-based approach to guide the Public Service Commissioner in considering whether to exercise the power of inquiry under section 83 of the *Government Sector Employment Act 2013* (GSE Act). It also provides guidance on the exercise of the power.

1.1 Legislative provisions

Section 83 of the GSE Act provides a power of inquiry to the Commissioner and the Secretary of the Department of Premier and Cabinet (DPC) and to anyone whom the Commissioner or Secretary authorises under that section. The section also provides coercive information gathering powers to assist the conduct of an inquiry.

Section 83 of the GSE Act is reproduced below:

83 *Inquiries by Public Service Commissioner or DPC Secretary into government sector agencies*

(1) *In this section:*

DPC Secretary means the Secretary of the Department of Premier and Cabinet.

(2) *The Commissioner or DPC Secretary, or a person authorised by the Commissioner or DPC Secretary, may conduct an inquiry into any matter relating to the administration or management of a government sector agency.*

(3) *An inquiry is not to be conducted by or on behalf of the DPC Secretary into any matter that is the subject of an inquiry by or on behalf of the Commissioner, except with the concurrence of the Commissioner.*

(4) *The Commissioner or DPC Secretary, or a person authorised by the Commissioner or DPC Secretary, may, for the purposes of conducting an inquiry under this section:*

(a) *enter and inspect the premises of a government sector agency, and*

(b) *require the production of, and take copies of, any documents in the custody of an employee of the government sector agency, and*

(c) *for the purposes of further examination, take possession of, and remove, any of those documents, and*

(d) *require an employee of the government sector agency to answer questions, and*

(e) *require an employee of the government sector agency to provide such assistance and facilities as is or are necessary to enable the Commissioner, Secretary or authorised person to exercise functions under this section.*

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A reference in this subsection to an employee of a government sector agency includes a reference to any person who is engaged by the agency (whether directly or indirectly) under a contract for services.

(5) This section does not affect the operation of section 82.

(6) The DPC Secretary cannot conduct (or authorise the conduct of) an inquiry under this section into the NSW Police Force.

A person conducting an inquiry under may wish to exercise the information gathering powers set out in section 83(4)(b)-(e) in relation to a company that has been engaged by a government sector agency (whether directly or indirectly) under a contract for services. These powers should be exercised in relation to only those employees of the company who worked on the matter which is the subject of the inquiry, or who are likely to have knowledge or documents in their possession which may be useful to the conduct of the inquiry.

1.2 Overview of the inquiry process

This guideline considers the inquiry process in four broad phases:

- Assessing whether a matter merits an inquiry
- Determining the scope and purpose of an inquiry
- Carrying out an inquiry
- The outcome of the inquiry including reporting and other action.

2 Assessing whether a matter merits inquiry

After receiving information about a matter that may merit inquiry, the Commissioner will:

- make a preliminary assessment of the information
- consider whether the matter falls within the scope of the inquiry power
- assess whether the matter merits inquiry.

The Commissioner may then decide whether or not to proceed to inquire into the matter or authorise someone else to do so, or whether some other action should be taken. (As set out below, special considerations apply if the matter has been referred to the Commissioner for investigation under section 53 of the *Independent Commission Against Corruption Act 1988* or under the *Public Interest Disclosures Act 1994*.)

2.1 Receiving information about matters that may merit inquiry

2.1.1 Sources of information

The Commissioner may become aware through a range of channels about matters that may merit inquiry under section 83 of the GSE Act. These channels include:

- allegations or information provided by a government sector agency or directly by individuals to the Commissioner
- formal referrals by government sector agencies under other legislation, including the ICAC Act and the *Public Interest Disclosures Act 1994* (see 2.2.4 below)
- allegations or information received by staff of the Public Service Commission (PSC) and referred to the Commissioner
- workforce reviews and surveys, such as the *State of the NSW Public Sector Report* and *People Matter Employee Survey Report*
- publicly available information, such as academic reviews or media reporting
- the day-to-day work of the PSC.

2.1.2 Types of information that may be received

Information received that could merit inquiry may be about:

- culture, policy, procedures and practices

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- the conduct of individuals or groups of employees (including persons engaged by a government sector agency, whether directly or indirectly, under a contract for services).

Such information may concern:

- a specific agency or agencies or part of an agency (including persons engaged by a government sector agency, whether directly or indirectly, under a contract for services)
- the government sector as a whole.

2.2 Undertaking a preliminary assessment

As soon as practicable after becoming aware of information that may merit inquiry under section 83 of the GSE Act, the Commissioner should undertake a preliminary assessment of the information at hand. The purpose of the assessment is to do the following:

- exclude any matters that on their face will clearly not merit inquiry (eg because they are frivolous, vexatious, or the responsibility of another oversight agency) – if there is no obvious and immediate exclusion, the Commissioner will then proceed to consider in further detail whether the matter at hand falls within the scope of the inquiry power and whether the facts of the matter merit inquiry
- if the matter involves a referral from another oversight body (including ICAC) or a public interest disclosure (PID) under the *Public Interest Disclosures Act 1994* (PID Act), consider the implications for the inquiry.

