



**NSW Police Force**

**New South Wales  
Police Force**

# **Release of complaint investigation information**

**Professional Standards Command**

## Release of complaint investigation information

### Essential Summary

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This document has been prepared in response to the large volume of enquiries received from the field by the Professional Standards Command, the Office of the General Counsel and the Information Access & Subpoena Unit in relation to requests for release of complaint information. It provides information for all employees involved in managing complaint investigations or responding to requests for complaint information on the release of information to complainants and subject officers.

It also provides specific information for employees who may be required to give evidence before the NSW Civil & Administrative Tribunal (NCAT), where the NSW Police Force has refused access to information held in disciplinary investigation files, in response to an application under the *Government Information (Public Access) Act 2009* (GIPAA).

## Document Control Sheet

### *Document Properties*

<b>Title</b>	Release of complaint investigation information
<b>Subject</b>	Information on releasing information held in Part 8A investigation files and administrative officer disciplinary investigation files including responding to applications under the <i>Government Information (Public Access) Act 2009</i> for formal release
<b>Command responsible</b>	Professional Standards Command
<b>Authorisation</b>	Commander, Professional Standards Command
<b>Security Classification</b>	Official: Sensitive
<b>Publication date</b>	March 2016
<b>Current version number</b>	3
<b>Review date</b>	March 2017
<b>Document number</b>	
<b>Copyright statement</b>	Copyright of this document is vested in the Commissioner of Police. © 2015

### *Modification History*

Version #	Version approval date	Author/Position	Summary of changes
2	March 2016	Professional Standards Command	<ul style="list-style-type: none"> <li>Update Police Regulation 2008 to reflect change to Police Regulation 2015</li> <li>Transfer to corporate template</li> <li>Apply protective marking</li> </ul>
3	August 2017	Professional Standards Command	<ul style="list-style-type: none"> <li>Updates to reflect the introduction of the Law Enforcement Conduct Commission Act 2016 and changes to the Police Act 1990</li> </ul>
	11 January 2021	Professional Standards Command	<ul style="list-style-type: none"> <li>Update security classification</li> </ul>

## Table of Contents

<b>1.</b>	<b>Scope.....</b>	<b>5</b>
1.1	Background.....	5
<b>2.</b>	<b>Part 1 – providing information to a complainant.....</b>	<b>6</b>
2.1	Part 8A section 150 of the <i>Police Act 1990</i> .....	6
2.2	During the investigation process.....	6
2.3	Consulting with the complainant at the end of an investigation.....	6
2.4	Information not to be discussed/disclosed.....	7
2.5	Request for documents – informal release under GIPAA.....	7
<b>3.</b>	<b>Part 2 – Providing information to subject officers.....</b>	<b>8</b>
3.1	Release of information to subject officers.....	8
3.2	Information not covered by clause 49.....	10
3.3	Evidence based investigation reports where a sustained finding is contemplated.....	10
3.4	Resolution reports where a sustained finding has been made against the subject officer.....	10
3.5	Current investigations or caveated files.....	10
3.6	Investigation files where no sustained finding is made against the subject officer.....	10
<b>4.</b>	<b>Part 3 – Responding to GIPAA applications.....</b>	<b>11</b>
4.1	Role of the Information Access and Subpoena Unit.....	11
4.2	Corporate position on the confidentiality of the complaint process.....	11
4.3	Application on the NSW Civil & Administrative Tribunal for a review.....	11
4.4	Preparing a statement.....	12
4.5	Types of statements.....	13
<b>5.</b>	<b>Compliance requirements and internal controls.....</b>	<b>14</b>
5.1	What is the public interest test.....	14
5.2	Exclusions.....	15
5.3	Investigation files and personal information.....	15
5.4	Investigation files and consultation under section 54 of GIPAA.....	16
	<b>Appendix 1 – GIPAA Part 6 Division 1 Protections.....</b>	<b>17</b>
	<b>Appendix 2 – Example open statement of evidence.....</b>	<b>18</b>
	<b>Appendix 3 – Example confidential statement of evidence.....</b>	<b>24</b>

## 1. Scope

This document may be useful to any NSW Police Force employee involved in managing complaint investigations or responding to requests or GIPAA applications for release of complaint information. It is specifically useful for:

- region and specialist command professional standards managers (PSM)
- Professional Standards Command (PSC), staff working in the Investigations & Field Services directorate.

### 1.1 Background

There are four methods by which government agencies can release information:

- mandatory release
- proactive release
- informal release
- formal release.

The Government has announced its commitment to open information and accountability in Goal 31 of the *State Plan NSW 2021*.

If information that does not need to be withheld, is made willingly and readily available to both internal and external complainants, this will signify that the NSW Police Force is prepared to be accountable for the quality of its decision making concerning complaints.

It should also result in practical benefits for the NSW Police Force in the form of fewer complaints and fewer formal applications to access information under GIPAA.

The object of GIPAA is to open government information to the public by:

- authorising and encouraging the proactive release of government information by agencies
- giving members of the public an enforceable right to access government information
- providing that access to government information is restricted only when there is an overriding public interest against disclosure.

GIPAA establishes a new system of openness under which formal applications for access to information should be a last resort.

Part three of this document specifically refers to application for formal release which is unrestricted and unconditional release to 'the world at large'. This is contrasted with an informal application for release where information could be released with conditions attached. For example a viewing of the document sought would constitute informal release.

