

## PART 9 CONFIDENTIALITY

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Refer: *Freedom of Information Act 1991 (FOI Act)*  
*Independent Commissioner Against Corruption Act 2012 (ICAC Act)*  
*Local Government Act 1999 (Local Government Act)*  
*Ombudsman Act 1972 (Ombudsman Act)*  
*Royal Commissions Act 1917 (Royal Commissions Act)*  
*Whistleblowers Protection Act 1993 (Whistleblowers Protection Act)*

### 1. INTRODUCTION

- 1.1 All investigations conducted under the Ombudsman Act must be conducted in private (section 18(2)); and in the main, confidentiality must be maintained by Ombudsman SA (section 26).
- 1.2 At the conclusion of an investigation, the general position is that the documents describing the result of the investigation and the identity of parties, may be disclosed in accordance with this policy. However, in certain circumstances, legislation may require a continuation of confidentiality (e.g. under the Whistleblowers Protection Act).

### 2. CONFIDENTIALITY - OMBUDSMAN AND STAFF

- 2.1 The Ombudsman and staff must maintain confidentiality in respect of information which comes to their attention in the course of their duties. Sections 26(1) and (2) of the Ombudsman Act provide:

**26—Confidentiality, disclosure of information and publication of reports**

(1) A person engaged or formerly engaged in the administration of this Act must not disclose information obtained in the course of the administration of this Act except—

a) for the purposes of the administration of this Act or proceedings under this Act or the Royal Commissions Act 1917; or

(b) for the purposes of the performance of official functions by an agency to which this Act applies, any agency or instrumentality of this State, the Commonwealth or another State or a Territory of the Commonwealth, or any other statutory authority or statutory office holder; or

(c) as authorised or required by the Ombudsman.

Maximum penalty: \$20 000.

(2) The Ombudsman is only to authorise or require information to be disclosed if of the opinion that the disclosure is in the public interest (but a person to whom an authorisation or requirement is directed need not inquire into the basis of the authorisation or requirement).

- 2.2 In accordance with the above obligation:

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- Ombudsman SA may only disclose information obtained about a complaint, including the fact that a complaint has been received, 'for the purposes of the administration of the Ombudsman Act, or of proceedings under that Act or the Royal Commissions Act'
- Ombudsman SA may only disclose information about a complaint to another body in the exercise of its official functions. These bodies may be:
  - other SA investigation bodies, such as OPI/ICAC, HCSCC, Auditor General, Equal Opportunity Commission; etc..
  - other state agencies and statutory authorities, including those which are and which are not within the jurisdiction of the Ombudsman (such as Police Ombudsman, SAPOL)
  - interstate, Territory and Commonwealth investigation bodies, such as other Ombudsman, FOI Commissioners, Human Rights Commission, AHPRA, etc...
  - other interstate, Territory and Commonwealth agencies and statutory authorities.
- It is an offence punishable with a fine of \$20 000 to contravene these provisions. They apply only to the Ombudsman, and to staff and former staff of Ombudsman SA.

### 3. OMBUDSMAN CAN AUTHORISE DISCLOSURE IF IN THE PUBLIC INTEREST

- 3.1 Under **section 26(1)(c) and 26(2)**, the Ombudsman can authorise or require release of any information obtained about a complaint to any other body, if of the opinion that it is in the public interest to do so. Such bodies might include the media, an NGO or the private sector.
- 3.2 Whilst disclosure of the fact that a complaint has been received needs to be considered by the Ombudsman in the circumstances of each matter, it might be the case that there is a public interest in clarifying to the media and/or the broader community that a complaint has been received, and in indicating whether it is under investigation or not.

### 4. RELEASING INFORMATION OBTAINED DURING AN INVESTIGATION

- 4.1 When considering whether to release information obtained during an investigation, each situation needs to be considered on its merits. In each case, the broader public interest factors which support disclosure need to be assessed against those factors which support maintenance of confidentiality and the need to conduct the investigation in private (section 18(2) Ombudsman Act).
- 4.2 It is necessary for sufficient information to be disclosed to the parties to a complaint to ensure that they are able to participate effectively and fairly in an investigation.
- 4.3 In the normal course, copies of each party's submissions are not provided to the other; and a party's natural justice entitlement will extend only to an opportunity to respond to a provisional finding. However, there are some circumstances where natural justice requirements might demand otherwise.
- 4.4 Section 18(2) of the Ombudsman Act requires that investigations be conducted in private. It will usually be the case that the public interest requires that information obtained in the course of an investigation should not be disclosed other than to the parties to the investigation.

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- 4.5 Ombudsman SA will normally seek to ensure that the contents of any letters or reports relating to the investigation are kept confidential, for the following reasons:
- to protect the integrity of the investigation
  - to ensure that natural justice can be provided to the parties
  - a party to the investigation may have requested confidentiality, and there may be reasons for this to occur
  - for privacy reasons.

## 5. IMPOSING CONFIDENTIALITY ON OTHERS

- 5.1 **Section 26(4)** of the Ombudsman Act provides:

(4) Information that has been disclosed under this section for a particular purpose must not be used for any other purpose by—

- (a) the person to whom the information was disclosed; or
- (b) any other person who gains access to the information (whether properly or improperly and whether directly or indirectly) as a result of that disclosure.

Maximum penalty: \$20 000.

- 5.2 This provision prevents a party, or another person to whom information has been disclosed, from using the information for a purpose other than that for which it was disclosed. For example, if information is disclosed to a party to enable them to participate in the investigation, the party must maintain the confidentiality of that information. To fail to do so may constitute an offence.
- 5.3 However, if information is released to the media, there is no further prohibition on publication because the purpose for which the information was released contemplates such publication.
- 5.4 It is important that Ombudsman SA staff advise people to whom information is disclosed about their obligations under section 26(4).