2.2.1 Where the Commissioner has a conflict of interest

Circumstances may arise in which the initial information received about a matter indicates that the Commissioner may have or be perceived as having a conflict of interest in conducting an inquiry into the matter. Where there is a clear actual or perceived conflict of interest, the Commissioner should refer the matter to the DPC Secretary for possible inquiry by the Secretary under section 83 or should delegate to a suitably senior person the Commissioner's power of inquiry in relation to that matter in accordance with section 17(2) of the GSE Act.

Where the potential impact of the conflict is minimal or unclear, the Commissioner may choose to seek legal advice on how it might be appropriately addressed or discuss this with the Ombudsman's Office. (NSW Ombudsman's 2012 publication [Fact Sheet 3: Conflict of interests](#) lists some of the ways in which a conflict of interest might be able to be addressed.)

Where the matter has been referred or delegated, the DPC Secretary or other person to whom the power has been delegated should then proceed to assess whether the matter merits inquiry under section 83, and should an inquiry proceed, to manage the conduct of that inquiry. The Commissioner should be informed of the outcome, but should not be involved in any decision-making in relation to the conduct of the inquiry.

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Similarly, if later in the preliminary assessment process or during an inquiry by the Commissioner information comes to light that indicates the Commissioner has or could reasonably be perceived as having a conflict of interest, the Commissioner should disclose the possible conflict or withdraw from the process as outlined in the above paragraphs.

2.2.2 Seeking further information

The Commissioner may seek further information informally about a matter to assist in this preliminary assessment. This may involve discussing the matter further with any person or agency that made the allegation or provided the information concerned.

2.2.3 Frivolous or vexatious claims

Where the information received is an allegation or complaint, the Commissioner will consider the option of an inquiry only if the allegation or complaint appears to the Commissioner to be credible, made in good faith and neither frivolous nor vexatious.

2.2.4 Consideration of whether the information constitutes a public interest disclosure

Where a public official makes an allegation or complaint directly to the Commissioner (or a Deputy Commissioner), consideration should be given in the first instance to whether the allegation or complaint constitutes a PID. If it does, care needs to be taken to deal with it in accordance with the PID Act and the PSC's [Public Interest Disclosures – Policy and Procedures](#) (see 4.4.3 below for further information on confidentiality implications for PIDs).

Broadly, disclosures protected under the PID Act are disclosures by a public official made to the head of an agency, nominated PID Coordinator, or nominated investigating agency; of information that the person making the disclosure honestly believes, on reasonable grounds, shows or tends to show wrongdoing. The PSC's *Public Interest Disclosures – Policy and Procedures* provide detailed guidance on what constitutes a PID.

Where a protected PID is received by or referred to (see 2.2.5 below regarding referrals) the Commissioner, this gives rise to a range of obligations under the PID Act, regardless of whether a section 83 inquiry is undertaken. This includes requirements of providing confidentiality and feedback to the PID reporter (see 4.4.3 below) as well as providing the PID reporter with protections against reprisals. The PSC's *PID – Policy and Procedures* provide guidance on the PSC's role in assessing the risks of reprisal, developing strategies to mitigate these risks, and investigating and stopping any reprisal actions that do occur.

2.2.5 Matters referred for investigation from other agencies under legislation

Where agencies refer matters to the Public Service Commissioner under the ICAC Act or PID Act, there are requirements for pre-referral consultation that have implications for the preliminary assessment stage.

Part 5 of the ICAC Act provides that ICAC may refer matters for investigation or other action to any person or body considered by ICAC to be appropriate in the circumstances. This may include the Public Service Commissioner. However, ICAC is required to conduct appropriate consultation with the person or body, and to take into account their views, before referring the matter.

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Sections 25 and 26 of the PID Act provide for the referral of public interest disclosures. Matters may be referred to a public authority (which includes the PSC) or a public official (which includes the Public Service Commissioner) considered appropriate in the circumstances. Where an investigating authority seeks to refer a disclosure, it is required to take into account the views of the receiving public authority or public official before making the referral.

This consultation should help to clarify whether the matter intended to be referred is within the scope of the inquiry power in section 83 of the GSE Act. Where the referral is by ICAC the consultation should be used to clarify ICAC's expectations in terms of any particular matters to be investigated. (See also 5.2 below.)

2.2.6 Referring matters to other agencies

If it is clear at the preliminary assessment stage (or indeed any stage) that the matter should be referred to another oversight body, the Commissioner will do so. Relevant oversight bodies in NSW are:

- Auditor-General: for serious and substantial waste
- Independent Commission Against Corruption: for corrupt conduct
- Department of Local Government: for matters involving serious and substantial waste in local government, general council management and breaches of the *Local Government Act 1993* and related Acts
- NSW Ombudsman: for maladministration, misconduct by police, or allegations of child abuse concerning the staff of designated government and non-government agencies
- Police Integrity Commission: for matters involving corrupt conduct or other serious misconduct by police
- NSW Police: for criminal conduct and for police misconduct
- Information and Privacy Commission: for matters involving government information contravention.

