

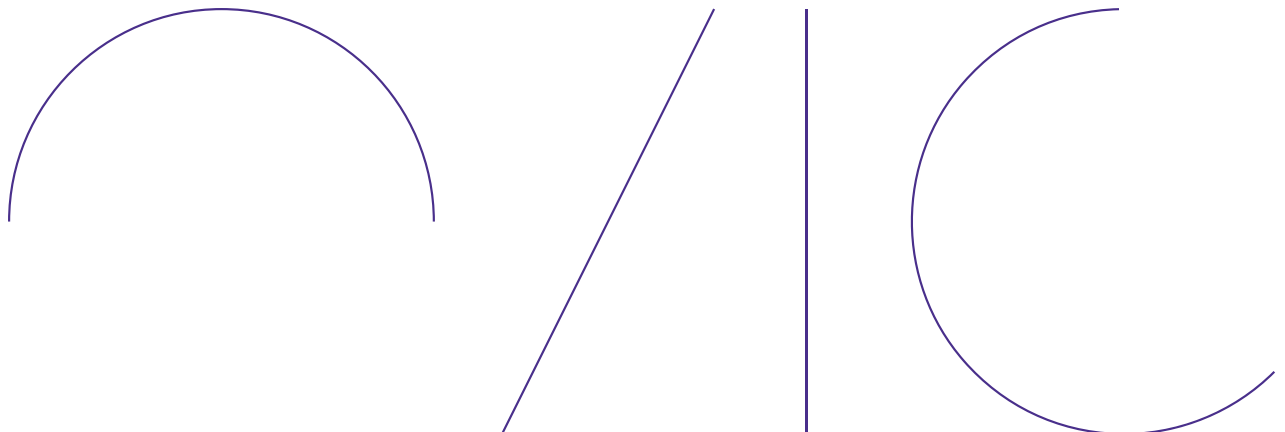


Office of the Victorian
Information Commissioner

Part VIB – Investigations

Freedom of Information Guidelines

FREEDOM OF INFORMATION



Document details

Document details	Part VIB – Investigations
Publication date	11 November 2024
CM ref / location	D21/10097[v2]
Document status	Published
Authority	Office of the Victorian Information Commissioner (OVIC)
Author	Policy Team

Version	Author	Date	Additions/changes
1.0	Policy Team	27/12/2023	Version 1.0
2.0	Policy Team	11/11/2024	Updates extracts of legislation and guidance following legislative amendments to sections 61TJ, 61TK, 61TL and 61TM by Act No 31/2024.

References to legislation

All legislative references are to the *Freedom of Information Act 1982* (Vic) (**the Act**) unless otherwise stated.

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Division 1—Investigations

Section 610 – Information Commissioner may conduct investigation

Extract of legislation

610 Information Commissioner may conduct investigation

- (1) The Information Commissioner may, on the Commissioner's own motion, conduct an investigation in respect of—
 - (a) the performance or exercise of a function or obligation, under this Act, by an agency or principal officer; or
 - (b) the failure to perform or exercise a function or obligation, under this Act, by an agency or principal officer; or
 - (c) the purported performance or purported exercise of a function or obligation, under this Act, by an agency or principal officer.
- (2) The Information Commissioner may not conduct an investigation in respect of—
 - (a) any action taken or a failure to take an action by—
 - (i) a Minister; or
 - (ii) a person employed as a Ministerial officer under Part 6 of the Public Administration Act 2004; or
 - (b) any action taken or a failure to take an action by an agency or principal officer, in the performance or purported performance of a Minister's functions or obligations under this Act.

Guidelines

Overview of Part VIB

- 1.1. Part VIB empowers the Information Commissioner to conduct own-motion investigations to examine how agencies perform or exercise their functions or obligations under the Act. To support these investigations, the Commissioner can compel information and documents and examine witnesses.

For more information on the Information Commissioner’s power to compel information and examine witnesses, see the FOI Guidelines on [Part VIC – Coercive Powers](#).

- 1.2. The Information Commissioner must produce a report after the completion of an own-motion investigation and, unless there are compelling reasons not to, will usually arrange for that report to be tabled in the Victorian Parliament.

For more information on reporting on investigations, see:

- [section 61Q – Investigation report](#)
- [section 6R – Content of investigation report](#)
- [section 61T – Tabling of report in Parliament](#)

OVIC’s regulatory goals and guiding principles

- 1.3. The Office of the Victorian Information Commissioner’s (OVIC) [Regulatory Action Policy](#) explains how OVIC¹ exercises its investigatory powers. It describes the guiding principles OVIC follows in conducting regulatory action (including investigations):

- **Independent** – OVIC exercises its regulatory powers independent of government;
- **Collaborative** – OVIC engages with the public and regulated bodies openly and constructively;
- **Effective and targeted** – OVIC uses its powers to protect the Victorian community from harm caused by infringements of their information rights and responds to possible contraventions of the Act based on their likelihood and severity. OVIC’s regulatory action leads to changed behaviour on the part of regulated bodies;
- **Proportional** – OVIC takes action that is proportionate to the issue being addressed. The scale of OVIC’s regulatory response is based on the risk of harm the issue creates for the community or for individuals and whether the issue is systemic; and
- **Transparent and consistent** – OVIC’s decisions, actions and performance are clearly explained and open to public scrutiny. OVIC’s regulatory action is consistent in similar circumstances.

¹ The FOI Guidelines refers to ‘OVIC’ to mean the Information Commissioner and the Public Access Deputy Commissioner and OVIC staff who assist in the conduct of investigations under the Act.