## **2. Part 1 – providing information to a complainant**

### **2.1 Part 8A section 137 of the *Police Act 1990***

Under section 137 (Part 8A) of the *Police Act 1990*, the Commissioner of Police (or delegate) is required, at the end of an investigation, to consult with the complainant before making a decision concerning any action to be taken against a police officer and then advise the complainant of the Commissioner's decision.

For a complainant to properly understand the decision making process and the reasons why a particular decision has been made, it is important that material relied upon is fully explained. Although a complainant may not be pleased with the results of an investigation, a reasonable complainant may accept that it was an appropriate decision to make in all the circumstances. This is unlikely to occur if a decision is not fully explained.

### **2.2 During the investigation process**

During an investigation it is best practice to effectively manage the complainant's expectations and to periodically provide updates regarding the progress of the investigation. For example it is not advisable to give the complainant any indication of expected outcomes in the initial stages of your inquiries. If you lead a complainant to believe that serious action is going to be taken, then the matter is not sustained, this disappointment can act as the catalyst for the complainant demanding to see all investigation documents. It is a better option to advise the complainant that you cannot give any indication of expected outcomes until you have properly collected and weighed up the evidence in relation to the matter.

Another way of managing a complainant's expectations is to keep the complainant periodically updated in relation to the progress of the investigation. Complainants can vary significantly in the level of communication that they expect from you. Some will not contact you at all and wait patiently to be advised of the outcome, while others will contact you every other day wanting to know what is going on.

Manage this expectation by advising the complainant up front when they can expect to hear from you. For example you may advise them not to expect to hear from you for eight weeks. If you contact the complainant at that time and advise them of any delays that you may have experienced, such as unavailability of witnesses, this can significantly reduce any anxiety or frustration that may have built up during that period. You can then advise them when they can expect to hear from you again. If you manage the complainant in this way, they are less likely to become resentful of the process and more likely to be receptive to your explanation at the end of the process, if the matter is not sustained.

### **2.3 Consulting with the complainant at the end of an investigation**

If you give a complainant a reasonable explanation of how you arrived at your decision, this may minimise potential formal requests for documents under GIPAA.

The following information at the conclusion of an investigation may satisfy the complainant that their concerns have been taken seriously and there has been no impropriety in the investigation.

- The outcome of the investigation.
- The evidence that effected the decision in general terms subject to the restrictions in Table 1 below.
- Where the investigation relates to a breach of a policy or procedure, an explanation as to why that policy or procedure was breached or not breached, whichever the case may be.
- Where there are issues of law, what legislation was applicable, whether or not there was a legislative breach and what your decision was in relation to that issue

## 2.4 Information not to be discussed/disclosed

The following table outlines things that should not be discussed with a complainant when providing the reasons as to your decision/s.

<ul style="list-style-type: none"><li>• Sensitive investigative methodologies, operational information and / or policing methods.</li><li>• Information relating to surveillance devices and / or telecommunications intercept material.</li><li>• The identity of other complainants, witnesses or other subject officers without their consent.</li><li>• Information relating to police informants.</li><li>• Complaint histories of police officers.</li><li>• Information obtained in connection with legislation that contains secrecy provisions and where those provisions prevent the disclosure of the information.</li><li>• The contents of legal advising's which are the subject of legal professional privilege.</li></ul>
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## 2.5 Request for documents – informal release under GIPAA

Despite providing adequate reasons for your decision, a complainant may still seek access to additional information.

You are entitled to show the complainant certain documents with or without deletions to assist in explaining the reasons for decisions / outcomes of investigations. This could reduce the likelihood of further complaints or the likelihood of a **formal** application through GIPAA.

GIPAA provides a number of protections to government employees who release information pursuant to a decision under the Act (see Annexure 1).

GIPAA includes an **informal release** provision which allows for restricted release under conditions imposed by an agency. In order to activate this provision, an informal request for information must be assessed under the provisions of the Act. The Commissioner has delegated this function to the NSW Police Force Information Access & Subpoena Unit (IASU).

Accordingly you should advise the complainant to make an informal request for information under GIPAA. The forms are available on the NSW Police Force internet site.

**Important:** You must make a file note and attach it to the file indicating that during the section 137 consultation process the complainant requested access to particular information and in your opinion making the information available for restricted release (e.g.: viewing only, viewing with deletions) would assist the complainant to understand reasons for the decision.

The purpose of the file note is to assist the IASU in making its determination under the provisions of GIPAA regarding informal release.

It is vital to also advise the complainant that formal applications take priority over informal applications, mainly due to the fact there are legislative time restrictions associated with formal applications, as opposed to informal applications where there are none.

Information will not be released where there is an overriding public interest against disclosure of the information.

### **3. Part 2 – Providing information to subject officers**

A police or administrative officer may make an informal request to their relevant commander who has the discretion to release information relating to the person / employee. This can be done without relying on GIPAA, allowing them access to information they would otherwise be entitled to if they were to make a GIPAA application.

The request for information must be forwarded to the IASU, Public Affairs Branch, if the person / employee is making a GIPAA application.

#### **3.1 Release of information to subject officers**

Members of the NSW Police Force have a general right to access information held about them. However, the confidential nature of disciplinary investigation files means that not all information can be released in order to maintain the integrity of the complaint system.



