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This document is intended as a general guide to the *Public Interest Disclosure Act 2003* (WA) ("the Act") for the purposes of informing members of the public who may be considering making a public interest disclosure to the department. The document should not be taken as legal advice. Those considering making a public interest disclosure should give consideration to seeking independent legal advice prior to making a public interest disclosure, for further information about the protections provided under the Act for people who make disclosures, the circumstances in which those protections can be forfeited, requirements in relation to the confidentiality of disclosers and the subjects of disclosures, and offences in relation to the breaching of confidentiality.

A. Overview of Making a Public Interest Disclosure

A1. About the Act

The *Public Interest Disclosure Act 2003* (WA) facilitates the disclosure of public interest information, and provides protection for those making such disclosures and those who are the subject of disclosures. The Act provides a system for the matters disclosed to be investigated and for appropriate action to be taken.

A public interest disclosure is made when a person discloses to a proper authority information that tends to show past, present or proposed future improper conduct by a public body in the exercise of public functions. In order to be a disclosure to which the Act applies, a disclosure must be:

- made by an discloser who believes on reasonable grounds that the information is or may be true
- a disclosure of public interest information
- made to the appropriate proper authority.

The Act does not confer additional powers on public authorities to investigate or take action in relation to public interest disclosures. Rather, it provides for protection to persons who make disclosures that may result in a proper authority exercising its existing powers to investigate and take action in relation to the subject matter of the disclosure.

While the Act provides for the protection of all public interest disclosures, not every proper authority will have the obligation or power to investigate and take action in relation to the disclosure. In some cases the discloser or information may need to be referred to another proper authority to enable an effective response to the disclosure to be made. In some circumstances the Act requires a public authority to investigate a matter and to notify the person making the disclosure of the action taken.

The Act only confers protection where a disclosure is made to an appropriate proper authority. The identity of the appropriate proper authority will vary according to the kind of information to be disclosed.

When an appropriate disclosure of public interest information is made to a proper authority, the Act:

- protects the person making the disclosure from legal or other action
- provides for the confidentiality of the identity of the person making the disclosure and a person who is the subject of a disclosure
- provides remedies for acts of reprisal and victimisation that occur substantially because the person has made a disclosure.

The Act also provides penalties for disclosing the identity of those persons about whom public interest disclosures are made, as well as emphasising the need for those persons to be accorded natural justice or procedural fairness.

B. Making, Receiving and Assessing a Public Interest Disclosure

B1. Who can make a disclosure?

Any person may make a disclosure of public interest information. While public officers may make disclosures of public interest information, the Act also allows for members of the public to make these disclosures. A person making a public interest disclosure can be called a discloser. The discloser does not necessarily need to be able to identify any person whom the disclosure concerns.

A person making a public interest disclosure must believe, on reasonable grounds, that the information disclosed is true or may be true. A person making a disclosure purporting to be a disclosure of public interest information commits an offence where they:

- know the information to be false or misleading in a material particular
- are reckless about whether the information is false or misleading in a material particular.

A public interest disclosure must be made to the department on the prescribed form, available on the department's internet site or by contacting the department directly. Before making a disclosure it is important that you are aware of the rights and responsibilities imposed on disclosers and others under the Act. Three issues are worth highlighting:

- it is an offence to make a disclosure if you know, or are reckless about, it being false and misleading
- with some exceptions, the public authority will investigate your information and in doing so you will be expected to cooperate
- you will have to keep your information confidential - or else you may lose protection under the Act and may commit an offence under the Act

Making a disclosure is a serious matter and needs to be fully considered. It is important that you give careful thought to:

- whether you have reasonable grounds to believe the information you are thinking of disclosing is or may be true
- whether you think it is important for the disclosure to be made because it is in the public interest? The information should not be tied to any personal agenda
- whether you have sought proper advice
- whether you fully understand your responsibilities under the Act if you make a disclosure.

B2. What is public interest information?

The Act only applies to disclosures of public interest information. Public interest information must meet a number of criteria. It must:

- relate to a public authority, public officer or public sector contractor (“a public body”)
- relate to the performance of a public function of the public body
- tend to show that the public body is, has been, or proposes to be, involved in improper conduct.

Not all disclosures about government can be classified as public interest disclosures that are protected by the Act. In order to be a disclosure to which the Act applies, a disclosure must be:

- made by an discloser who believes on reasonable grounds that the information is or may be true
- a disclosure of public interest information
- made to the appropriate proper authority.

B3. Who are the public bodies to which public interest information must relate?