For information on who oversees OVIC’s investigations, see [section 61ZD – Office of the Information Commissioner to report to the Victorian Inspectorate on issue of notice to produce or attend](#).

What are own motion investigations?

- 1.4. Own-motion investigations are done at the Information Commissioner’s initiative and discretion. This means the investigation does not need to be in response to a complaint or an application to investigate conduct. OVIC identifies issues of non-compliance in many ways including through:
 - FOI reviews and complaints;
 - monitoring compliance with the [FOI Professional Standards](#);
 - stakeholder engagement;
 - engaging with regulated bodies including through their reporting on their FOI operations; and
 - reports from members of the public, including the media.
- 1.5. An investigation may examine issues at one agency or wider ‘systemic’ issues affecting multiple agencies or the FOI system more generally.
- 1.6. When conducting regulatory action (such as an investigation), OVIC seeks to be ‘targeted and proportional’. This means OVIC targets issues based on how likely they are to occur and how severe the impact would be if they did occur or reoccur. OVIC takes action that is proportionate to the issue being addressed.
- 1.7. OVIC takes a risk-based approach in deciding when and how to investigate. OVIC targets practices or issues that most seriously undermine the object of the Act.

For more information on how OVIC investigates agency conduct under the Act, see OVIC’s [Regulatory Action Policy](#) (Schedule 2 – Freedom of Information Regulatory Activities).

What can OVIC investigate?

- 1.8. OVIC can investigate, in relation to an [agency](#) or [principal officer](#) the:
 - performance or exercise of functions under the Act;
 - failure to perform or exercise functions under the Act; or

- purported performance or exercise of functions under the Act.

Example

OVIC conducted an own motion investigation into the timeliness of FOI decisions at five Victorian government agencies to identify the factors contributing to delay.

Read the report [here](#).

- 1.9. OVIC cannot investigate the conduct of Ministers, Ministerial officers,² or an agency or Principal Officer where the agency or Principal Officer performs Ministerial functions or obligations under the Act.³
- 1.10. OVIC also cannot investigate a claim that a document is exempt for national security, defence or international relations reasons under [section 29A](#).⁴
- 1.11. The Information Commissioner may delegate the power to conduct an investigation to the Public Access Deputy Commissioner in accordance with section 6R(2).

² A Ministerial officer is person employed as a Ministerial officer under Part 6 of the [Public Administration Act 2004 \(Vic\)](#).

³ [Freedom of Information Act 1982 \(Vic\)](#), section 61O(2).

⁴ [Freedom of Information Act 1982 \(Vic\)](#), section 29A(3); this includes a certificate made under section 29A(2), a question whether a document falls within the exemption in section 29A(1), 29A(1A) or 29A(1B), and a decision to sign a certificate under section 29A(2).

Section 61P – Conduct of investigation

Extract of legislation

61P Conduct of investigation

- (1) An investigation under this Part must be conducted in private.
- (2) During an investigation, the Information Commissioner may serve on a person, a notice to produce or attend, in accordance with Part VIC.

Guidelines

Conducting investigations in private

- 1.1. The Office of the Victorian Information Commissioner (**OVIC**) must conduct own-motion investigations in private. This means OVIC does not publicly comment on its investigations while they are underway, and its examination and other investigation processes are not open to the public.
- 1.2. However, if a matter is subject to significant public discussion or concern, OVIC may confirm that it is taking regulatory action without giving detail. OVIC aims for its public statements to be accurate, fair, and balanced.⁵
- 1.3. In some circumstances, OVIC may announce the start of an investigation or other regulatory action by publishing a statement on its website. This will usually only happen where the topic has been of significant public discussion or concern, or where OVIC seeks the public's help with the regulatory action.
- 1.4. Unless there is compelling reason not to, OVIC publicly communicates the outcome of its regulatory action. In the case of own-motion investigations, OVIC sends the investigation report to Parliament to be tabled in accordance with [section 61T](#).

⁵ [Explanatory Memorandum](#), Freedom of Information Amendment (Office of the Victorian Information Commissioner) Bill 2016, 10 ('*Explanatory Memorandum*') 14.

How does OVIC approach investigations?

- 1.5. OVIC’s approach to conducting an investigation will depend on each matter. Actions OVIC may take in conducting an investigation include:
- contacting affected parties and the agency’s Principal Officer to gather information voluntarily;
 - using OVIC’s coercive powers in [section 61U](#) to compel an agency or other person to produce documents or compel a person to give evidence under oath or affirmation; and
 - providing the agency being investigated a reasonable opportunity to respond to potential adverse findings.

After OVIC completes an investigation

- 1.6. When an investigation is complete, OVIC must prepare an investigation report which OVIC may table in the Victorian Parliament.⁶
- 1.7. During an investigation, if OVIC receives documents claimed to be exempt, at the end of the investigation OVIC must return any originals of the documents to the agency who provided it and either return or destroy any copies.⁷
- 1.8. Other (non-exempt) documents gathered for the investigation are retained in accordance with OVIC’s obligations under the [Public Records Act 1973 \(Vic\)](#) and any retention and disposal authorities that apply.
- 1.9. After an investigation is complete, OVIC will monitor and liaise with the agency to ensure any recommended actions are implemented.

More information

For information on how OVIC supports the welfare of witnesses and other people involved in OVIC’s regulatory action, see OVIC’s [Witness Welfare Management Policy](#).

⁶ [Freedom of Information Act 1982 \(Vic\)](#), sections 61Q and 61T.