If the Public Service Commissioner receives an allegation or complaint which constitutes a PID, he or she may seek to refer the disclosure to the relevant investigating authority, or to the relevant principal officer of another public authority.

Should matters arise at any stage during the inquiry which fall within the remit of any federal oversight body the Commissioner will refer relevant information to the relevant federal body (for example, the Australian Taxation Office where there are apparent breaches of Australian taxation laws).

Referral of a specific allegation or complaint to another oversight body would not preclude the Commissioner from conducting a concurrent inquiry on broader questions of culture, policy, procedure and practices related to the administration or management of an agency or agencies.

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2.3 Is the matter within the scope of the Commissioner's power of inquiry?

Section 83 provides that the Commissioner or a person authorised by the Commissioner may inquire into “any matter relating to the administration or management of a government sector agency”.

Such matters might include, but are not limited to, where there are reasonable grounds for the belief or suspicion that:

- there are serious shortcomings in the administration or management of a government sector agency, which cannot be resolved internally
- an agency head or other very senior executive is personally involved in a matter of concern
- a matter of concern may be systemic across the government sector
- the matter concerns administration or management culture, policy, procedures or practices across the government sector as a whole
- the matter could affect the administration or management of other government sector agencies or have consequences for strategic management and workforce planning for the government sector
- public trust in the integrity and accountability of the government sector could be undermined.

2.4 Do the facts of the matter merit inquiry?

Where a matter falls within the inquiry power, the Commissioner will consider whether the facts of the matter merit inquiry on that occasion. In doing so, the Commissioner will have regard to the Commissioner's objectives and functions as set out in sections 10 and 11 of the GSE Act. Additional specific considerations are discussed below.

2.4.1 Matters concerning a specific agency or agencies to be resolved internally, where possible and appropriate

Under the GSE Act, agency heads are responsible for the general conduct and management of the functions and activities of their agency in accordance with the government sector's core values as set out in the Act. This includes promoting and maintaining ethical conduct by their agencies and employees and managing unsatisfactory performance and misconduct by employees of their agency.

Where the Commissioner becomes aware of a matter of administration or management in a particular agency that may merit inquiry, he or she will (where possible and appropriate) consult the agency head with a view to the matter being resolved internally within the agency. This includes matters relating to the conduct of individuals or groups of employees, and matters relating to culture, policy, procedures and practices. Agency heads should respond to the Commissioner in

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writing when a matter is resolved internally, setting out how the matter was resolved and what actions were taken.

There may be instances where the matter cannot be resolved internally, or where it would be inappropriate to rely solely on internal agency oversight mechanisms to resolve a matter (for example, where the agency head is the subject of an allegation or there are other reasonable grounds for the belief or suspicion that the agency head would have a conflict of interest in dealing with the matter).

2.4.2 Where internal resolution is not possible or appropriate – factors to consider in assessing whether a matter merits inquiry

In making that assessment, the Commissioner may consider the following factors:

- primarily, whether an inquiry would be in the public interest
- whether the matter is or has already been the subject of review, inquiry, investigation or prosecution by another NSW oversight or enforcement body
- whether there are better alternative means that could be used effectively to obtain the information sought or to resolve the matter
- the gravity of the matter and its potential to adversely affect the management, administration, operation or reputation of individual agencies or the NSW government sector if not investigated
- the seniority and number of government sector employees involved
- any likely operational impact of an inquiry on the agency or agencies concerned
- the length of time since any activities of concern took place
- competing work priorities of the PSC, including the operational demands of any other inquiries under way at the time
- whether there are good prospects that the outcomes of the inquiry will make a significant contribution to resolving the matter and/or the administration and management of the sector
- the risk that the public reputation of the government sector may be undermined if not investigated.

If the Commissioner considers that the matter merits inquiry, he or she will proceed to identify the scope and purpose of the inquiry in accordance with chapter 3 of this guideline.

2.5 Deciding not to proceed to an inquiry

On consideration of the available information, the Commissioner may decide that a matter is outside the scope of section 83 or does not merit an inquiry.

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If the Commissioner nonetheless considers that some form of action or oversight is appropriate the following options may be available:

- referral of the matter at any stage to another oversight body which may have jurisdiction (see *2.2.6 Referring matters to other agencies*)
- review of particular issues in reliance on publicly available information or the voluntary provision of information by agencies (particularly in the case of sector-wide reviews of culture, policy, procedures or practices)
- issuing a direction under section 13 of the GSE Act (for example, where it would be appropriate for agencies to collate and provide information on an issue, rather than for the information gathering powers under section 83 to be used)
- requiring the head of a government sector agency to provide the Commissioner with a report in accordance with section 16 of the GSE Act
- monitoring the matter for any developments that may result in the matter coming within the scope of the inquiry power or meriting an inquiry
- recommending that particular action be considered under the GSE Regulation and Rules (for example in relation to apparent misconduct of an employee).