Under clause 49 of the Police Regulation 2015 the Commissioner of Police is required to keep the following information about police officers:

- (a) *information as to any offence in respect of which the officer has been charged before a court, including information as to:*
  - (i) *whether the officer was found guilty of the offence, or*
  - (ii) *whether the charge was withdrawn, dismissed or otherwise disposed of,*
- (b) *information as to any finding of misconduct or unsatisfactory performance in respect of which a section 173 order has been made, being:*
  - (i) *a reviewable section 173 order, or*
  - (ii) *a non-reviewable section 173 order made as a consequence of the officer's substantial or consistent failure to meet reasonable standards of performance or conduct,*

*including information as to the reasons for the finding,*
- (c) *information as to any offence in respect of which a departmental charge had been preferred against the officer before 8 March 1999, including information as to:*
  - (i) *whether the charge was found proven (and, if so, the reasons for the finding), or*
  - (ii) *whether the charge was withdrawn, dismissed or otherwise disposed of.*

Under clause 49(2) a police officer is entitled on application to be given access to any information kept in relation to the police officer in accordance with clause 49. Police officers should be reminded of this provision as an alternative to a request for release under GIPAA.

Administrative officers have a right to access their records under Chapter 5 of the *Public Service Personnel Handbook*.

#### **5-3.4.4 Access by employees**

*Employees are entitled to have access to their records and may make notes and photocopy information from the record. Photocopies should be permitted on request without cost to the individual. Employees should provide appropriate proof of identity before access is granted. Employees may nominate a representative to access their record on their behalf. In such cases access should only be granted with the written consent of the employee. Access should be given at a mutually convenient time and be supervised to ensure that information is not removed from the file.*

#### **5-3.4.5 Access by former employees**

*Former employees should be permitted to see their employee records. Photocopies of information on the records should be permitted on request, and the department may charge a fee for providing them.*

### 3.2 Information not covered by clause 49

The NSW Police Force also keeps information about subject officers other than that required under clause 49.

The following guidance is provided in deciding how to respond to a request by a subject officer for information concerning them held on complaint investigation files.

### 3.3 Evidence based investigation reports where a sustained finding is contemplated

*Information Sheet 10/03* states where the NSW Police Force is contemplating reviewable action against a police officer, the officer is entitled to the section of the evidence based report that relates to them. In addition, any supporting documentation that has been relied upon should be provided, in accordance with procedural fairness.

### 3.4 Resolution reports where a sustained finding has been made against the subject officer

Except in the case that section 179 of the *Law Enforcement Conduct Commission Act 2016* has been invoked, a subject officer subject of an adverse finding is entitled to a copy of the *Resolution outcome report*.

However information about:

- the identity of the complainant and any information that could identify the complainant,
- evidence against other subject officers,
- personal information about any person who is not the subject officer,

must be redacted unless any of the above people consent to the release of the information.

### 3.5 Current investigations or caveated files

Files under this category cannot be released under any circumstances. To do so could compromise an investigation or the gathering of information that involves possible corruption, criminal activity or other serious misconduct.

### 3.6 Investigation files where no sustained finding is made against the subject officer

Where no adverse finding is made the general position is that the file should remain confidential and not be released to the subject officer. This is to protect witnesses and complainants who have provided evidence in the matter.

However, if you are of the view that there is information that could be the subject of restricted release to the subject officer you should advise the officer to make an informal request for information through GIPAA. For example, the reports of supervisors or managers where you have discussed the release with the author and he or she has no objection. **Note:** this differs from a formal application through GIPAA which is unconditional release.

The purpose of advising the subject officer to make an informal application through GIPAA is to activate the protection available under the Act (see Annexure 1).

You should make a file note and attach it to the file indicating what information in your view could be informally released, e.g.: by conducting a viewing only, redacting information etc.

The purpose of the file note is to inform the IASU in making its determination under the provisions of GIPAA regarding informal release.

## **4. Part 3 – Responding to GIPAA applications**

### **4.1 Role of the Information Access and Subpoena Unit**

Where a member of the public or a member of the NSW Police Force makes a formal application for access to material held in investigation files, the application is received by the IASU, which has the delegated authority from the NSW Commissioner of Police to make determinations on release of information under GIPAA.

A formal application is where an applicant is seeking unrestricted access to government information. That means that once the applicant has been given access to the document its use cannot be controlled by the NSW Police Force.

In performing its functions, the IASU is required to consider:

- public interest considerations for disclosure
- public interest considerations against disclosure
- whether the public interest for disclosure outweighs the public interest against disclosure.

The IASU relies on information provided by different areas of the NSW Police Force and relevant corporate policies and processes in arriving at a determination.

### **4.2 Corporate position on the confidentiality of the complaint process**

The IASU is entitled to rely on NSW Police Force corporate policies and processes as an evidentiary basis when considering the public interest tests **for** and **against** release.

### **4.3 Application on the NSW Civil & Administrative Tribunal for a review**

Where a person is not satisfied with a decision of the IASU, they have a right to make application to the NSW Civil & Administrative Tribunal (NCAT) for a review of the decision.

The NSW Police Force may be required to provide evidence in support of its decision in the form of an affidavit by a **suitable senior officer**.

The following positions are determined to have the appropriate level of seniority and experience in the complaint handling environment to give this type of evidence.

