

Public Interest Disclosures Policy and Procedures January 2020

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Public Interest Disclosures Policy & Procedures

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PUBLIC INTEREST DISCLOSURE POLICY

1. STATEMENT OF SUPPORT TO DISCLOSERS

The Victorian Planning Authority (VPA) is a public body subject to the *Public Interest Disclosures Act 2012* (“Act”). The purpose of the Act is to encourage and facilitate the making of disclosures of improper conduct by public officers and public bodies, including the VPA, its staff, members and employees.

The VPA is committed to the aims and objectives of the Act. It does not tolerate improper conduct by the organisation, its employees, officers, members, nor the taking of reprisals against those who come forward to disclose such conduct.

The VPA recognises the value of transparency and accountability in its administrative and management practices, and supports the making of disclosures that reveal improper conduct. Potential disclosers should be aware that Public Interest Disclosures should be made directly to IBAC, not to the VPA.

The VPA will take all reasonable steps to protect people who make such disclosures from any detrimental action in reprisal for making the disclosure. It will also afford natural justice to the person or body who is the subject of the disclosure.

2. PURPOSE

This policy and procedures have been established under s 58 of the Act and in accordance with the IBAC Guidelines published under s 57 of the Act.

The procedures set out an integrity system for protected disclosure welfare management and education and training by the VPA or its employees, officers or members.

Any disclosures or detrimental action should be made to IBAC. Disclosures may be made by any individual, including employees or members of the public.

The processes contained in these procedures are designed to complement normal communication channels between supervisors and employees, the organisation and the community at large. Employees, officers and staff are encouraged to continue to raise appropriate matters at any time with their supervisors. Similarly, external individuals and members are likewise encouraged to raise matters of concern with the organisation at any time by contacting the relevant Executive Director or the Chief Executive Officer.

3. OBJECTS OF THE ACT

The Act commenced operation on 10 February 2013. The purpose of the Act is to encourage and facilitate the making of disclosures of improper conduct by public officers and public bodies.

Such disclosures may be made about any of the public officers or bodies as defined in s 3 of the Act and s 6 of the IBAC Act. They include:

- government departments;
- statutory authorities;

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- municipal councils
- government-appointed boards and committees;
- government-owned companies;
- universities and TAFEs;
- public hospitals;
- state-funded residential care services;
- employees, staff and members of public bodies such as the above;
- Councillors;
- Members of Parliament;
- Judicial officers;
- IBAC officers;
- police and protected service officers;
- teachers; and
- public servants.

The Act provides protection to persons affected by public interest disclosures, including the discloser, a witness or a person who is the subject of an investigation. It establishes a system for the matters disclosed to be considered, assessed by IBAC and further dealt with pursuant to IBAC's investigative and other powers and functions in accordance with the IBAC Act and the Act.

4. DEFINITIONS OF KEY TERMS

The two key concepts in the integrity system are improper conduct and detrimental action. Definitions of these terms are set out below.

IMPROPER CONDUCT

A disclosure may be made about improper conduct by a public body or public official. Improper conduct means:

- Corrupt conduct
- Criminal offence
- Serious professional misconduct (e.g. a serious breach of a professional code of conduct, or a serious failure to exhibit the skills and experience required to perform the functions of the office)
- Dishonest performance of public functions
- Intentional or reckless breach of public trust
- Intentional or reckless misuse of information
- Substantial mismanagement of public resources
- Substantial risk to health or safety of a person
- Substantial risk to the environment
- Conduct of any person that adversely affects the honest performance by a public officer of their functions (e.g. attempting to bribe a public officer)
- Conduct of any person that is intended to adversely affect the effective performance by a public officer of their functions for the benefit of the other person.

The term "mismanagement" is to be distinguished from "misuse"; the former is about poor or incorrect management whereas the latter is about wrong or improper use. As an example, in IBAC's view, using a government car for personal gain is a misuse rather than mismanagement.

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DETRIMENTAL ACTION

Under the Act, detrimental action may not be taken against a discloser in reprisal for a public interest disclosure. In addition, detrimental action may not be taken against other persons in relation to a public interest disclosure made under the Act.

Detrimental action includes:

- action causing injury, loss or damage;
- intimidation or harassment; and
- discrimination, disadvantage or adverse treatment in relation to a person's employment, career, profession, trade or business, including the taking of disciplinary action.