Where the Commissioner decides not to inquire into a matter, the reasons for deciding not to inquire should be documented and recorded, and the agency or individual which provided the information or made the allegations should be informed in writing of the decision not to proceed to an inquiry and the reasons for this.

3 Identifying the scope and purpose of the inquiry

3.1 Drafting terms of reference for consultation

If the Commissioner decides that a particular matter merits an inquiry he or she will prepare draft terms of reference setting out the proposed scope and purpose of the inquiry.

The terms of reference should be drafted to provide clear direction and limitations for the inquiry, but not be so prescriptive as to overly limit the flexibility needed to inquire into all relevant aspects of a matter.

3.2 Consultation with DPC Secretary and any other relevant parties

The Commissioner may inform the DPC Secretary of the Commissioner's decision to inquire into a particular matter or to authorise another person to conduct the inquiry. If appropriate, the Commissioner may consult the Secretary on the draft terms of reference and, depending on the nature of the inquiry, to consult on whether it would be appropriate for the Secretary to conduct the inquiry instead of the Commissioner, or for DPC and the PSC to share resources and expertise on a particular inquiry.

The Commissioner may also choose to consult other relevant parties to refine and finalise the scope and purpose of the inquiry as set out in the terms of reference.

In consulting on the terms of reference, personal information about individuals who may be the subject of the inquiry should only be disclosed where it is reasonably necessary to properly consult on the draft terms of reference. If a PID is involved there are particular confidentiality obligations (see 4.4.3 below).

Following any appropriate consultations, the Commissioner will finalise terms of reference.

4 Carrying out the inquiry

The following section deals with the authorisation of a person to conduct an inquiry and provides broad guidance about the conduct of the inquiry.

4.1 Appointing an authorised person to conduct an inquiry on the Public Service Commissioner's behalf

Section 83 of the GSE Act permits the Commissioner to conduct an inquiry personally or authorise another person to conduct the inquiry on his or her behalf. It is anticipated that the Commissioner will generally adopt the latter course given the number and scope of the Commissioner's functions.

4.1.1 Nature of the authorisation

A person authorised by the Commissioner to conduct an inquiry under section 83 conducts the inquiry in their own right. The person does not conduct the inquiry as the Commissioner's agent or representative.

4.1.2 Who should be authorised to conduct the inquiry

The Commissioner will only authorise a person who the Commissioner is satisfied:

- is sufficiently senior and has relevant skills and experience in conducting investigations and knowledge of relevant matters such as the rules of procedural fairness and
- has had no prior direct involvement in the matter, and no actual or perceived conflicts of interest in the matter. (The Commissioner may, for that purpose, seek a conflict of interest declaration from the person.)

The person may be a NSW government sector employee (who may be a member of the PSC's executive) or an individual or incorporated organisation (such as a consultancy firm) outside the sector. The choice will depend to a large extent on the nature of the matter under inquiry. Where an incorporated organisation is authorised to conduct the inquiry, the associated contract of engagement should name the individuals within the organisation who are to conduct the inquiry.

The PSC may also engage individuals or firms to provide the Commissioner or whoever is authorised to conduct the inquiry with specialist services needed for the inquiry (see 4.1.5 below).

4.1.3 Instrument of authorisation

The Commissioner's authorisation of a person to conduct the inquiry will be in writing signed and dated by the Commissioner and will:

- specify or attach the terms of reference of the inquiry

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- set out the coercive investigatory powers under section 83 that the person is authorised to exercise on the Commissioner's behalf.

A copy of the instrument will be provided to the authorised person.

4.1.4 Contract to engage services of person authorised to conduct the inquiry

Where the Commissioner authorises someone from outside the NSW government sector to conduct the inquiry there should be a contract between the PSC and the consultant engaging the consultant to provide services (namely, the conduct of the inquiry).

In addition to the standard terms (term of appointment, fee, termination, dispute resolution etc) the contract should set out terms governing the consultant's relationship with the Commissioner, including:

- an undertaking to keep the Commissioner informed of key developments and seek the Commissioner's input into critical decisions in the inquiry
- a timeline for the inquiry
- a reporting schedule that provides for when and how reports will be provided to the Commissioner
- the instrument of authorisation to conduct the inquiry.

Given the nature of the services, the Commissioner may consider it appropriate for the contract not to include the standard contract conditions imposing on the person providing the services obligations about insurance and indemnities. It may be appropriate for the contract to indemnify the person in respect of loss or damage they might suffer in connection with the bona fide conduct of the inquiry.

Where a government sector employee is appointed to conduct an inquiry, a contract is unlikely to be necessary. However, the terms of the relationship between the Commissioner and that person, including reporting expectations, should be set out in writing prior to the commencement of the inquiry. The person's potential exposure to liability in connection with the conduct of the inquiry should also be considered.

4.1.5 Contract to engage specialists to assist person conducting the inquiry

The Commissioner may arrange for the person authorised to conduct the inquiry to have access to specialist assistance from an external provider (for example, forensic accountants). The individual or organisation concerned should be engaged by the PSC under a standard consultancy contract. The terms of the contract will need to be consistent with the terms of reference for the inquiry and relevant legislation.