- Officers of the rank of Inspector or above attached to Investigations & Field Services, PSC on request to the Director, Investigations & Field Services
- Region or specialist command PSMs

Where a request for a statement is made by the Office of General Counsel (OGC) to any of the above officers it must be complied with.

Examples of when the OGC will request a statement from PSC staff:

- evidence is required at a tribunal regarding PSC corporate policies and processes
- evidence is required at a tribunal regarding investigations conducted by PSC.

From region / specialist PSMs:

- evidence is required at a tribunal where a specific knowledge of the investigation or the applicant is required. This will generally have been raised in the original response provided to the IASU in reply to the access application.

#### 4.4 Preparing a statement

The following information will generally be included in the statement.

- Briefly explain the investigation process conducted under either Part 8A of the Police Act or under the *Government Sector Employment Act 2013* (GSE Act) and Government Sector Employment Rules 2014 and the confidential nature of the process.
- Highlight the confidential nature of the c@tsi system or Administrative Officer Conduct Unit database and the restricted access requirements of the system.
- Refer to the oversight of the Law Enforcement Conduct Commission (LECC), and Independent Commission Against Corruption (ICAC) that provides complainants and the general public reassurance that complaints about the police and police employees are investigated properly.
- Provide an explanation of the confidentiality of the process including the statutory protection afforded complainants under section 169A of the Police Act, clause 54 of the Police Regulation and the GSE Act. Explain that the identity of complainants can be released internally in limited circumstances in order to effectively manage a matter. For example a complaint of sexual harassment could not be effectively managed if the victim's identity could not be released to the subject officer. However the information is only disclosed within the confines of a complaint investigation. It is not released to 'the whole world'.
- Refer to protection of internal witnesses from detrimental action under section 206 of the Police Act or section 69 of the GSE Act.
- Explain that the process is a confidential process where information is only released in furtherance of the matter.

- Explain that complainants and witnesses might expect that their statements could be disclosed to the person to whom it relates through the prosecution of an individual or to take serious management action. For example where serious action is contemplated against a police officer documentation is released in accordance with procedural fairness but with strict conditions placed on the circulation of the documents or disclosure of the contents, e.g.: to the officer's legal representative. But also explain that complainants and witnesses would not have an expectation that their statements would be released to the world at large.
- Explain your knowledge of the reluctance of witnesses to come forward if they knew evidence could be released to the world at large in response to an access application.
- Explain that release of information other than in furtherance of an investigation would inhibit full and frank disclosure from within the NSW Police Force.
- Explain how disclosure of the documents would be prejudicial to the proper working of the NSW Police Force with regard to the internal investigation process.

#### 4.5 Types of statements

There are two types of statement that may be required.

- An **open** statement of evidence refers to the documentation in general terms without identifying the information that is withheld, e.g.: information that could identify the complainant, witnesses or police methodology. The open statement is provided to the access applicant.
- A **confidential** statement of evidence refers to the information in more specific terms and is held in confidence by the NCAT.

The contents of a statement will depend on the reasons stated in the IASU Statement of Reasons for refusing access to the requested documents.

Examples of both types of statements are annexed to this document.

The statement will require the deponent to include his / her credentials and experience as a senior officer within a complaint handling environment such as:

- name, rank, details of position held and reporting responsibilities
- career history with emphasis on your involvement in complaint investigation and complaint management
- associated legislation, policies and guidelines
- the role of the Complaint Management Team and your experience with it
- any other information relating to your expertise in complainant management and investigation.

The OGC can provide assistance in drafting the affidavit if required.

## 5. Compliance requirements and internal controls

All NSW Government agencies are expected to be frank and transparent in their official dealings with the public and with their own employees.

NSW Government policy requires that members of the public (including employees of government agencies) should have a number of alternative means through which they can access information held in official records about them and which materially affects them.

Reforms to the New South Wales' right to information system took effect on 1 July 2010 with the *Government Information (Public Access) Act 2009* (GIPAA) replacing the *Freedom of Information Act 1989* (NSW).

The reforms are a direct response to the community's desire for greater transparency in government decisions. GIPAA encourages government agencies to release more information than ever before.

### 5.1 What is the public interest test

There is a presumption in favour of the disclosure of government information unless there is an overriding public interest against disclosure.

There is no limit to the number of public interest considerations agencies can consider **in favour** of disclosure

GIPAA sets out a limited number of public interest considerations **against** disclosure. These are found in section 14 and Schedule 1.

Section 14 sets out the public interest considerations against disclosure.

- (1) *It is to be conclusively presumed that there is an overriding public interest against disclosure of any of the government information described in Schedule 1.*
- (2) *The public interest considerations listed in the Table to this section are the only other considerations that may be taken into account under this Act as public interest considerations against disclosure for the purpose of determining whether there is an overriding public interest against disclosure of government information.*

Schedule 1 refers to information for which there is conclusive presumption of overriding public interest against disclosure.

Examples include:

- *Bail Act 2013* – section 89 (restrictions on publication of association conditions)
- *Child Protection (Offenders Registration) Act 2000* – section 21E (prohibited disclosure of information concerning registrable persons)
- *Crimes(Forensic Procedures) Act 2000* – section 109 (Disclosure of information)

- Police Act – section 169A (Identity of complainant not be disclosed)
- Police Regulation – clause 54 (Secrecy as to complaints about conduct)
- legal professional privilege
- documents created by the Counter Terrorism & Special Tactics Command of the NSW Police Force.