Examples of detrimental action prohibited by the Act include:

- the demotion, transfer, isolation or change in duties of a discloser due to him or her having made a disclosure;
- threatening, abusing or otherwise harassing (whether directly or indirectly) a discloser or the discloser's family or friends;
- discriminating against the discloser or the discloser's family and associates in subsequent applications for promotions, jobs, permits or tenders because the discloser made a disclosure under the Act.

Further information about detrimental action is provided later in these procedures.

5. WHAT CAN DISCLOSURES BE MADE ABOUT?

Disclosures may be made about "improper conduct" on the part of a public body or its staff, employees and members. Disclosures may also be made about "detrimental action" taken (or suspected may be taken) in reprisal or in connection with a disclosure made about improper conduct. The conduct or action being disclosed may have taken place, still be occurring, or is believed will occur or be engaged in.

For more information about the definition of terms, see the Independent Broad-based Anti-corruption Commission ("IBAC") website www.ibac.vic.gov.au.

If the VPA believes a disclosure may be a protected disclosure made in accordance with the Act, it will refer the person to notify the disclosure to the Independent Broad-based Anti-corruption Commission for assessment. The IBAC will then deal with the disclosure.

6. WHO CAN MAKE A DISCLOSURE?

Any individual natural person (e.g., not a group, organisation or company) may make a disclosure under the Act. The individual could be a person within the organisation, or any member of the public externally.

Disclosures may be made in a number of ways set out in the Act, including anonymously, in writing or orally. An individual need not identify the person or body about whom the disclosure is made.

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7. ROLES AND RESPONSIBILITIES

EMPLOYEES

Employees are encouraged to raise matters of concern in relation to the VPA, including about any person, staff, member, or employee of the VPA. In particular, employees are encouraged to report known or suspected incidences of improper conduct or detrimental action to IBAC in accordance with these procedures, whether such conduct or action has taken place, is suspected to take place, or is still occurring. If employees have concerns about matters that do not meet the definition of improper conduct in this policy, they are encouraged to raise these with the CEO, any Board member, the Executive Director Corporate Services or the Governance and Corporate Information Manager. However, it is noted that such disclosures are not subject to the protections in the *Public Interest Disclosures Act*.

All employees of VPA have an important role to play in supporting those who have made a legitimate disclosure in accordance with the Act (where known). All employees must refrain from any activity that is, or could be perceived to be, victimisation or harassment of a person who makes a disclosure. Furthermore, they should protect and maintain the confidentiality of a person they know or suspect to have made a disclosure.

CEO

The CEO is responsible for ensuring that the VPA has a strong corporate culture that encourages people to speak up about any matters of concern, and that disclosers (where known) are appropriately protected and not subject to detrimental action. The CEO is also obliged to notify IBAC if they have reasonable grounds to suspect that corruption is occurring or has occurred at the VPA.

EXECUTIVE DIRECTOR CORPORATE SERVICES

The Executive Director Corporate Services is:

- the contact point for general advice about the operation of the Act and for integrity agencies such as IBAC;
- responsible for ensuring that VPA carries out its responsibilities under the Act or any regulations and any IBAC guidelines;
- the VPA's chief liaison with IBAC;
- to take all necessary steps to ensure that if any information received or obtained in connection with a disclosure, including the identities of the discloser and the person(s) to whom the disclosure relate, are kept secured, private and confidential at all times;
- responsible for arranging any necessary and appropriate welfare support for the discloser (if known), including appointing a Welfare Manager to support the discloser and to protect him or her from any reprisals;
- to provide an educative role and arrange appropriate training for staff;
- to establish and manage a confidential filing system;
- to collate any relevant statistics; and
- to liaise with the Chief Executive Officer and the Chair of the VPA.