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4.2 Best practice literature

The carrying out of an inquiry is a complex task, and providing detailed advice on all aspects of the carrying out of inquiries is beyond the scope of this guideline. However, a wide range of literature exists on best practice in conducting inquiries and investigations in the NSW government sector. A person authorised by the Commissioner to conduct an inquiry should familiarise themselves with this material, which includes:

- Administrative Review Council 2008 report and best practice principles: [*The Coercive Information-Gathering Powers of Government Agencies*](#)
- NSW Independent Commission Against Corruption's 2012 [*Fact Finder: A guide to conducting internal investigations*](#)
- NSW Ombudsman's 2004 publication [*Investigating complaints: A manual for investigators*](#)
- NSW Ombudsman's 2009 publication [*Managing information arising out of an investigation - Balancing openness and confidentiality*](#)
- NSW Ombudsman's 2012 publication [*Reporting of progress and results of investigations*](#)
- NSW Ombudsman's 2012 publication [*Fact Sheet 14: Natural justice/procedural fairness*](#).

4.3 Procedural fairness and natural justice obligations

There is a presumption that the rules or principles of procedural fairness must be observed in exercising statutory powers that could affect the rights, interests or legitimate expectations of individuals.

In implementing an inquiry, the Commissioner or person authorised by the Commissioner must ensure as an overriding priority that the inquiry observes procedural fairness and natural justice. This requires the person conducting the inquiry to:

- avoid actual and perceived conflicts of interest, and to act in an impartial and objective manner
- inform any individuals who are the subject of an inquiry of the allegations against them, and to provide an opportunity for them to respond comprehensively to the allegations
- make reasonable inquiries, including providing a hearing to or receiving submissions from affected parties, before making a decision
- take into account all relevant factors and no irrelevant factors
- base findings on facts and the best available information

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- complete the inquiry without undue delay, and to inform affected parties of any unexpected delay.

4.4 Confidentiality and privacy obligations

To ensure procedural fairness, the person conducting the inquiry will need to consider carefully how the public interest is best served in balancing confidentiality with transparency throughout the course of the inquiry. The balance is likely to change depending on the nature of the inquiry. In considering these issues persons conducting an inquiry should have regard to the NSW Ombudsman's 2009 publication [Managing information arising out of an investigation - Balancing openness and confidentiality](#) and 2012 publication [Natural justice/procedural fairness](#).

The person conducting the inquiry should also seek advice and guidance from the Commissioner or a senior Public Service Commission staff nominated by the Commissioner where difficult judgments need to be made about balancing confidentiality with transparency.

4.4.1 Principles guiding whether information in an inquiry should remain confidential

The Ombudsman's publications mentioned above note that circumstances where it may be appropriate to disclose information include (within the limitations provided by the *Privacy and Personal Information Protection Act 1998* (PIIP Act)):

- to facilitate an investigation
- to keep interested parties aware of the progress and results of an investigation
- to comply with procedural fairness requirements
- to give reasons for decisions or conclusions
- to disclose the identity of a complainant, PID reporter or source of information for the purpose of protecting the person from reprisals
- to comply with an open disclosure policy when things go wrong
- to comply with legal obligations, eg under subpoena, for the purposes of criminal or disciplinary proceedings, etc.

The publication notes the following circumstances where it may be appropriate not to disclose information:

- to minimise detrimental impact on individuals (eg harassment, reputational damage, privacy or defamation actions)
- to minimise detrimental impact on current or future investigations

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- to minimise prejudice to the future supply of information to the agency or government to minimise or prevent substantial adverse impact on the management or assessment of an agency's personnel
- to minimise prejudice to occupational health and safety
- in various specific circumstances, eg, in relation to complaints by third parties, disciplinary proceedings, child protection
- to maintain confidentiality, including complying with obligations under the PID Act
- to comply with privacy requirements
- to comply with secrecy requirements.

4.4.2 Providing information on the progress of an inquiry to affected parties

The Commissioner will write to the head of the government sector agency that is the subject of the inquiry to advise of the commencement of the inquiry and the expectation of cooperation by the agency's employees. The agency head should also be advised at this stage of the terms of reference of the inquiry; the estimated timeframe; details of the person authorised to conduct the inquiry; and the person's powers under section 83.

Affected parties (complainants, PID reporters, subjects, witnesses) should be provided with appropriate information about the commencement and progress of an inquiry, in accordance with best practice investigation standards. The NSW Ombudsman's 2012 publication [Reporting of progress and results of investigations](#) includes a useful table which sets out detailed recommendations about what type of information should be provided to each category of affected party at each stage of the inquiry.

However, there are limitations on the disclosure of personal information about identifiable individuals under privacy laws (see 4.4.5 below) when informing affected parties about the progress of an inquiry.

Note that particular requirements and limitations apply to disclosing information to affected parties where the inquiry involves a PID or referral from ICAC (see 4.4.3 and 4.4.4 below).