The following are public authorities to which public interest information may relate:

- a department in the public service
- an agency within the public sector
- a local government or regional local government
- a body established under State law for a public purpose. (e.g. public universities, port authorities government boards etc.)
- bodies established by the Governor or a minister.

The following are public officers to whom public interest information may relate:

- Ministers, Parliamentary Secretaries and Members of Parliament
- judicial officers
- police officers
- officers such as a bailiff serving or executing the process of a court or tribunal for remuneration
- public service officers
- members, officers and employees of public authorities
- holders of offices under the State and offices established by the Governor or a minister
- officers of the Commonwealth exercising a function on behalf of the State.

The Act does not apply to information relating to Commonwealth Government bodies, apart from officers of the Commonwealth exercising functions for the State under State law.

Public sector contractors to whom public interest information may relate are contractors engaged by public authorities for the supply of goods and services or the performance of public functions.

B4. What is a public function to which public interest information must relate?

The Act does not apply to the disclosure of information concerning improper conduct, unless the conduct relates to the performance of the functions of the public authority, public officer or public sector contractor. So, for example, the Act would not apply to information that an employee of a department had engaged in criminal behaviour unconnected with their employment.

B5. What is improper conduct to which public interest information must relate?

Public interest information must tend to show the involvement of a public body in:

- improper conduct
- an offence against State law
- a substantial unauthorised or irregular use of public resources
- a substantial mismanagement of public resources
- conduct involving a substantial and specific risk of injury to public health, prejudice to public safety or harm to the environment
- conduct relating to matters of administration affecting someone in their personal capacity falling within the jurisdiction of the Ombudsman.

A public authority can receive many different types of complaints. These can range from workplace disputes, through harassment, bullying or occupational health concerns, to allegations of improper conduct or corruption. Not all of these disclosures will be of public interest information to which the

Act will apply. For example, the chart below identifies some of the differences between a grievance to which the Act would not apply and a public interest disclosure.

Grievance	Public Interest Disclosure
Aims to resolve a complaint or dispute	Does not aim to resolve a grievance or dispute
Aims to deal with the complaint as close to the source as possible, i.e. to resolve differences directly between the parties concerned	This principle is not relevant to the handling of a public interest disclosure
Usually a dispute between an employee and management, or between two parties	More than a dispute between two parties - relates to a matter of public interest
A complainant generally 'owns' the complaint and can withdraw it at any stage	The discloser doesn't 'own' the disclosure once it has been made and cannot withdraw it
Generally can be resolved by agreement between the parties	The aim is not to resolve the issue between two or more parties

B6. To whom must a public interest disclosure be made?

A disclosure will only be a public interest disclosure if it is made to the appropriate proper authority. Depending on the nature of the disclosure, the identity of the appropriate proper authority will vary. It is important that the disclosure be made to the appropriate proper authority as disclosures to other persons will not be protected.

The Act only applies to disclosures made to an appropriate proper authority. Disclosures to a journalist, the media or other persons who are not specified as proper authorities are not protected by the Act. A public interest disclosure may be made internally to the public authority concerned or, in appropriate cases, externally to the proper authorities named in the Act. The named proper authorities are listed in the following chart.

Generally, disclosures about a public authority or its officers or contractors should be made to the Public Interest Disclosure Officer (PID Officer) of the public authority concerned. The Act requires that each public authority specify a position the holder of which is the PID Officer responsible for receiving disclosures of public interest information.

The PID Officer of a public authority is the proper authority for the disclosure of information relating to a matter falling within the sphere of responsibility of that public authority. The PID Officer should become familiar with procedures. Importantly, the PID Officer has a responsibility to keep up to date with all information made available by the Commissioner for Public Sector Standards. The PID Officer must also comply with the Code of Conduct and Integrity made under the Act.

In some cases a public interest disclosure may be made to an external named proper authority. The authority to which a disclosure ought to be made will vary according to the nature of the information disclosed. The chart below identifies the appropriate proper authority for each type of disclosure.