WELFARE MANAGER

The Welfare Manager is responsible for looking after the general welfare of a discloser of a public interest disclosure. The Welfare Manager will:

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- meet with the person making the public interest disclosure, where this is appropriate, to support that person.
- examine the immediate welfare and protection needs of a discloser who has made a disclosure and seek to foster a supportive work environment.
- advise the discloser of the legislative and administrative protections available to them.
- listen and respond to any concerns of harassment, intimidation or victimisation in reprisal for making a disclosure.
- ensure the expectations of the discloser are realistic.
- take any possible actions to ensure that the discloser is protected from detrimental action as required.
- where the person making the public interest disclosure consents and it is appropriate in the circumstances, meet with their supervisor to ensure any detrimental action is monitored, recorded and reported.
- ensure that the person making the public interest disclosure understands the protection provided by the VPA against detrimental action, and the courses of action available where detrimental action is found to have occurred. This may include a discussion as to a possible transfer of employment in accordance with the Act.
- Ensure that confidentiality is maintained.

8. CONFIDENTIALITY

GENERAL OBLIGATION OF CONFIDENTIALITY ON THE VPA AND ALL INDIVIDUALS

The VPA takes its confidentiality obligations under the Act seriously. This includes the requirement to protect the identity of the discloser and the matters disclosed by a discloser. It is a criminal offence under the Act to disclose information connected with a disclosure made in accordance with the Act, including the identity of the discloser.

The VPA will take all reasonable steps to protect the identity of the discloser (if known) and the matters disclosed by a discloser. Maintaining confidentiality in relation to protected disclosure matters is crucial, among other things, in ensuring reprisals are not made against a discloser.

The obligation of confidentiality extends to any person making a disclosure. It is in the interest of the discloser to ensure that they do not discuss any related matters other than with authorised persons.

STEPS TAKEN BY THE VPA TO ENSURE CONFIDENTIALITY

Information management

The VPA will ensure all files, whether paper or electronic, are kept securely. Those files will be accessible only by officers who are permitted to access them under the Act. Where necessary, a Welfare Manager may be able to gain access (where appropriate) to related welfare matters.

Exemption - Freedom of Information Act 1982 (“FOI Act”)

Section 78 of the Act excludes the application of the FOI Act to any disclosure related information, including any information that is likely to lead to the identification of a discloser. The relevant staff must ensure that is clearly marked on any relevant information.

LIMITED EXCEPTIONS PERMITTED BY THE ACT

The Act makes it a crime to disclose information connected with a disclosure made in accordance with the Act. There are limited exceptions that enable the discloser to share information with specified categories of persons where necessary to:

- Seek legal advice

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- Seek help from a health practitioner
- Seek help from a trade union
- Make a compensation claim to WorkCover.

It is important to note that the Act prohibits the inclusion of any details, in any report or recommendation that is likely to lead to the identification of a discloser. The Act also prohibits the identification of the person who is the subject of the disclosure in any particulars included in an annual report or any reports to Parliament.

PENALTIES APPLY FOR BREACH OF CONFIDENTIALITY

The penalties for breaching the confidentiality required by the Act include imprisonment, financial payments or both.

9. TRAINING FOR ALL STAFF

The VPA will:

- ensure that staff, employees, officers and members have access to a copy of these procedures in hard or soft copy;
- incorporate into its induction procedures training about the VPA's general obligations under the Act and the rights and obligations of all employees, staff and members;
- periodically provide refresher courses for existing staff, employees and members about their rights and obligations under the Act;
- provide additional training and assistance to:
 - any staff with functions and duties under the FOI Act or with responsibilities for information management, to ensure that no prohibited information is disclosed under the Act and to ensure there is appropriate liaising with IBAC staff or other investigative agencies where required in response to a request for access under the FOI Act; and
 - all staff and employees dealing with customers to ensure any potential disclosures received from external sources can be handled appropriately in accordance with the Act and these procedures.

10. COLLATING & PUBLISHING ANNUAL REPORT INFORMATION

The VPA is required to publish certain information about the Act in its annual reports. That information relates mainly to how these procedures may be accessed and information about its educative role during the financial year.

The Executive Director Corporate Services will establish a secure register to record such information.

11. WHO TO MAKE A DISCLOSURE TO

Public Interest Disclosures regarding the VPA should be made to IBAC in the first instance.

IBAC (Independent Broad-based Anti-Corruption Commission) Victoria

Details on how to make a disclosure can be found at the IBAC website by following this link:

<http://www.ibac.vic.gov.au>

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Victorian Ombudsman

Details on how to make a disclosure can be found at the Victorian Ombudsman website by following this link:

<http://www.ombudsman.vic.gov.au>

Disclosures about other public bodies or public officers

Disclosures relating to improper conduct or detrimental action involving other public bodies or officers who are not employees, staff or members of the VPA may be made to the various bodies – see the IBAC website & IBAC Guidelines for details.