⁷ [Freedom of Information Act 1982 \(Vic\)](#), section 63E(5).

Division 2—Reporting of investigations

Section 61Q – Investigation report

Extract of legislation

61Q Investigation report

As soon as practicable after the completion of an investigation, the Information Commissioner must make a report of the findings of the investigation.

Guidelines

Information Commissioner must prepare an investigation report

- 1.1. After completing an investigation, the Information Commissioner must make a report of its findings.⁸
- 1.2. The Information Commissioner may table an investigation report in Parliament, in accordance with [section 61T](#).
- 1.3. OVIC generally publishes regulatory reports on its [website](#).

More information

For more information on:

- the content of an investigation report, see [section 61R](#);
- tabling the investigation report in Parliament, see [section 61T](#).

⁸ [Freedom of Information Act 1982 \(Vic\)](#), section 61Q.

Section 61R – Content of investigation report

Extract of legislation

61R Content of investigation report

- (1) The Information Commissioner must not include in a report under this Division—
 - (a) any information that the Information Commissioner reasonably believes would prejudice a criminal investigation, criminal proceedings or any investigation by the IBAC or the Victorian Inspectorate; or
 - (b) any information that—
 - (i) if included in a document would make that document an exempt document in accordance with section 28 or 29A; or
 - (ii) is subject to legal professional privilege or client legal privilege; or
 - (c) a finding or an opinion that a specified person is guilty of or has committed, is committing or is about to commit an offence; or
 - (d) a recommendation that a specified person be, or an opinion that a specified person should be, prosecuted for an offence
- (2) If the Information Commissioner intends to include in a report under this Division a comment or opinion that is adverse to any person, the Information Commissioner must first give the person a reasonable opportunity to respond to the adverse material, and must fairly set out each element of the person's response in the report.
- (3) If the Information Commissioner intends to include in a report under this Division a comment or opinion that is not adverse to a person, the Information Commissioner must first provide that person with the relevant material in relation to which the Information Commissioner intends to name that person.
- (4) If the Information Commissioner intends to include in a report under this Division any adverse finding about an agency, the Information Commissioner must first give the principal officer of that agency a reasonable opportunity to respond to the adverse material, and must fairly set out each element of the response in the report.
- (5) The Information Commissioner must not include in a report under this Division any information that would identify any person who is not the subject of any adverse comment or opinion unless the Information Commissioner—
 - (a) is satisfied that—
 - (i) it is necessary or desirable to include the information in the public interest; and

- (ii) including the information will not cause unreasonable damage to the person's reputation, safety or wellbeing; and
- (b) states in the report that the person is not the subject of any adverse comment or opinion.

Guidelines

OVIC must prepare an investigation report

- 1.1. After completing an investigation, the Office of the Victorian Information Commissioner (**OVIC**) must make a report of its findings.⁹
- 1.2. An investigation report will generally outline the background to the investigation, how the investigation was conducted, the investigations' findings, and recommendations from the Information Commissioner. OVIC generally publishes regulatory reports on its [website](#).

Information that cannot be included in an investigation report

- 1.3. There is certain information which cannot be included in an investigation report, including:
 - information that would prejudice other legal proceedings and investigations;¹⁰
 - information that would be exempt under section 28 or 29A;¹¹
 - legally privileged information;¹²
 - findings or opinions of guilt,¹³ and
 - a recommendation or opinion that a person should be prosecuted for an offence.¹⁴

⁹ [Freedom of Information Act 1982 \(Vic\)](#), section 61Q.

¹⁰ [Freedom of Information Act 1982 \(Vic\)](#), section 61R(1)(a).

¹¹ [Freedom of Information Act 1982 \(Vic\)](#), section 61R(1)(b)(i).

¹² [Freedom of Information Act 1982 \(Vic\)](#), section 61R(1)(b)(ii).

¹³ [Freedom of Information Act 1982 \(Vic\)](#), section 61R(1)(c).

¹⁴ [Freedom of Information Act 1982 \(Vic\)](#), section 61R(1)(d).

Information that would prejudice other legal proceedings and investigations

- 1.4. OVIC cannot include information in an investigation report if the information would prejudice a criminal investigation, criminal proceeding, or any investigation by the Independent Broad-based Anti-corruption Commission or the Victorian Inspectorate.¹⁵ This is unless OVIC can remove the risk of prejudice through some other means (for example, OVIC may defer publishing or tabling a report in Parliament until after the other process has concluded so that the material may be included in the report).

Information that would be exempt under section 28 or 29A

- 1.5. OVIC cannot include information in an investigation report that, if included in a document, would make the document exempt under [section 28](#) (cabinet documents) or [section 29A](#) (documents affecting national security, defence, or international relations).¹⁶

Legally privileged information

- 1.6. OVIC cannot include information in an investigation report that is subject to legal professional privilege or client legal privilege.¹⁷
- 1.7. However, this requirement does not apply to information where privilege has been waived. Privilege will be waived where a person engages in conduct which is inconsistent with the maintenance of the privilege. If a person discloses privileged information to OVIC during an investigation, this may amount to a waiver of privilege unless special arrangements between OVIC and the agency were made.
- 1.8. Where an agency wishes to give privileged information to OVIC in confidence without waiving its privilege over the information, it should consider seeking legal advice and obtain OVIC's express agreement to receive the information on a confidential basis and to not disclose the privileged information.

For more information on when a document will be subject to legal professional privilege or client legal privilege, see [section 32 – Documents affecting legal proceedings](#).