4.4.3 Additional confidentiality and reporting requirements for PIDs

Under the PID Act, information that might identify or tend to identify the person who has made the PID must remain confidential unless:

- the person consents in writing to the disclosure of that information, or it is generally known that the person has made the PID (otherwise than by making the PID) as a result of the person having voluntarily identified themselves as the person who made the PID, or
- it is essential, having regard to the principles of natural justice, that the identifying information be disclosed to a person whom the information provided by the PID may concern, or

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- the Commissioner is of the opinion that disclosure of the identifying information is necessary to investigate the matter effectively or it is otherwise in the public interest to do so.

The NSW Ombudsman has produced a fact sheet and guideline about confidentiality requirements and PIDs, including factors to consider in deciding in what circumstances it will be necessary to disclose a PID reporter's identity on the grounds of natural justice, the effective investigation of the inquiry, or where it is otherwise in the public interest (see [Fact Sheet 7 - Confidentiality and its practical alternatives](#) and [Guideline C7: Confidentiality – Public Interest Disclosures](#)).

Under the PID Act, the public official who made the PID must be informed if it becomes necessary to disclose his or her identity in accordance the second or third dot point above. However, where possible, the person who made the PID should be consulted where it is considered necessary to disclose their identity in accordance with the PID Act, and given the opportunity to object, before their identity is disclosed in accordance with the PID Act.

Note that where an inquiry has involved a PID, the PID Act requires that written acknowledgement and a copy of the policy be provided to a person making a PID within 45 days of the PID being made. The PSC's *PID – Policy and Procedures* set out a detailed structure for providing feedback about the progress of an investigation to employees who report wrongdoing.

4.4.4 Additional secrecy and reporting requirements for matters referred by ICAC

Section 54 of the ICAC Act provides that ICAC may require the person or body to whom it referred a matter for investigation to provide reports. ICAC may give directions about the nature of and timeframe for these reports. Where a matter has been referred by ICAC, the Public Service Commissioner will communicate progress and updates in accordance with any reporting directions or requirements made by ICAC.

In addition, in accordance with secrecy requirements under section 111 of the ICAC Act, the Commissioner will not divulge any information about the commencement or progress of the inquiry except in accordance with section 111.

4.4.5 Privacy law obligations

The Public Service Commissioner, and any authorised person conducting an inquiry, will ensure compliance with the Information Protection Principles under the PPIP Act. This includes ensuring that personal information is:

- used appropriately
- only disclosed in accordance with the PPIP Act
- stored securely.

The Privacy Commissioner's [Direction on Processing of Personal Information by Public Sector Agencies in relation to their Investigative Functions](#) provides specific guidance on the operation of privacy law with respect to investigations and inquiries. In accordance with this guideline, the Public Service Commissioner or person authorised to conduct an inquiry may disclose personal

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information where this is reasonably necessary for the proper exercise of the section 83 inquiry power.

The Public Service Commissioner may disclose personal information that is reasonably necessary to provide the complainant with advice as to the progress of the investigation into their complaint. However, the Commissioner will not disclose to a complainant personal information relating to any other person's ethnic or racial origin, political opinions, religious or philosophical beliefs, trade union membership or sexual activities.

The Privacy Commissioner's [*Direction on Information Transfers between Public Sector Agencies*](#) provides that public sector agencies are exempted from the Information Privacy Principles in relation to exchanges of personal information which are reasonably necessary for the purpose of referring inquiries between agencies.

4.4.6 Government Information (Public Access) exclusion

Information about inquiries held by the office of the Commissioner is excluded from the application of the *Government Information (Public Access) Act 2009*. The Commissioner is not obliged to release information about such inquiries under that Act.

4.5 Record-keeping obligations

4.5.1 General principles

Agencies are obliged to make and keep full and accurate records of their activities (section 12 (1), *State Records Act 1998*). Agencies must ensure that full and accurate records are created and maintained of work undertaken and decisions made, including the reasons for those decisions. Individuals responsible for or in possession of these records must ensure that they are kept secure against unauthorised access, alteration, loss or destruction.

4.5.2 Record-keeping responsibilities during the carrying out of an inquiry

In the context of an inquiry it is essential that contemporaneous notes of all discussions, phone calls and interviews are made. 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.

To ensure compliance with the PPIP Act, care should also be taken with personal information held in hard copy to ensure that documents are not lost, misplaced, modified or disclosed at any stage throughout the inquiry process.

All tangible (ie non-digital) 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 who is the subject of the complaint or their associates.

All documents should be stored in a manner that maintains their original condition. Documents should not be stapled, folded, excessively handled or in any way mutilated. Envelopes should be

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placed in a resealable bag or envelope with an identifying label on the bag, not on the document. Documents should not be stored in plastic bags because they sweat and could become damaged.

4.5.3 Electronic records

Electronic documents about inquiries should be saved in Objective, the PSC's electronic records management system, with a dedicated folder for each inquiry which is only accessible by those with a need to know the information.