Proper Authorities for Receiving Disclosures of Public Interest Information

When the disclosure relates to...	the proper authority is...
The sphere of responsibility of a public authority (matters about the public authority or its officers, or which the public authority has the function of investigating)	The Public Interest Disclosure Officer (PID Officer) of the public authority
Offences under State law	A police officer or the Corruption and Crime Commission
Substantial unauthorised or irregular use of, or substantial mismanagement of, public resources	The PID Officer of the public authority concerned, or the Auditor General
Matters of administration affecting someone in their personal capacity falling within the jurisdiction of the Ombudsman	The PID Officer of the public authority concerned or the Ombudsman
A police officer	The Commissioner of Police or the Corruption and Crime Commission
A Member of the Legislative Council	The President of the Legislative Council
A Member of the Legislative Assembly	The Speaker of the Legislative Assembly
A judicial officer	The Chief Justice
A public officer who is not a member of Parliament, a Minister, a Judicial Officer or a Commissioned or other officer specified in schedule 1 of the <i>Parliamentary Commissioner Act 1971</i> (WA)	The PID Officer of the public authority concerned, the Ombudsman or the Commissioner for Public Sector Standards
A person or a matter of a prescribed class	A person declared by the regulations to be a proper authority

Important Note: In addition, the information disclosed must be public interest information as defined in the Act. Not all proper authorities to which a disclosure may be made will be required or have the power to investigate the information disclosed. It may be necessary for the discloser or information to be referred to another proper authority with power to investigate the information.

B7. Can a disclosure of public interest information be made to more than one proper authority?

Yes - the Act refers to a disclosure being made to more than one proper authority. In such a case the protection and obligations created by the Act will apply to each of the disclosures.

A public authority may not have to investigate a matter raised by a public interest disclosure where it considers that the matter is being or has been adequately investigated by another person to

whom a disclosure under the Act has been made. In some cases the proper authority to which the disclosure is made may refer the matter to some other person having power to investigate the matter.

In general, a disclosure about a public authority or its officers or contractors, or a disclosure falling within the sphere of responsibility of a public authority should, in the first instance, be made to the public authority concerned.

B8. Is there a time limit on a disclosure?

A disclosure may relate to matters that occurred before the commencement of the Act. There is no time limit to the retrospectivity of a disclosure. However, a claim cannot be made in relation to victimisation that occurred prior to the Act coming into effect on 1 July 2003.

B9. Can information protected by legal professional privilege be disclosed?

The Act does not protect disclosures of information protected by legal professional privilege. Legal professional privilege protects confidential communications between public authorities and their legal advisers, and associated documents. This protection exists where the communication was made or document was created for the dominant purpose of:

- obtaining or giving legal advice
- with reference to current or contemplated litigation.

C. Dealing with Public Interest Disclosures

C1. Must a public interest disclosure be investigated?

A proper authority is not obliged to investigate every public interest disclosure made to it. Generally, a proper authority must investigate information disclosed under the Act where:

- the disclosure relates to the proper authority, its officers or contractors
- the disclosure relates to a matter or person that the proper authority has a function or power to investigate.

A proper authority may refuse to investigate, or discontinue an investigation, where it considers that:

- the matter is trivial
- the disclosure is vexatious or frivolous
- there is no reasonable prospect of obtaining sufficient evidence due to the time that has elapsed since the occurrence of the matter
- the matter is being or has been adequately or properly investigated by another proper authority to which an appropriate disclosure of public interest information has been made.

The obligations in relation to investigations do not apply to the Corruption and Crime Commission or the Ombudsman where they have functions in relation to the disclosure under their own legislation. These provisions are made in the legislation.

The Act does not give proper authorities investigative powers that they do not otherwise have. The proper authority must look to the other legislation which they operate under for their investigative powers. Where a proper authority lacks sufficient power to effectively investigate the matter, but the information received causes the proper authority to form the opinion that a public body has engaged in improper conduct, the proper authority may need to refer the matter to another investigative body.

C2. What action must a proper authority take following an investigation?

A proper authority is only required to take action following an investigation if it forms the view that a person may be, may have been, or may in the future be, involved in improper conduct to which the Act applies. If the proper authority does not form that view after undertaking the investigation that is within its power, it is not required to take further action other than reporting to the discloser and recording the outcome.

If the proper authority forms the view that a person may be, may have been, or may in the future be, involved in improper conduct to which the Act applies, then it will be required to take action in relation to the matter. In taking that action the proper authority remains limited by the powers and functions that are conferred by the legislation under which the authority operates. The Act does not give the proper authority additional powers to take action.

As well as being limited to matters within the functions and powers of the proper authority, the action to be taken is guided by what is necessary and reasonable. Having regard to those matters, the proper authority must take action to:

- prevent the matter to which the disclosure relates from continuing or occurring in future
- refer the matter to the Commissioner of Police or another person, body, or organisation having power to investigate the matter, or
- take disciplinary action or commence or enable disciplinary proceedings to be commenced against a person responsible for the matter.