¹⁵ [Freedom of Information Act 1982 \(Vic\)](#), section 61R(1)(a).

¹⁶ [Freedom of Information Act 1982 \(Vic\)](#), section 61R(1)(b)(i).

¹⁷ [Freedom of Information Act 1982 \(Vic\)](#), section 61R(1)(b)(i).

Findings or opinions of guilt

- 1.9. OVIC cannot include in an investigation report a finding that a person is guilty of or has committed, is committing, or is about to commit an offence.¹⁸ OVIC also cannot recommend or offer an opinion that a person should be prosecuted.¹⁹
- 1.10. This restriction only prevents the Commissioner from making their own finding or recommendation of this nature. The Commissioner may refer to a finding of another body, for example, the fact that a person has been found guilty of an offence by a court or has been recommended for prosecution by a different body.

Adverse comments or opinions

- 1.11. Where OVIC intends to include an adverse comment or opinion about an agency or person in an investigation report, OVIC must give them a reasonable opportunity to respond to the adverse material.²⁰ OVIC must then fairly set out each element of their response in the report.
- 1.12. OVIC will usually provide persons or agencies who are subject to adverse comment or opinion two opportunities to respond:
- first, an opportunity to review a preliminary version of the proposed adverse material and provide a response for OVIC to consider before the draft report is finalised;
 - second, an opportunity to provide a response to the adverse material that is proposed to be included in the final report.
- 1.13. Where a response is provided by a person or an agency in response to their being provided with adverse material, the Commissioner must fairly set out their response in the report.²¹

¹⁸ [Freedom of Information Act 1982 \(Vic\)](#), section 61R(1)(c).

¹⁹ [Freedom of Information Act 1982 \(Vic\)](#), section 61R(1)(d).

²⁰ [Freedom of Information Act 1982 \(Vic\)](#), section 61R(4). See *Woodman v IBAC* [2022] VSC 684 which considered section 162 of the IBAC Act which imposes similar obligations on IBAC.

²¹ [Freedom of Information Act 1982 \(Vic\)](#), sections 61R(2) and 61R(4).

Persons who are named, but not subject to adverse comment

- 1.14. OVIC generally cannot identify a person in an investigation report who is not subject to adverse comment or opinion. This is unless OVIC is satisfied it needs or wants to include the information in the public interest and provided the information will not unreasonably damage the person's reputation, safety or wellbeing.²² OVIC must also state in the report that the person being named is not the subject of any adverse comment or opinion.²³
- 1.15. Before OVIC includes an opinion or comment in an investigation report about a person (where the information is not adverse), OVIC must first provide that person with the material in which they are intended to be named.²⁴

²² [Freedom of Information Act 1982 \(Vic\)](#), section 61R(5)(a).

²³ [Freedom of Information Act 1982 \(Vic\)](#), section 61R(5)(b).

²⁴ [Freedom of Information Act 1982 \(Vic\)](#), section 61R(3).

Section 61S – Legal advice and representation— investigation report

Extract of legislation

61S Legal advice and representation – investigation report

A person may seek legal advice, and be represented by, a legal practitioner in relation to a proposed report, or draft or part of a proposed report under this Division that is received by the person.

Guidelines

A person may seek legal advice and representation

- 1.1. A person may seek legal advice and be represented by a legal practitioner in relation to a proposed or draft report received by them.²⁵ This applies regardless of whether the report makes an adverse comment or opinion about the person or not. An agency may also seek legal advice where OVIC proposes to make an adverse finding about it.

Example

For example, where the Information Commissioner intends to make an adverse comment or opinion in relation to a person, they can seek legal advice in formulating their response to the findings. Where the Commissioner is not making an adverse finding about a person, they can seek legal advice to understand the material in relation to which the Commissioner intends to name them and about their rights in relation to the Commissioner’s proposal to name them in the report.

²⁵ [Freedom of Information Act 1982 \(Vic\)](#), section 61S.

Section 61T – Tabling of report in Parliament

Extract of legislation

61T Tabling of report in Parliament

- (1) The Information Commissioner may cause a report to be transmitted to each House of the Parliament as soon as practicable after the investigation report has been completed.
- (2) The clerk of each House of the Parliament must cause the report to be laid before the House of the Parliament on the day on which it is received or on the next sitting day of the House of the Parliament.
- (3) If the Information Commissioner proposes to transmit a report to the Parliament on a day on which neither House of the Parliament is sitting, the Information Commissioner must—
 - (a) give one business day's notice of the intention to do so to the clerk of each House of the Parliament; and
 - (b) give the report to the clerk of each House of the Parliament on the day indicated in the notice; and
 - (c) publish the report on the Internet site of the Office of the Victorian Information Commissioner as soon as practicable after giving it to the clerks.
- (4) The clerk of each House of the Parliament must—
 - (a) notify each member of the House of the Parliament of the receipt of a notice under subsection (3)(a) on the same day that the clerk receives that notice; and
 - (b) give a copy of a report to each member of the House of the Parliament as soon as practicable after the report is received under subsection (3)(b); and
 - (c) cause the report to be laid before the House of the Parliament on the next sitting day of the House of the Parliament.
- (5) If the Information Commissioner proposes to transmit a report to the Parliament under this section, the Information Commissioner must give an advance copy of the report to—
 - (a) the Minister; and
 - (b) the Secretary to the Department of Premier and Cabinet.
- (6) The copy of the report must be given at least one business day before—
 - (a) if subsection (3) applies—the report is given to the clerk of each House of the Parliament; or
 - (b) otherwise—the report is due to be transmitted to the Parliament.
- (7) The Information Commissioner is not required to give an advance copy of the report under subsection (5) if the Information Commissioner considers that in all the circumstances it would be inappropriate to do so.