## 6. WHAT CAN THE PARTIES DO WITH OMBUDSMAN SA LETTERS OR REPORTS?

- 6.1 **Section 26(3)** of the Ombudsman Act provides:

(3) The Ombudsman may, if of the opinion that it is in the public interest to do so, cause a report on an investigation, or a statement about an investigation, or a decision not to investigate or to discontinue an investigation, to be published in such manner as the Ombudsman thinks fit.

- 6.2 In accordance with the confidentiality obligations set out above, documents produced by Ombudsman SA must normally be kept confidential whilst an investigation is underway.
- 6.3 However, in accordance with section 26(3), it is usually in the public interest to make publicly available, reports or investigation outcome documents when an investigation is completed (such as publishing on Ombudsman SA website or AustLII).

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- 6.4 When considering whether to publish a report of an investigation, or a statement about an investigation, each situation needs to be considered on its merits. In each case, the public interest factors which support publication need to be assessed against those factors which support maintenance of confidentiality.
- 6.5 In relation to specific types of documents, the following policy will apply, unless in the particular circumstances of the matter:
- the law (e.g. the Whistleblowers Protection Act, or a specific confidentiality provision in another relevant Act) requires otherwise
  - privacy considerations require otherwise
  - the Ombudsman directs otherwise.

#### Section 17(2)(d) letters

- in accordance with the above policy, recipients of section 17(2)(d) letters will not normally be required to keep the contents confidential after the investigation or enquiry is complete e.g. after the expiration of the period within which a complainant must respond to a provisional decision that further investigation is unnecessary or unjustifiable.

#### Provisional reports

- recipients of a provisional report are required to keep the contents confidential
- confidentiality is required to facilitate procedural fairness.

#### Preliminary investigation - final report

- recipients of a final report of a preliminary investigation will **not** normally be required to keep the contents confidential. This is because the investigation is concluded.

#### Full investigation - final report

- recipients of a final report of a full investigation will **not** normally be required to keep the contents confidential. This is because the investigation is concluded.
- the final report of a full investigation may be published by the Ombudsman (section 26(3) Ombudsman Act).

Where a document is provided to a council, it is a matter for the council to determine how it deals with it. If Ombudsman SA has required confidentiality for a document which is to be considered by the full council, this will normally require a council to treat it as confidential under section 90(3)(g) of the Local Government Act.

Where the Ombudsman has investigated a council member's conduct under the Local Government Act, a council is obliged to table the final report.

## 7. DISCLOSURE OF PRIVILEGED DOCUMENTS AND CABINET DOCUMENTS TO OMBUDSMAN SA

### 7.1 Is an agency entitled to privilege from producing documents or giving evidence?

Section 20 of the Ombudsman Act provides that the Crown or an agency to which the Act applies cannot claim privilege to prevent information from being produced or evidence being given to the Ombudsman. This includes legal advice from the Crown Solicitor's Office, and private legal advice provided to councils.

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## 7.2 Cabinet proceedings

Section 21 of the Ombudsman Act provides that Cabinet proceedings and documents are protected; and no person is required to furnish any information, answer any questions or produce any documents that relate to proceedings of Cabinet or any committee of Cabinet. However, this provision does not apply in relation to an FOI external review (see section 39(6) FOI Act).

## 8. CONFIDENTIALITY and ICAC Act

**Unless specifically authorised, Ombudsman SA cannot 'publish' or 'cause to be published' the following information under the ICAC Act:**

- information tending to suggest a person is, has been, may be or may have been the subject of a complaint, report, assessment, investigation or referral under the ICAC Act
- information that might enable a person who has made a complaint or report to be identified or located
- the fact that a person has made or may be about to make a complaint or report under the ICAC Act
- information that might enable a person who has given or may be about to give information or other evidence under the ICAC Act to be identified or located
- the fact that a person has given or may be about to give evidence under the ICAC Act.

Certain authorisations have been given to the Ombudsman and staff in relation to investigations conducted as a result of a referral by the Commissioner pursuant to section 24(2) of the ICAC Act. These investigations are conducted within the ICAC framework, and the confidentiality provisions in the Ombudsman Act are not applicable. Regard must be had to the Commissioner's directions and guidance under the ICAC Act. Refer Admin Resolve File AF2013/000042 Office for Public Integrity/Independent Commissioner Against Corruption, Letter from Hon Bruce Lander QC dated 4 April 2014.

Refer PART 6.

## 9. WHISTLEBLOWERS PROTECTION ACT

### 9.1 A whistleblower's identity must not be disclosed

The identity of a whistleblower must not be divulged without their consent, except in order to enable a proper investigation of the particular information in the disclosure (section 7(1) Whistleblowers Protection Act).

The obligation to maintain confidentiality imposed by this section 7(1) applies despite any other statutory provision, or common law rule, to the contrary (section 7(2)).

In other words, the only circumstances in which a whistleblower's identity may be disclosed are:

- if consent has been given, or
- if disclosure is necessary to ensure that the matters to which the information relates are properly investigated.

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The identity of the person who has made the public interest disclosure is to be safeguarded to the maximum extent possible.

**9.2 Disclosing a whistleblower's identity if it is necessary to ensure that the matters to which the information relates are properly investigated**

- The need to disclose a whistleblower's identity in an investigation will depend on the facts of the case and the allegations made, and whether the whistleblower's identity is pivotal to ensuring that the complaint is thoroughly investigated.
- Disclosure of a whistleblower's identity may not be necessary to ensure that the matters to which the information relates are properly investigated. For example, it may be possible in a council investigation to refer to a 'ratepayer' of the council rather than using the whistleblower's name. Refer PART 2.