These options are not mutually exclusive, and a proper authority may take more than one of the indicated steps: for example, to seek to terminate the employment of an officer caught stealing and refer the matter to the police. Before taking preventative or disciplinary action the proper authority is to afford any person against whom, or in respect of whom, the action is to be taken the opportunity to make a submission, either orally or in writing, in relation to the matter.

The above obligations to take action do not apply to the Corruption and Crime Commission or the Ombudsman where they have functions in relation to the disclosure under their own legislation. Provision relating to their actions after investigation is made in their legislation.

C3. Is the discloser given details of the investigation and action taken?

Where a proper authority refuses to investigate information disclosed under the Act, or discontinues an investigation, it must give the discloser reasons for doing so.

Within three months after a public interest disclosure is made the proper authority must notify the discloser of the action taken or proposed to be taken, in relation to the disclosure. A discloser may also request a progress report. If an investigation is not complete, the proper authority may provide a progress report on the current status of the investigation to the discloser. If an investigation is complete, the proper authority must provide a final report to the discloser stating the outcome of the investigation and the reason for taking action following the investigation.

In providing information and reports to disclosers, a proper authority must not give information that, in its opinion, would be likely to adversely affect:

- any person's safety
- the investigation of an offence or possible offence
- necessary confidentiality about the existence or identity of another person who has made a disclosure of public interest information under the Act.

The obligations to report do not apply to the Corruption and Crime Commission or the Ombudsman where they have functions in relation to the public interest disclosure under their own legislation.

C4. Can a discloser withdraw a public interest disclosure?

No. Once a disclosure of public interest information is made, a proper authority is required to investigate it and take action regardless of the subsequent attitude of the discloser. In addition, an discloser may forfeit the protection given by the Act if they fail, without reasonable excuse, to assist a person investigating the matter to which the information relates by supplying any information requested, unless a court otherwise orders.

C5. What if a discloser does not agree with the action taken by the proper authority?

The Act does not provide for any right of appeal against decisions of an appropriate authority as to investigations and subsequent action. If a discloser is dissatisfied with a decision made by a proper authority, they may make a further disclosure of the information to another proper authority. For example, where a discloser is dissatisfied with the response to a public interest disclosure about a matter of administration made to a PID Officer of a department, the discloser may disclose the information to the Ombudsman.

However, a proper authority to which a subsequent disclosure is made need not investigate the matter if it considers the matter has been adequately or properly investigated by another proper authority. In deciding whether this is the case, the second proper authority may need to contact the authority that has already dealt, or is already dealing, with the information in relation to its investigation.

D. Confidentiality and Protection for Disclosers

D1. What protection does the act provide to disclosers?

The Act offers protection to disclosers by:

- providing for immunity from legal or other action in relation to the disclosure
- providing for an offence of reprisal
- providing for civil remedies for acts of victimisation
- providing for confidentiality of the identity of the discloser, subject to exceptions
- requiring public authorities to provide protection from detrimental action for disclosers who are their employees.

D2. What immunity do disclosers have?

Making an appropriate disclosure of public interest information to a proper authority does not result in a discloser:

- incurring any civil or criminal liability
- being liable to any disciplinary action under State law
- being liable to be dismissed or have his or her services dispensed with or otherwise terminated
- being liable for any breach of a duty of secrecy or confidentiality or any other applicable restriction on disclosure.

D3. Is it an offence to take reprisals against a discloser?

Yes. A person must not take, or threaten to take, detrimental action against another because someone has made, or intends to make, a disclosure under the Act. This is the offence of reprisal. Detrimental action for these purposes includes action causing:

- injury, damage, or loss
- intimidation or harassment
- adverse discrimination, disadvantage, or adverse treatment in relation to a person's career, profession, employment, trade, or business
- a reprisal.

A person who attempts to commit the offence of reprisal, or incites another to commit that offence, is also guilty of this offence. The maximum penalty for the offence of reprisal is a fine of \$24,000 or imprisonment for two years.

D4. What remedies does a discloser have against victimisation?

A person who takes or threatens to take detrimental action against another because someone has made, or intends to make, a disclosure of public interest information commits an act of victimisation. A person who is subject to detrimental action may either take civil proceedings for damages or make a complaint under the Equal Opportunity Act 1984. Instituting one of these alternative avenues of relief extinguishes the other.

Civil proceedings may be taken against either the perpetrator of the act of victimisation or any employer of the perpetrator. For example, the employer of the perpetrator may be:

- the State, in the case of public service officers
- the public authority which employs the perpetrator
- a public sector contractor whose employees engage in victimisation.