Guidelines

Tabling investigation reports

- 1.1. Although investigations are conducted in private,²⁶ section 61T empowers the Office of the Victorian Information Commissioner (**OVIC**) to publish the investigation report by sending it to the Victorian Parliament to be tabled.
- 1.2. OVIC will usually table a completed investigation report unless there are compelling reasons not to do so. For example, OVIC may not publish a report if publishing it would cause unreasonable harm to particular groups or individuals.

For more information on when OVIC publishes investigation reports, see OVIC's [Regulatory Action Policy](#), under Part 1 – OVIC's Approach to Regulatory Action, 'Publishing the results of regulatory action'.

Process for tabling reports

- 1.3. After an investigation report is complete, OVIC may send the report to be tabled in Parliament as soon as practicable after the investigation report has been completed.²⁷ If OVIC sends the report for tabling, the clerk of each House of Parliament must cause the report to be laid before the House of Parliament on the day on which it was received or the next sitting day of Parliament.²⁸
- 1.4. If OVIC sends the report on a day on which neither House of the Parliament is sitting, OVIC must:
 - give one business' day's notice to the clerk;
 - give the report to the clerk of each House of Parliament on the day indicated in the notice; and
 - publish the report on OVIC's website.²⁹

²⁶ [Freedom of Information Act 1982 \(Vic\)](#), section 61P(1).

²⁷ [Freedom of Information Act 1982 \(Vic\)](#), section 61T(1).

²⁸ [Freedom of Information Act 1982 \(Vic\)](#), section 61T(2).

²⁹ [Freedom of Information Act 1982 \(Vic\)](#), section 61T(3).

1.5. Where this happens, the clerk of each House of Parliament must:

- on the day the clerk receives the notice, notify each member of the House that the notice has been received;
- give a copy of the report to each House member as soon as practicable; and
- cause the report to be laid before Parliament house on the next sitting day.³⁰

1.6. If OVIC plans to send the report to Parliament, they must give an advance copy of the report to the Minister and the Secretary to the Department of Justice and Community Safety.³¹

1.7. However, OVIC does not have to send an advance copy of the report to the Minister or Secretary if OVIC considers it would be inappropriate.³²

³⁰ [Freedom of Information Act 1982 \(Vic\)](#), section 61T(4).

³¹ [Freedom of Information Act 1982 \(Vic\)](#), section 61T(5). Although the FOI Act refers to the ‘Secretary to the Department of Premier and Cabinet’, items 9 and 10 of the Administrative Arrangements Order No. 234, 2020 state that this should be read as a reference to the Secretary of the Department of Justice and Community Safety.

³² [Freedom of Information Act 1982 \(Vic\)](#), section 61T(7).

Division 3—Investigations of public interest complaints

Section 61TA – Information Commissioner must investigate public interest complaints

Extract of legislation

61TA Information Commissioner must investigate public interest complaints

- (1) Subject to sections 61TB and 61TC, the Information Commissioner must conduct an investigation under this Act on a public interest complaint referred to the Information Commissioner by the IBAC.
- (2) The Information Commissioner must not refer a public interest complaint referred to the Information Commissioner under subsection (1) to another person or body under section 61C for investigation by that person or body.

Guidelines

What is a public interest disclosure and a public interest complaint?

- 1.1. People who make disclosures about improper conduct and detrimental action in the Victorian public sector receive protections such as keeping the identity of the person reporting improper conduct confidential and protecting them from reprisals (including bullying, harassment or legal action).³³
- 1.2. A public interest disclosure is a disclosure of information that shows or tends to show (or the person believes on reasonable grounds that):
 - a person, public officer or public body has engaged or proposes to engage in improper conduct; or

³³ Independent Broad-based Anti-corruption Commission, Guidance Material, '[What is a public interest disclosure](#)' (1 January 2020).

- a public officer or public body has, is or is proposing to take detrimental action against a person in reprisal for their disclosure.³⁴

1.3. People may report improper conduct to the Independent Broad-based Anti-corruption Commission (IBAC) or to the Public Interest Disclosure Coordinator of certain public sector bodies and agencies. A Public Interest Disclosure Coordinator must keep all potential public interest disclosures confidential and refer them to IBAC for assessment.³⁵

A list of entities that can receive public interest disclosures is available on IBAC's website [here](#).

1.4. [IBAC](#) is Victoria's agency responsible for preventing and exposing public sector corruption and police misconduct.

Public interest complaints

1.5. If a public interest disclosure is made to IBAC, IBAC must assess the disclosure to determine whether the disclosure is a public interest complaint.³⁶ IBAC may decide to dismiss the matter, investigate the matter, or refer the matter to another investigating entity (such as OVIC).

For more information about reporting corruption and misconduct, and how public interest disclosures are assessed, see IBAC's:

- factsheet '[What is a public interest disclosure?](#)';
- information sheet '[Public interest disclosure procedures: key issues to consider](#)';
- [Guidelines for Handling Public Interest Disclosures](#).

What is OVIC's role in public interest complaints?

1.6. Division 3 of Part VIB provides for the Information Commissioner to investigate public interest complaints referred by IBAC.

³⁴ [Public Interest Disclosures Act 2012 \(Vic\)](#), sections 3, 9 and 45.