4.6 Preparing an inquiry plan

The person conducting the inquiry should carefully plan the inquiry before starting to gather information. The inquiry plan should consider the following matters, among others:

- what the core factual issues are
- what the key risks are and how to manage them
- what information gathering powers will be used and how
- how information obtained will be recorded and stored
- what resources will be required to successfully complete the inquiry (staff, financial, assets)
- the timeframe for completing the various steps of the inquiry.

Note that if the inquiry is into a matter referred by ICAC for investigation ICAC may have requested that it be provided with the investigation plan.

4.7 Gathering information

Under section 83 of the GSE Act, the person conducting the inquiry may exercise any of the following coercive information gathering powers in conducting an inquiry:

- enter and inspect the premises of a government sector agency
- require the production of, and take copies of, any documents in the custody of an employee of the government sector agency (or a person/company engaged by the agency under a contract for services)
- for the purposes of further examination, take possession of, and remove, any of those documents
- require an employee of the government sector agency (or a person/company engaged by the agency under a contract for services) to answer questions
- require an employee of the government sector agency (or a person/company engaged by the agency under a contract for services) to provide such assistance and facilities

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as is or are necessary to enable the person conducting the inquiry to exercise their inquiry functions.

Existing best practice literature provides significant guidance on techniques for gathering these types of information in a way that is effective and accountable. Legal or other technical advice may be required.

The person conducting the inquiry should consider the use to which information that is to be gathered is likely to be put at the conclusion of the inquiry and, as far as practicable, ensure that the information would be appropriate for that use. For example, if it is likely that the information will be needed as evidence in legal proceedings the information should, where practicable, meet the requirements for admissibility as evidence in those proceedings (see 5.2). If this is the case the person authorised to conduct an inquiry should seek expert guidance on the admissibility of evidence before starting to gather information.

4.8 Nature of the inquiry to guide information gathering methods used

Given the wide range of matters relating to the “administration or management” of government sector agencies that could potentially fall within the Commissioner’s power of inquiry, the conduct of inquiries may differ significantly from case to case. Not every inquiry will necessitate the use of all or any of the information gathering powers available to the person conducting the inquiry. Coercive information gathering powers may be used to the extent necessary to conduct the inquiry fairly, effectively and efficiently.

Before exercising coercive information gathering powers, the Commissioner or person undertaking the inquiry should, to the extent practicable, outline to all affected persons the inquiry process and how the information gathering powers are intended to be used. This information should generally include, at a minimum:

- the terms of reference of the inquiry (the Commissioner may also elect to publish the terms of reference on the PSC website where this is warranted by the significance or nature of the inquiry)
- the methods by which evidence is intended to be gathered
- the timeframe within which the inquiry is intended to be conducted
- any opportunity that will be afforded to comment on proposed findings or recommendations or respond to a report of the inquiry.

The nature and extent of the information that can be provided will be affected by, among other things, legal requirements to maintain confidentiality and protect personal information.

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5.1 Report on the factual findings and recommendations

After all relevant information has been gathered, the person who carried out the inquiry will prepare a written report for the Commissioner's consideration. This report should include:

- the terms of reference of the investigation
- an outline of relevant legislation and policies
- an overview of how relevant information was obtained
- a statement of all relevant facts and evidence (copies of evidence may be attached to the report in appendices)
- the factual findings reached and the basis for them
- recommendations for action (if any)
- any other relevant information.

If the inquiry was into a matter that ICAC had referred for investigation the referral may have required a report to ICAC from the Commissioner under section 54 of the ICAC Act. The report should be prepared in accordance with ICAC's *Section 54 Report Guidelines*.

Where the person who conducted the inquiry wishes to make findings or recommendations about a specific allegation, and about broader system issues, it may be appropriate to produce two separate reports.

Where the inquiry is not conducted by the Commissioner a copy of the report should be provided to the Commissioner for consideration. The Public Commissioner should record that he or she has received and read the report, and should record any comments or responses to the findings and recommendations.

5.2 Standard of proof

Applying an appropriate standard of proof in making inquiry findings is important to ensure that administrative decisions and actions taken as the result of the findings (particularly decisions and actions that affect the rights, interests or legitimate expectations of individual employees) will not be overturned should the matter proceed to litigation.

In making findings of fact on the basis of information obtained through an inquiry, the civil (rather than criminal) standard of proof should be applied. This means allegations must be proved 'on the balance of probabilities'.

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For a finding to be made on the balance of probabilities, the information gathered must establish that it is more probable than not that the facts occurred (*Miller v Minister of Pensions* [1947] 2 All ER 372 at 374). However, the strength of evidence necessary to establish a fact in issue on the balance of probabilities may vary according to the seriousness of the issues involved. The more serious the allegation, the more satisfied the decision-maker must be that the evidence demonstrates a fact on the balance of probabilities (known as the ‘Briginshaw test’ from *Briginshaw v Briginshaw* (1938) 60 CLR 336). The Briginshaw test has been widely applied in courts, in particular with regard to proving workplace misconduct and discrimination allegations.