ASSESSMENT BY IBAC

Once a disclosure has been notified to IBAC, IBAC will determine whether it is a public interest disclosure complaint. Such a determination must be made within a reasonable time after the disclosure is notified to IBAC.

If IBAC determines the disclosure is a public interest disclosure complaint

If the IBAC determines the disclosure is a public interest disclosure complaint, the IBAC must advise the discloser in writing and within a reasonable time after the determination is made, that:

- the IBAC has determined that the disclosure is a public interest disclosure complaint;
- regardless of the determination, the protections available to a discloser of a public interest disclosure under Part 6 of the Act apply;
- the discloser has rights, protections and obligations under the Act as contained in ss 72, 74 and Parts 6 and 7 of the Act, including an explanation of the effect of those sections and Parts of the Act; and
- it is an offence under s 74 of the Act to disclose that the IBAC has determined that the disclosure is a public interest disclosure complaint.

IBAC must deal with a public interest disclosure complaint in accordance with the IBAC Act. The IBAC Act details the IBAC's powers and functions, including investigating, dismissing or referring the public interest disclosure complaint to another investigative agency to be dealt with.

If IBAC determines the disclosure is not a public interest disclosure complaint

If IBAC determines the disclosure is not a public interest disclosure complaint, IBAC must advise the discloser in writing and within a reasonable time after the determination is made, that:

- IBAC has determined that the disclosure is not a public interest disclosure complaint; and
- as a consequence of that determination:
 - the disclosure will not be investigated as a public interest disclosure complaint; and
 - the confidentiality provisions under Part 7 of the Act no longer apply in relation to the disclosure; and
- regardless of whether IBAC has determined that the disclosure is a public interest disclosure complaint, the protections under Part 6 apply to a public interest disclosure.

In addition, if IBAC is of the view that the disclosure, although not a public interest disclosure complaint, may be able to be dealt with by another entity, IBAC may advise the discloser that:

- the matter which is the subject of the disclosure may be able to be dealt with by that entity other than as a public interest disclosure complaint; and
- if the discloser wishes to pursue the matter, to make a complaint directly to that entity.

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12. PREVENTING DETRIMENTAL ACTION

COMMITMENT TO PROTECTING DISCLOSERS

The VPA is committed to the protection of genuine disclosers against detrimental action taken in reprisal for the making of public interest disclosures. The Executive Director Corporate Services is responsible for ensuring disclosers (where known) are protected from direct and indirect detrimental action, and that the culture of the workplace and the VPA more broadly, is supportive of public interest disclosures being made.

The Executive Director Corporate Services may appoint a Welfare Manager to a discloser (where known to the VPA) if there is a risk of detrimental action or if this is necessary to ensure the discloser receives effective support. . The Welfare Manager will monitor the needs of the discloser and provide advice and support.

The protections to disclosers extend to both internal and external sources making a protected disclosure under the Act. For internal disclosers, the Welfare Manager will ensure a supportive work environment and respond appropriately to any reports of intimidation or harassment against the discloser. For external disclosers, the Welfare Manager will take reasonable steps to provide appropriate support. The Welfare Manager will discuss reasonable expectations with all disclosers.

PROHIBITION ON TAKING DETRIMENTAL ACTION IN REPRISAL FOR PUBLIC INTEREST DISCLOSURES

A person takes detrimental action against another person in reprisal for a public interest disclosure if:

- the person takes, or threatens to take, detrimental action against the other person because, or in the belief that:
 - the other person or anyone else has made, or intends to make, the disclosure; or
 - the other person or anyone else has cooperated, or intends to cooperate, with an investigation of the disclosure; or
- for either of the reasons above, the person incites or permits someone else to take or threaten to take detrimental action against the other person.

Protections available to disclosers

All persons are cautioned it is an offence for a person to take detrimental action in reprisal for a public interest disclosure. The penalties can be monetary or imprisonment.

The taking of detrimental action in breach of the Act can also be grounds for making a disclosure under the Act and can result in an investigation by the IBAC or another investigative entity authorised under this Act or the IBAC Act.