³⁵ Independent Broad-based Anti-corruption Commission, Guidance Material, '[What is a public interest disclosure](#)' (1 January 2020).

³⁶ [Public Interest Disclosure Act 2012 \(Vic\)](#), section 26.

- 1.7. If IBAC decides that a disclosure is a public interest complaint, they will deal with it under the [Independent Broad-based Anti-corruption Act 2011 \(Vic\) \(IBAC Act\)](#).³⁷ This may include referring the complaint to OVIC or another integrity body under sections 73 or 73A of the IBAC Act.
- 1.8. If IBAC refers the complaint to OVIC, OVIC must investigate it.³⁸ However, there are specific instances where OVIC cannot, or may refuse to, investigate a public interest complaint.

For more information on when OVIC must or may refuse to investigate a public interest complaint, see:

- [section 61TB – Information Commissioner must refuse to investigate certain public interest complaints](#); and
- [section 61TC – Information Commissioner may refuse to investigate certain public interest complaints](#).

When can IBAC refer a public interest complaint?

- 1.9. Section 73A of the IBAC Act allows IBAC to refer public interest complaints to certain other agencies, including OVIC.³⁹ IBAC may only refer public interest complaints if:
 - it does not consider the subject matter of the complaint amounts to corrupt conduct;⁴⁰
 - the subject matter of the complaint is relevant to the functions of the agency it is referring it to;⁴¹
 - the complaint is not about the agency it is referring it to;⁴²
 - IBAC considers it is more appropriate that the other agency investigate the complaint than IBAC;⁴³ and
 - IBAC has consulted with the agency before referring the complaint.⁴⁴

³⁷ [Public Interest Disclosures Act 2012 \(Vic\)](#), section 32.

³⁸ [Freedom of Information Act 1982 \(Vic\)](#), section 61TA.

³⁹ [Independent Broad-based Anti-corruption Act 2011 \(Vic\)](#), section 73A(1)(c).

⁴⁰ [Independent Broad-based Anti-corruption Act 2011 \(Vic\)](#), section 73A(2).

⁴¹ [Independent Broad-based Anti-corruption Act 2011 \(Vic\)](#), section 73A(3)(a).

⁴² [Independent Broad-based Anti-corruption Act 2011 \(Vic\)](#), section 73A(3)(b).

⁴³ [Independent Broad-based Anti-corruption Act 2011 \(Vic\)](#), section 73A(3)(c).

⁴⁴ [Independent Broad-based Anti-corruption Act 2011 \(Vic\)](#), section 73A(3)(d).

Background to public interest complaints

1.10. Division 3 was inserted into the FOI Act by the *Integrity and Accountability Legislation Amendment (Public Interest Disclosures, Oversight and Independence) Act* (Vic) in 2019 (**Integrity and Accountability Amendment Act**).

1.11. The Integrity and Accountability Amendment Act's second reading speech said that it gave effect to seven guiding principles:

- 'Accountability: the Bill promotes responsibility for the actions and decisions of public officials and bodies by encouraging people to report wrongdoing, and ensuring serious wrongdoing is effectively investigated.
- 'Independence: the Bill strengthens the roles of key integrity bodies' such as OVIC and 'supports the investigation of serious wrongdoing by investigating entities who are independent from government influence and control.'⁴⁵
- 'Effectiveness: the Bill ensures that each integrity body has appropriate and proportionate powers that allow them to achieve their objectives within the system. The Bill also makes the process of disclosure, notification, assessment and investigation more streamlined and effective.
- 'Transparency: the Bill provides clear and transparent guidance on how complaints are to be treated by the public sector and integrity bodies, and how integrity bodies are overseen by the Victorian Inspectorate.
- 'Collaboration: the Bill will allow integrity bodies to collaborate more effectively with each other and with the public sector.
- 'Cohesion: the Bill resolves discrepancies between integrity bodies' jurisdictions and improves referral mechanisms, which will prevent the duplication efforts between bodies and will help to ensure matters are resolved in a timely, efficient manner.
- 'Fairness: the Bill provides additional safeguards to protect the rights, safety and welfare of people who are involved in an integrity body's investigation, to ensure that people are treated fairly and equally.'⁴⁶

⁴⁵ Victoria, *Parliamentary Debates*, Legislative Assembly, 19 December 2018 (Jill Hennessy).

⁴⁶ Victoria, *Parliamentary Debates*, Legislative Assembly, 19 December 2018 (Jill Hennessy).

Section 61TB – Information Commissioner must refuse to investigate certain public interest complaints

Extract of legislation

61TB Information Commissioner must refuse to investigate certain public interest complaints

- (1) The Information Commissioner must refuse to conduct an investigation on a public interest complaint if the investigation would prejudice any—
 - (a) criminal proceedings or criminal investigations; or
 - (b) investigations by the IBAC or the Victorian Inspectorate.
- (2) For the purposes of ensuring compliance with subsection (1), the Information Commissioner may consult any of the following—
 - (a) the Director of Public Prosecutions;
 - (b) the Chief Commissioner of Police;
 - (c) the IBAC;
 - (d) the Victorian Inspectorate.

Guidelines

The Information Commissioner must refuse to investigate certain public interest complaints

- 1.1. Usually, the Office of the Victorian Information Commissioner (**OVIC**) must investigate a public interest complaint referred to it by the Independent Broad-based Anti-corruption Commission (**IBAC**).⁴⁷ However, where a public interest complaint would prejudice criminal proceedings or investigations, or investigations by IBAC or the Victorian Inspectorate, OVIC must refuse to investigate the complaint.