5.3 Deciding on action to be taken as a result of the inquiry findings

Following the inquiry, there is a range of actions that the Commissioner could consider taking. These include:

- making, amending or repealing a government sector employment rule in accordance with the GSE Act
- issuing a direction to the head of a government sector agency in accordance with section 13 of the GSE Act
- requiring the head of a government sector agency to provide a report in accordance with section 16 of the GSE Act
- recommending to a government sector agency head that he or she:
 - ensure training or professional development is provided for a particular individual or group within the agency
 - make changes to administration and management culture, systems, policies, practices or procedures
- where a matter concerns the conduct or performance of a particular individual, recommending that consideration be given to the taking of particular action in relation to that person under the GSE Act
- recommending policy or legislative changes to the government of the day
- monitoring the matter for further developments
- referring the matter to a different oversight body (see *2.2.6 Referring matters to other agencies*, above)
- taking no action.

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5.4 Communicating the outcome of the inquiry

The Commissioner will determine the manner in which the findings of the inquiry and any action taken are to be communicated.

The following represents standard practice (see NSW Ombudsman's 2012 publication [Reporting of progress and results of investigations](#)) although it may vary depending on the nature of the inquiry.

As a general rule, personal information should not be disclosed through the communication of the outcome of the inquiry unless the Commissioner considers it reasonably necessary to the proper conduct of the inquiry.

Note that where the inquiry arose from a PID, it will be important to ensure that where possible the confidentiality of the PID reporter continues to be respected when communicating the outcome of the inquiry, in particular to provide protection against reprisals (see 4.4.3 above).

5.4.1 Advising complainants of the outcome (where the inquiry arose from a complaint or allegation)

Complainants should be informed of:

- the general outcome of the investigation
- any recommendations that could impact on the interests of or otherwise be of concern to the complainant
- what is likely to happen next and whether the complainant is likely to be further involved in the matter
- the need to keep this information confidential (where appropriate).

In accordance with the Privacy Commissioner's [Direction on Processing of Personal Information by Public Sector Agencies in relation to their Investigative Functions](#), the Public Service Commissioner may disclose personal information that is reasonably necessary to provide a complainant with advice as to the outcome of the complaint and any action taken as a result of the complaint. However, the Commissioner may not disclose to a complainant personal information relating to any other person's ethnic or racial origin, political opinions, religious or philosophical beliefs, trade union membership or sexual activities.

5.4.2 Advising PID reporters (where the inquiry arose from a PID)

Under section 27 of the PID Act, an organisation must notify a reporter about any action taken or proposed in response to their PID within six months of their PID being made.

PID reporters should be advised:

- of sufficient information to demonstrate that adequate and appropriate action was taken or is proposed to be taken, in respect of their disclosure and, in relation to any systemic issue brought to light by their disclosure, advice as to whether he or she will be further involved in the matter

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- not to discuss the PID with any other person, particularly any person who may have been involved in the inquiry (where on-going confidentiality as to the reporter's identity is an important issue).

5.4.3 Subjects of an inquiry (agencies and individuals)

The Department Secretary or Head of Agency should be advised of the following information at the conclusion inquiry into their Department or agency. Where an allegation or complaint was made against a particular individual, that individual should also be advised of the following information:

- the outcome of the investigation
- any recommendations that relate particularly to the subject of the investigation
- what is likely to happen next
- where appropriate, a request that this information be kept confidential.

5.4.4 Witnesses who were involved in the inquiry (where applicable)

Witnesses should be advised of:

- the general outcome of the investigation
- what is likely to happen next and whether the witness will be further involved in the matter
- a request or direction that this confirmation be kept confidential (where appropriate).

5.4.5 Special requirements for matter referred by ICAC

Section 54 of the ICAC Act provides that ICAC may require the person or body to whom it referred a matter for investigation to provide reports. ICAC may give directions about the nature of and timeframe for these reports. Where a matter has been referred by ICAC, the Commissioner will communicate any report on the findings of the investigation to ICAC in accordance with any requirement or direction made.

Where ICAC has required a report back under section 54, it will inform the initial complainant of the outcome of the Commissioner's investigation (rather than the Commissioner informing the complainant).

Where ICAC has not required a report back, it will merely inform the complainant that the matter has been referred for investigation. However, if the Commissioner chooses to inform ICAC of the investigation outcome, and the initial complaint was a PID made directly to ICAC, ICAC will inform the complainant of the outcome.

In accordance with secrecy requirements under section 111 of the ICAC Act, the Commissioner will not divulge any information about the findings of the inquiry except in accordance with section 111.

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5.5 Ongoing evaluation

Following an inquiry, the PSC will assess the inquiry process to determine whether and, if so, how the process could be improved. It may be useful for the person who conducted the inquiry, and any other PSC staff who were involved, to document any “lessons learned”. This evaluation should be recorded and may be drawn on in future inquiries to refine inquiry processes where required.

6 Publication details

Policy owning unit	PSC Legal
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