The Office of the Information Commissioner has published a document titled *Applying the Public Interest test – a snapshot*, which can be found on the Information & Privacy Commission (NSW Government) website to assist with understanding the way in which government agencies are required to apply the public interest test.

## 5.2 Exclusions

GIPAA specifically excludes from consideration:

- that disclosure of the information might cause embarrassment to, or a loss of confidence in government
- the fact that the information might be misinterpreted or misunderstood by any person.

## 5.3 Investigation files and personal information

Under GIPAA, personal information is both a public interest consideration in favour and against disclosure depending on the context and circumstances of each application.

For a detailed description of what constitutes personal information under the Act, the Office of the Information Commissioner has published *Guideline 4 – Personal information as a public interest consideration under the Government Information (Public Access) Act 2009 (NSW)*. This can be found on the Information & Privacy Commission (NSW Government) website to assist agencies in applying this provision under the Act.

Typically an investigation file will include a complaint document, witness' statements, a resolution report or an evidence based investigation report. There will also be other associated evidentiary material depending on the type of investigation or resolution process being conducted, e.g.: police rosters.

Most of the documents contained in an investigation file will contain some form of personal information.

For example, an access application by a subject officer where the information is about the subject officer could constitute personal information of the subject officer. However, the evidence of a witness about the subject officer could be the personal information of the witness. The balancing of these competing interests is a difficult process.

## 5.4 Investigation files and consultation under section 54 of GIPAA

Where an access application involves a request for personal information, section 54 of GIPAA provides for consultation where there needs to be balancing between information access rights and the right of individuals to protect and control the privacy of their personal information.

The Office of the Information Commissioner has published *Guideline 5 – Consultation on public interest considerations under section 54 of the Government Information (Public Access) Act 2009 (NSW)*. This can be found on the Information & Privacy Commission (NSW Government) website to assist with understanding how this process is applied.

The IASU formal request form includes a section specifically relating to witness statements. Applicants are required to answer a number of questions when submitting their application.

- *If available, are you seeking access to witness statements?*
- *Have you obtained an authority from the other person/s to release their statement to you?*
- *If YES please attached written authority.*
- *If NO consultation with other involved people may be required. Please complete the Consultation section below.*
- *CONSULTATION: (To be completed ONLY if the documents you require involve or may involve other people)*
- *Do you wish for other involved people to be contacted to obtain their consent to release information to you?*
- *Do you understand that to engage in a consultation process, that the time to respond to your application will be extended by a further 15 days?*
- *Do you understand that as the information requested is considered non personal that additional charges may apply?*
- *Do you require the personal information of other people involved (e.g.: name and address)?*
- *Do you consent to the other party being given your details as the applicant requesting their information?*
- *Would you accept a statement without the personal information of the other party?*

This information is collected to assist the IASU in meeting its obligations under GIPAA.



## Appendix 1 – GIPAA Part 6 Division 1 Protections

### **Division 1 Protections**

#### **113 Protection in respect of actions for defamation or breach of confidence**

- (1) *If government information is disclosed pursuant to a decision under this Act, and the person by whom the decision is made believes in good faith, when making the decision, that this Act permits or requires the decision to be made:*
- (a) *no action for defamation or breach of confidence lies against the Crown, an agency or an officer of an agency by reason of the making of the decision or the disclosure of information, and*
  - (b) *no action for defamation or breach of confidence in respect of any publication involved in, or resulting from, the disclosure of information lies against the author of a record containing the information or any other person by reason of the author or other person having supplied the record to an agency.*
- (2) *Neither the giving of access to information pursuant to a decision under this Act nor the making of such a decision constitutes, for the purposes of the law relating to defamation or breach of confidence, an authorisation or approval of the publication of a record containing the information or its contents by the person to whom the information is disclosed.*

#### **114 Protection in respect of certain criminal actions**

*If government information is disclosed pursuant to a decision under this Act, and the person by whom the decision is made believes in good faith, when making the decision, that this Act permits or requires the decision to be made, neither the person by whom the decision is made nor any other person concerned in disclosing the information is guilty of an offence merely because of the making of the decision or the disclosing of information.*

#### **115 Personal liability**

*No matter or thing done by an agency or officer of an agency, or by any person acting under the direction of an agency or officer of an agency, if the matter or thing was done in good faith for the purposes of executing this Act, subjects the officer or person so acting, personally to any action, liability, claim or demand.*

## Appendix 2 – Example open statement of evidence

# Example only

## NSW Civil & Administrative Tribunal

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Level 15, 111 Elizabeth Street, Sydney NSW 2000

Tel: (02) 9223 4677 Fax: (02) 9233 3283 Freecall: 1800 060 410 DX 1523 Sydney

### OPEN STATEMENT OF EVIDENCE

File No:

Division: General Division

Applicant: [name]

Respondent: NSW Commissioner of Police

I, [insert name], of the NSW Police Force, at [insert location, e.g.: North Region], [suburb], state the following:

- 1 I am the Professional Standards Manager (PSM) attached to the [insert location], in the NSW Police Force. I hold the rank of Inspector of Police. I have been in my current position since [date]. In my position I report directly to the Commander, [insert location]. This officer holds the rank of Assistant Commissioner.
- 2 I have been a serving police officer since [date]. [Outline your service history]. During this time I have worked in various units which have required me to provide technical advice to commanders regarding legislation, policy and procedures relative to the investigation and disciplinary processes emanating from allegations of police misconduct, including criminal misconduct and professional misconduct.
- 3 In my current position, among other things, I provide advice to commanders within the [insert location] in relation to the conduct of investigations and investigation processes pursuant to Part 8A of the *Police Act 1990*. Part 8A provides the legislative framework against which the NSW Police Force manages complaints relating to allegations of police officers' misconduct.
- 4 I also advise local area commanders in relation to disciplinary proceedings pursuant to Part 9 of the *Police Act*. Part 9 provides the legislative framework against which the NSW Police Force manages sustained outcomes of police investigations of police misconduct. Primarily, Part 9 is the disciplinary legislative framework within which the NSW Police Force operates.
- 5 I also provide advice in respect to internal policy and procedures which compliment the legislation contained within Part 8A and Part 9 of the *Police Act*.
- 6 In my current position, I am a member of the [insert location]'s complaint management team (CMT). Complaint management teams oversight and manage the conduct of investigations,

review the final reports of investigators and determine the final outcomes of those investigations. As part of my duties, when required, I quality review investigations and the decisions of [local area command / specialist unit] CMTs and report my findings to the Assistant Commissioner, [insert location]. I also provide advice in respect to internal policy and procedures which compliment the legislation contained within Part 8A and Part 9 of the Police Act.

- 7 As the PSM, I am aware of all officers attached to commands within the region who are subject of criminal proceeding or who are the subject of disciplinary proceedings before the Internal Review Panel. The Internal Review Panel is a panel of experts, including four assistant commissioners who provide advice to commanders on appropriate disciplinary action. The Panel also refer more serious matters to the Commissioner of Police for his consideration and determination. Also, as PSM, I become aware of all officers who are charged with offences or who are the subject of disciplinary proceedings. [Name] falls within these categories.
- 8 As the PSM of the [insert location], I am generally aware of correspondence from the Law Enforcement Conduct Commission (LECC) to the [local area] commanders within the [insert location]. Correspondence between the agencies generally relates to the manner in which a complaint of police misconduct has been, or is being, investigated. The Law Enforcement Conduct Commission (LECC) oversight investigations conducted by the NSW Police Force into allegations of police misconduct, pursuant to Part 8A of the Police Act. All Part 8A complaints of police misconduct are managed and recorded on the 'Customer Assistance Tracking System' (c@ts.i) database. The LECC has live access to the system.
- 9 I have considered the schedule of documents for which exemptions are claimed, which has been prepared for the purpose of these proceedings. I have also reviewed those documents, which are to be filed as a confidential exhibit with the Tribunal. The document numbers used in this statement refer to the revised schedule.
- 10 All documents over which exemption is claimed relate to [state number] of complaint files which concern investigations pursuant to Part 8A of the Police Act into conduct by [name]. All complaints were instigated by police officers.

#### Investigations under Part 8A Police Act

- 11 Pursuant to Part 8A of the Police Act, a person (complainant) may make a complaint about the conduct of a police officer. The Act defines conduct as being "...*any action or inaction (or alleged action or inaction) of a police officer*". The conduct complained of can occur on or off duty, inside or outside the State of New South Wales, and include people who are not police officers. A complainant may be a member of the public or a police officer (internal police complainant – IPC). Dependent upon the circumstances, investigations into allegations relating to police conduct can be conducted as criminal investigations or departmental investigations. This is determined by the CMT managing the complaint. All members of the NSW Police Force are required to comply with the NSW Police Force *Code of Conduct and Ethics*.
- 12 Investigations under Part 8A are particularly sensitive. There are both legislation and policies which provide for protection of witness identity and the confidentiality of information. For example, under section 169A of the Police Act, a member of the Police Force is not to disclose the identity of a complainant. Investigations under Part 8A are confidential. Section 170 of the Police Act provides that documents brought into existence for the purpose of Part 8A are privileged from production in all but related proceedings. All documents sought by [name] fall within the parameters of Part 8A complaint investigations.
- 13 The NSW Police Force Complaint Handling Guidelines (CHG) states at page [insert page No]:

- [insert relevant section]
- 14 With respect to Part 8A investigations the CHG states at page [insert page No]  
[insert relevant section]
  - 15 I annexe to my open witness statement a copy of the CHG.
  - 16 Guidelines have been established by the Commissioner under section 169A of the Police Act. The Guidelines govern the way complaints under Part 8A are to be dealt with.
  - 17 I annexe to my open witness statement a copy of the Guidelines.
  - 18 The Police Force has also put in place an Internal Witness Support Policy (Policy), which is directed to supporting IPCs. The Policy states at page [insert page No]  
[insert relevant section]
  - 19 Annexed and marked "AO" is a copy of the Policy and the supporting document to my open witness statement.
  - 20 Complaints by both members of the public and internal sources are made on the expectation that they will be confidential.
  - 21 It is standard procedure for a complainant's identity to be protected from disclosure from the subject officer no matter how obvious it may be as to where the complaint may have originated. To reveal the identity of a complainant, might subject a complainant to payback or intimidation. This would undermine the confidence members of the public and IPCs have in coming forward with information about police misconduct and prejudice the future supply of such information. The legislation and policies stress that complaint information must be managed so that its integrity is protected at all times. If the identities of complainants were disclosed, it would undermine the reporting and detection of misconduct by police, to which Part 8A is directed.
  - 22 As part of the investigation process, the officer who is the subject of the complaint is usually interviewed and the substance of the allegations put to the police officer involved, although confidentiality is maintained over the evidence and the identity of the complainant and witnesses. Access to a Part 8A investigation complaint file is not provided to the any officer, other than those involved in the investigation and management of the complaint. Should the officer be subject of a criminal charge, the normal rules of evidence apply and the officer is served with a brief of evidence.
  - 23 I believe that even after Part 8A investigations are concluded it is important to maintain confidentiality over the identity of complainants and witnesses and the information provided. If such information were subsequently disclosed (except as required by law) I believe that complainants and witnesses would be reluctant to come forward with information and / or the quality of information would be adversely affected with the result that future investigations under Part 8A would be adversely impacted as would management of officers.
  - 24 Part 8A investigations may also form the basis of consideration by the Commissioner of Police to making an order under section 181D of the Police Act which falls within Part 9.
  - 25 If the NSW Police Force is contemplating serious reviewable action such as transfer or demotion or dismissal, a subject officer is served with all documentation on the Part 8A file that relates to the subject officers conduct and any supporting documentation. This is provided to the subject officer with restrictions on disclosure attached for the purpose of according the officer procedural fairness.

26 I attach a copy of Form P1048 – Investigators Report and supporting Evidence for Service on a Subject Officer

[Relevant c@ts.i reference number]

- 27 This file contains documents relating to a Part 8A investigation of allegations of [describe allegation e.g. assault].
- 28 The documents [insert document numbers] disclose the identity of the witness who made the complaint, an internal police complainant (IPC), the evidence given by the IPC as well as the evidence given by various other witnesses.
- 29 The information provided to police pursuant to a Part 8A investigation is provided in the expectation that it will be treated as strictly confidential. Even though [name] may have some idea who has provided information, he / she does not know with any certainty what information has been provided, nor does he / she know with any certainty who provided it. The disclosure of further information would, I believe, enable [name] to infer the identity of an IPC. I believe this would undermine the policy of confidentiality of witness identity and the integrity of information.
- 30 Based on my experience as a PSM and a CMT member, I am of the view that if members of the public and the NSW Police Force became aware of the fact that their identities could be disclosed, it would deter them from making such complaints or providing evidence during the course of investigations in the future. This arises even in circumstances where the relevant officer has guessed or even knows the identity of witnesses.
- 31 I am aware that the information released under the *Government Information (Public Access) Act 2009* is unrestricted release and may be disclosed to the wider public. It is important for the police complaints handling process that such information not be disclosed, as this will ensure the continuing flow of information to them. If complainants were liable to exposure, the supply of such information in the future may be diminished or ended. This would undermine the capacity of the Commissioner of Police to assess and manage his personnel. As it is in the interests of justice for the NSW Police Force to act ethically and professionally, given that they enforce and administer the law, it would be contrary to the public interest to undermine the process by which they are investigated and disciplined.
- 32 Disclosure would also undermine workplace relationships and discipline, if an IPC were to come forward with information about a colleague, and his or her identity and the information was disclosed. It would also make it extremely difficult to maintain the team relationship, not only between the two officers but with other officers in the team. Ultimately if the confidentiality were not maintained, it could impact on management of officers.
- 33 The receipt, on a confidential basis, of complaints and information from the community and members of the Police Force is an important part of the investigation of misconduct by police and the effective management of police personnel. Ultimately, disclosure of the information would undermine the process for the conduct of investigations under Part 8A with the result that it would impact on the Force's ability to manage investigations into misconduct and ultimately manage its officers. Investigations under Part 8A are a vital part of such management strategies which assists in maintaining the integrity of the NSW Police Force, and promotes ethical policing.
- 34 [Insert document number] discloses the full criminal history of a person, including the names of associates. It is not appropriate, for the reasons already given, to disclose this information.
- 35 [Insert document number] also contains information about the location of CCTV cameras inside a police station. Release of such information would present a security risk for those in

custody as well as police officers. For operational reasons, it is inappropriate to disclose this sort of information.

[Relevant c@ts.i reference number]

36 This is a complaint file relating to [describe allegation] by [name], which became the subject of a Part 8A investigation. The complaint was also IPC instigated.

37 [Insert document number]. This document discloses the identity or identities of the IPC or IPCs concerned. Although [name] may be able to infer the identity of the witness involved, from the information provided, there is nevertheless a policy in place to protect the identity of IPCs and the confidentiality of the information they provide. For the reasons outlined in paragraphs 15-25 and 35-39 above, disclosure of that information would undermine the ability to conduct investigations under Part 8A by disclosing the identities of witnesses and disclosing confidential information in breach of guidelines. Ultimately any such disclosure would affect the future supply of the information and would impact adversely on the ability of the Police Force to manage its officers.

38 The document also contains information which could identify a person who was charged with an offence. For the reason given in paragraphs 40 of my statement, it is not appropriate to disclose such information, even though [name] is likely to be able to identify the person from the context.