⁴⁷ [Freedom of Information Act 1982 \(Vic\)](#), section 61TA.

- 1.2. In deciding whether OVIC must refuse to investigate a public interest complaint, OVIC may consult with the Director of Public Prosecutions, the Chief Commissioner of Police, IBAC, or the Victorian Inspectorate.⁴⁸

⁴⁸ [Freedom of Information Act 1982 \(Vic\)](#), section 61TB(2).

Section 61TC – Information Commissioner may refuse to investigate certain public interest complaints

Extract of legislation

61TC Information Commissioner may refuse to investigate certain public interest complaints

- (1) The Information Commissioner may refuse to conduct an investigation on a public interest complaint if the Information Commissioner considers the subject matter of the public interest complaint has already been investigated or otherwise dealt with by—
 - (a) an integrity body within the meaning of the **Independent Broad-based Anti-corruption Commission Act 2011**; or
 - (b) any other person or body (whether or not still in existence) with the power to require the production of documents or the answering of questions.
- (2) The Information Commissioner may refuse to conduct an investigation on a public interest complaint if the person who made the public interest complaint—
 - (a) made the disclosure that was determined to be a public interest complaint more than 12 months after becoming aware of the disclosed matter; and
 - (b) fails to give a satisfactory explanation for the delay in making the disclosure.
- (3) The Information Commissioner may refuse to conduct an investigation on a public interest complaint if the Information Commissioner considers that the conduct that is the subject of the complaint does not amount to improper conduct, within the meaning of section 3 of the **Public Interest Disclosures Act 2012**, or detrimental action against a person in contravention of section 45 of that Act.

Guidelines

The Information Commissioner may refuse to investigate certain public interest complaints

- 1.1. Usually, the Office of the Victorian Information Commissioner (**OVIC**) must investigate a public interest complaint referred to it by the Independent Broad-based Anti-corruption Commission (**IBAC**).⁴⁹ However, there are certain instances where OVIC may decide not to investigate a public interest complaint referred to it by IBAC, including where:⁵⁰
- **the matter has already been investigated or dealt with:** OVIC considers the subject matter of the public interest complaint has already been investigated or dealt with by a different integrity body or another person or body with the power to require documents to be produced or require answers from a person;⁵¹
 - **the disclosure is delayed:** the person who made the public interest complaint made the disclosure more than 12 months after becoming aware of the disclosed matter and cannot give a satisfactory explanation to explain why they were delayed in making the disclosure;⁵²
 - **the conduct is not improper conduct or detrimental action:** OVIC considers the conduct referred to in the public interest complaint does not amount to improper conduct within the meaning of section 4 of the [Public Interest Disclosures Act 2012 \(Vic\)](#), or detrimental action within the meaning of section 3 of the [Public Interest Disclosures Act 2012 \(Vic\)](#) against a person.⁵³

⁴⁹ [Freedom of Information Act 1982 \(Vic\)](#), section 61TA.

⁵⁰ [Freedom of Information Act 1982 \(Vic\)](#), section 61TC.

⁵¹ [Freedom of Information Act 1982 \(Vic\)](#), section 61TC(1)(a) and 61TC(1)(b).

⁵² [Freedom of Information Act 1982 \(Vic\)](#), section 61TC(2)(a) and 61TC(2)(b).

⁵³ [Freedom of Information Act 1982 \(Vic\)](#), section 61TC(3).

Section 61TD – Notification of refusal to conduct investigation on public interest complaint

Extract of legislation

61TD Notification of refusal to conduct investigation on public interest complaint

- (1) This section applies if the Information Commissioner refuses under section 61TB or 61TC to conduct an investigation on a public interest complaint.
- (2) Within a reasonable time after the public interest complaint is referred to the Information Commissioner by the IBAC, the Information Commissioner must inform the IBAC and the person who made the public interest disclosure of—
 - (a) the refusal to conduct the investigation; and
 - (b) the reason for that refusal.

Guidelines

When OVIC decides not to investigate a public interest complaint: Notifying IBAC and other parties

- 1.1. If the Office of the Victorian Information Commissioner (**OVIC**) decides not to investigate a public interest complaint, OVIC must tell the Independent Broad-based Anti-corruption Commission and the person who made the public interest disclosure why.⁵⁴ OVIC must do this within a reasonable time after the public interest complaint was referred to it.

⁵⁴ *Freedom of Information Act 1982 (Vic)*, section 61TD(2).

Section 61TE – Notification of corrupt conduct

Extract of legislation

61TE Notification of corrupt conduct

If, at any time before, during or after an investigation of a public interest complaint, the Information Commissioner believes that the conduct that is the subject of the complaint appears to involve corrupt conduct, the Information Commissioner must—

- (a) notify the IBAC of that belief; and
- (b) if the investigation of the public interest complaint has not been completed— suspend the investigation pending a response from the IBAC to the notification.

Guidelines

Notifying IBAC of corrupt conduct in a public interest complaint

- 1.1. Public interest disclosures include conduct or action that shows or tends to show improper conduct or detrimental action. Improper conduct includes corrupt conduct, criminal offences, and other conduct outlined in the [Public Interest Disclosures Act 2012 \(Vic\)](#).⁵⁵
- 1.2. The Office of the Victorian Information Commissioner (**OVIC**) must notify the Independent Broad-based Anti-corruption Commission (**IBAC**) if OVIC believes the conduct being complained of in a public interest complaint that has been referred to it appears to involve corrupt conduct.⁵⁶
- 1.3. OVIC must suspend a current investigation (if the investigation is still ongoing) until it receives a response from IBAC.⁵⁷ OVIC must give IBAC an opportunity to investigate a public interest complaint, if OVIC thinks the complaint involves corrupt conduct.