However, an employer may have a defence to civil proceedings for damages where it proves that it:

- was not knowingly involved in the act of victimisation
- did not know and could not reasonably be expected to have known about the act of victimisation, and
- could not, by the exercise of reasonable care, have prevented the act of victimisation.

D5. Is a discloser's identity to be kept confidential?

Generally, a person must not make a disclosure of information that might identify or tend to identify anyone as a person who has made an appropriate disclosure of public interest information under the Act. This prohibition against disclosure applies both to disclosures that identify a discloser and disclosures that might tend to identify an discloser. For example, to disclose that a young woman in a small accounts section has made a public interest disclosure about irregularities she has detected in the accounts of a particular public authority might tend to identify the discloser, even though she is not named.

Exceptions arise where the disclosure of an discloser's identity:

- is made with the discloser's consent
- is made in accordance with section 152 or 153 of the *Corruption and Crime Commission Act 2003 (WA)*
- is necessary, having regard to the rules of natural justice (see Section E2 in relation to the rules of natural justice)
- is necessary to enable the matter to be investigated effectively.

In the case of the last two bullet points, the person making the disclosure must take all reasonable steps to inform the person whose identity is to be disclosed:

- that the disclosure is being made
- the reasons for the disclosure being made.

Those steps to inform the person must be taken a reasonable time before the identifying disclosure is made. A breach of these confidentiality requirements is an offence punishable with a penalty of \$24,000 or imprisonment for two years.

D6. Is the identity of a person about whom a disclosure is made to be kept confidential?

The protection that the Act gives to the discloser is largely mirrored in the protection offered to a person to whom disclosed public interest information relates. A person must not make a disclosure of information that might identify or tend to identify anyone as a person in respect of whom a disclosure of public interest information has been made under the Act. Exceptions arise where:

- the disclosure is made with the consent of that person
- the disclosure is made in accordance with section 152 or 153 of the *Corruption and Crime Commission Act 2003* (WA)
- the disclosure is necessary to enable the matter to be investigated effectively
- the disclosure is necessary in the course of taking action following the investigation
- there are reasonable grounds to believe that the disclosure of identifying information is necessary to prevent or minimise the risk of injury to any person or damage to any property.

A breach of these confidentiality requirements is an offence punishable with a penalty of \$24,000 or imprisonment for two years.

D7. Is natural justice owed to subjects?

The Act requires that natural justice, or procedural fairness, be accorded to those who may be the subject of a public interest disclosure. An exception to the obligation to keep identifying information confidential arises where, having regard to the rules of natural justice, disclosing identifying information is necessary.

The precise requirements of the rules of natural justice will vary according to the circumstances, however will generally include a requirement that before disciplinary or other action is taken against them, or adverse findings are made against them, those subject to a disclosure be given the opportunity to:

- be informed of the substance of the allegations
- make a submission, either orally or in writing, in relation to the matter.

E. Further information

Public Interest Disclosure Officers in Department of Education Services

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Phone: (08) 9441 1900
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For advice about the Code of Ethics and Public Sector Standards

Office of the Public Sector Standards Commissioner
Phone: (08) 9260 6600
Fax: (08) 9260 6611
Email: pscc@opssc.wa.gov.au
Website: www.opssc.wa.gov.au

For advice about misconduct and corruption

Corruption and Crime Commission

Phone: (08) 9215 4888

Outside metro: 1800 809 000

Fax: (08) 9215 4884

Email: info@ccc.wa.gov.au

Website: www.ccc.wa.gov.au

For advice on public authorities' accountability and performance requirements

Office of the Auditor General

Phone: (08) 9222 7500

Fax: (08) 9322 5664

Email: info@audit.wa.gov.au

Website: www.audit.wa.gov.au

For advice on offences under a State law

WA Police

Phone: (08) 9223 1000

Fax: (08) 9223 1010

Website: www.police.wa.gov.au

For advice on matters of State and local government administration

WA Ombudsman

Phone: (08) 9220 7555

Outside metro: 1800 117 000

Fax: (08) 9325 1107

Email: mail@ombudsman.wa.gov.au

Website: www.ombudsman.wa.gov.au

For advice on remedies for acts of victimisation under the *Equal Opportunity Act 1984*

Equal Opportunity Commission

Phone: (08) 9216 3900

Fax: (08) 9216 3690

Website: www.equalopportunity.wa.gov.au

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