39 Documents [insert document numbers] contain the statements made by IPCs. Documents [insert document numbers] are communications between the IPC and the investigating officer concerning the evidence and the investigation. For the reasons outlined in paragraphs 13-15 and 35-40, disclosure of this information is contrary to policies and guidelines and would undermine the ability to conduct investigations under Part 8A, would affect the future supply of the information and would impact adversely on the ability of the Police Force to manage its officers.

[Relevant c@ts.i reference number]

40 This is a complaint file relating to [describe allegation] by [name]. The complaint was IPC instigated and became the subject of a Part 8A investigation.

41 [Insert document number] is an investigator's report concerning the Part 8A investigation with deletions. I refer to my confidential statement.

42 [Insert document numbers] are records of interview given under directive under cl 8(1) of the Police Regulation 2015. A direction requires the police officer to promptly comply with all lawful orders from those in authority over them. Such directives are sometimes given in the course of conducting a Part 8A investigation, where an investigator seeks to get truthful and factually correct answers to a series of questions.

43 The NSW Police Force operates under a strict *Code of Conduct and Ethics* (Code) and failure of police to adhere to the Code may result in management action being taken against the officer. The Code states that officers must comply with lawful directions from senior officers. While s211F of the Police Act 1990 states that police officers have a duty to report police misconduct or serious maladministration in writing to a senior officer, it is understood that police often do not come forward, for example, because of fear of ostracism or retribution by colleagues if it became known among colleagues that the officer provided evidence during an investigation into the alleged misconduct by a fellow officer. Directions are used to circumvent this situation. Failure to comply with a directive could result in the directed officer being subjected to disciplinary proceedings

- 44 Annexed and marked "BO" to my witness statement is a copy of the NSW Police Force *Code of Conduct and Ethics*.
- 45 However, I believe that, although the person giving the information under directive is required to provide the information and answer truthfully, the confidentiality of the information and the identity of the officer should be given the same degree of protection as is given to IPCs who instigate complaints or provide information voluntarily.
- 46 I believe that if the same protection was not given to these witnesses and the information provided under directive, there would not be full and frank disclosure of all relevant evidence, as the witnesses would fear reprisal and payback from the police officers they had given evidence about, undermining the whole system of investigations under Part 8A and the management of the NSW Police Force.

**Signed:**

[name]

Inspector of Police, Professional Standards Manager

**Signed:**

**Witness:** [name]

Rank/ position/location

**Dated:**

## Appendix 3 – Example confidential statement of evidence

# NSW Civil & Administrative Tribunal

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Level 15, 111 Elizabeth Street, Sydney NSW 2000

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### CONFIDENTIAL STATEMENT OF EVIDENCE

File No:

Division: General Division

Applicant: [name]

Respondent: NSW Commissioner of Police

I, [name], of the New South Wales Police Force, at [the relevant e.g. North] Region, [suburb], state the following:

1. This statement accurately sets out the evidence that I would be prepared, if necessary, to give before the Tribunal as a witness, and it is true to the best of my knowledge and belief.
2. I refer to my open statement in these proceedings. The matters set out in this confidential statement relate to information that I am not prepared to disclose to the applicant. If the contents of this affidavit were released to the applicant, it would amount to a disclosure of the information over which exemptions have been claimed in response to the applicant's freedom of information application. I have no objection to the Tribunal considering the contents of this affidavit but object to its wider dissemination, including to the applicant.
3. I refer to paragraph [insert paragraph number] of my open statement. Deletions in [insert document numbers] refer to a restricted operation conducted on premises in which the conduct which was the subject of the Pt 8A investigation occurred. The identity of the premises and the operation being conducted there by police is not relevant to investigation pursuant to Pt 8A.
4. Disclosure of this information for example in [insert document numbers] would alert persons to the fact that venues are under covert observation and that there is police intelligence in relation to certain premises being linked to organised crime and outlaw gang activity. Disclosure of such information would undermine the Force's ability to detect and investigate illegal and criminal activities and would disclose operational matters which could affect adversely its functions.
5. Document [insert document number] is an internal police document detailing strategies in respect of a particular covert operation and how they will be implemented in detecting crime. Details include how such operations are approached, the resources which are put into play in conducting such an operation, the fact that some police are in uniform and some are not and who is the target of the operations. It also discloses the procedures and venues involved in arresting and detaining offenders and how communications are to be conducted throughout.



6. The document also includes the names of individual officers involved in a covert operation. Disclosure of this information could provide a security risk to our officers. Although the operation is now completed, the methodology remains current and disclosure of the use of resources and operational factors would affect the ability of police to detect and investigate criminal activity in future.
  
7. [insert document numbers] show that the applicant was under suspicion of being involved in criminal activities, in part due to his frequenting of certain venues and in part due to his association with a named person and that consideration was given to conducting covert surveillance on the applicant. Police officers suspected of criminal activity may be subject of covert surveillance and intelligence reports. Disclosure of the information may compromise future covert operations, including future strategies of investigation of criminal activities, which may include the activities of the applicant. Release of this information would impede the effectiveness of methods of detecting and investigating such activity. Disclosure of the information could also reveal operational methods. It would have a major adverse affect on the Force's ability to manage the conduct of its officers. [Insert document number] also contains intelligence information involving the criminal activities of third parties. For reasons provided in paragraph [insert paragraph number] of my open statement, such information should never be disclosed.

**Signed:**

[name]

Inspector of Police, Professional Standards Manager

**Signed:**

**Witness:** [name]

Rank/ position/location

**Dated:**