In addition, a discloser of a public interest disclosure may:

- take civil action against the person who took detrimental action against the discloser and seek damages;
- take civil action against the VPA jointly and severally to seek damages if the person who took detrimental action against the discloser took that action in the course of employment with, or while acting as an agent of the VPA and
- apply for an order or an injunction from the Supreme Court.

REPORTING DETRIMENTAL ACTION

If a discloser reports an incident of harassment, discrimination or adverse treatment that would amount to detrimental action taken in reprisal for the making of a disclosure, the Welfare Manager will:

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- record the details of the incident;
- advise the discloser of his or her rights under the Act; and
- inform, as soon as possible, the Executive Director Corporate Services and the Chief Executive Officer of the detrimental action.

The taking of detrimental action in reprisal for the making of a disclosure can be an offence under the Act as well as grounds for making a further disclosure. Where such detrimental action is reported, the Executive Director Corporate Services will advise the detrimental discloser to report the reprisal as a new disclosure under the Act, or will report this directly to IBAC.

Where the detrimental action is of a serious nature likely to amount to a criminal offence, consideration will be given to reporting the matter to the police or IBAC (if the matter was not already the subject of a disclosure notified to IBAC).

CONSEQUENCES FOR DISCLOSERS IMPLICATED IN IMPROPER CONDUCT, OR DISCIPLINARY MATTERS

Where a discloser is implicated in improper conduct, and the VPA has been advised of the situation, the VPA will protect the discloser from reprisals in accordance with the Act, the IBAC's guidelines and these procedures. The VPA acknowledges that the act of disclosing should not shield disclosers from the reasonable consequences flowing from any involvement in improper conduct.

The Act specifically provides that a person's liability for his or her own conduct is not affected by the person's disclosure of that conduct under the Act, and the Act provides that the discloser is not subject to criminal or civil liability for making the disclosure. However, in some circumstances, an admission may be a mitigating factor when considering disciplinary or other action.

The Chief Executive Officer will make the final decision on the advice of the Executive Director Corporate Services as to whether disciplinary or other action will be taken against a discloser. Where disciplinary or other action relates to conduct that is the subject of the disclosure, the disciplinary or other action will only be taken after the disclosed matter has been appropriately dealt with.

In all cases where disciplinary or other action is being contemplated, the Chief Executive Officer must be satisfied it has been clearly demonstrated that:

- the intention to proceed with disciplinary action is not causally connected to the making of the disclosure (as opposed to the content of the disclosure or other available information);
- there are good and sufficient grounds that would fully justify action against any non-discloser in the same circumstances; and
- there are good and sufficient grounds that justify exercising any discretion to institute disciplinary or other action.

The Executive Director Corporate Services will thoroughly document the process including recording the reasons why the disciplinary or other action is being taken, and the reasons why the action is not in retribution for the making of a disclosure. The Executive Director Corporate Services will advise the discloser clearly of the proposed action to be taken, and of any mitigating factors that have been taken into account.

In addition, the Act permits the VPA to take management action in relation to a discloser which may amount to detrimental action, only if the fact that the discloser made a public interest disclosure is not a reason for the taking of that management action.

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13. MANAGEMENT OF THE PERSON(S) AGAINST WHOM THE DISCLOSURE IS MADE

The VPA recognises that persons against whom disclosures are made must also be supported during the handling and investigation of disclosures. Where the VPA has been informed, the VPA will take all reasonable steps to ensure the confidentiality of the person who is the subject of the disclosure during investigation process.

Consistent with the VPA's confidentiality obligations under the Act as outlined in these procedures, the fact that a disclosure has been made, whether it has been notified to the IBAC for assessment, any information received from the IBAC or another investigative agency, the identities of persons involved will not be divulged.

The Executive Director Corporate Services will provide support and advice to a person the subject of a disclosure, particularly in relation to their rights and obligations under the Act, the VPA's internal recording system, these procedures, and any other relevant law or code of conduct.

The VPA will give its full support to a person who is the subject of a disclosure where the allegations contained in a disclosure are clearly wrong or unsubstantiated. If the matter has been publicly disclosed by the VPA, the Chief Executive Officer will consider any request by that person to issue a statement of support.

14. REVIEW

These procedures will be reviewed annually or upon significant change to the Act, the Regulations or the IBAC's guidelines to ensure they comply with the requirements of the Act, the Regulations and the IBAC's guidelines.