⁵⁵ [Public Interest Disclosures Act 2012 \(Vic\)](#), section 4.

⁵⁶ [Freedom of Information Act 1982 \(Vic\)](#), section 61TE(a).

⁵⁷ [Freedom of Information Act 1982 \(Vic\)](#), section 61TE(b).

What is corrupt conduct?

- 1.4. Corruption is the misuse of public power, position, or funds. It can happen through improper or unlawful actions, failure to act by public sector staff or agencies, or people trying to improperly influence the functions or decisions of the public sector.⁵⁸
- 1.5. The [Independent Broad-based Anti-corruption Commission Act 2011 \(Vic\)](#) defines ‘corrupt conduct’ in section 4. It includes conduct such as dishonest performance of a public officer’s functions and misusing information or material acquired through performing a public officer’s functions.

For more information on what corruption means, visit IBAC’s [website](#).

⁵⁸ Independent Broad-based Anti-corruption Commission, ‘[What is corruption?](#)’.

Section 61TF – Procedure on completion of investigation of public interest complaint

Extract of legislation

61TF Procedure on completion of investigation of public interest complaint

- (1) On completion of an investigation of a public interest complaint, the Information Commissioner may, subject to subsection (3), make recommendations in accordance with section 61L.
- (2) However, the Information Commissioner must not refer a public interest complaint to another person or body under section 61L for investigation by that person or body.
- (3) The Information Commissioner must not include in a recommendation under section 61L any information that—
 - (a) is likely to lead to the identification of a person who has made an assessable disclosure; and
 - (b) is not information to which section 53(2)(a), (c) or (d) of the **Public Interest Disclosures Act 2012** applies.

Guidelines

What happens after OVIC completes a public interest complaint investigation?

- 1.1. After the Office of the Victorian Information Commissioner (**OVIC**) completes an investigation into a public interest complaint, OVIC may make a recommendation under [section 61L](#) (except for making a recommendation to refer the public interest complaint to another person or body).⁵⁹
- 1.2. Section 61L(1) allows OVIC to make recommendations to an agency, principal officer or Minister.⁶⁰ This can include suggestions for improvements to the policies, procedures and systems of the agency.⁶¹

⁵⁹ [Freedom of Information Act 1982 \(Vic\)](#), section 61TF(1) and 61TF(2).

⁶⁰ [Freedom of Information Act 1982 \(Vic\)](#), section 61L(1).

⁶¹ [Freedom of Information Act 1982 \(Vic\)](#), section 61L(2).

Identifying a person who made an assessable disclosure in a recommendation

- 1.3. If OVIC makes a recommendation under section 61L, OVIC cannot include information in the recommendation that is likely to identify a person who made the public interest disclosure, unless an exception applies.⁶²
- 1.4. For example, this includes where:
 - the person has given written consent to OVIC to disclose information or specific information likely to lead to their identification;⁶³
 - the Independent Broad-based Anti-corruption Commission, the Victorian Inspectorate, or the Integrity and Oversight Committee has determined that the disclosure is not a public interest complaint and the Information Commissioner discloses the information after that determination;⁶⁴ or
 - an investigating entity has already published a report or otherwise made the information public consistently with its confidentiality obligations under the Public Interest Disclosures Act.⁶⁵
- 1.5. There are additional confidentiality provisions in Part 7 of the [Public Interest Disclosure Act 2012 \(Vic\)](#) and exceptions to those confidentiality provisions.⁶⁶

For more information on confidentiality under the Public Interest Disclosures Act, see IBAC's [Guidelines for handling public interest disclosures](#) and IBAC's video on [Protections, information sharing, and confidentiality](#).

⁶² [Public Interest Disclosures Act 2012 \(Vic\)](#), section 53(2).

⁶³ [Public Interest Disclosures Act 2012 \(Vic\)](#), section 53(2)(a).

⁶⁴ [Public Interest Disclosures Act 2012 \(Vic\)](#), section 53(2)(c).

⁶⁵ [Public Interest Disclosures Act 2012 \(Vic\)](#), section 53(2)(d).

⁶⁶ See [Public Interest Disclosures Act 2012 \(Vic\)](#), section 54.

Section 61TG – Person who made public interest disclosure to be informed of result of investigation

Extract of legislation

61TG Person who made public interest disclosure to be informed of result of investigation

- (1) If the Information Commissioner conducts an investigation on a public interest complaint, the Information Commissioner must inform the person who made the complaint (unless the complaint was made anonymously) of—
 - (a) the result of the investigation; and
 - (b) any other information that the Information Commissioner thinks proper.
- (2) The Information Commissioner must not disclose any information under this section if the Information Commissioner considers that the disclosure of the information would—
 - (a) not be in the public interest or in the interests of justice; or
 - (b) put a person's safety at risk; or
 - (c) cause unreasonable damage to a person's reputation; or
 - (d) prejudice any criminal proceedings or criminal investigations, or investigations by the Ombudsman, the IBAC or the Victorian Inspectorate; or
 - (e) otherwise contravene any applicable statutory secrecy obligations or involve the unreasonable disclosure of information relating to the personal affairs of any person.

Guidelines

Providing information about the results of the investigation

- 1.1. The Office of the Victorian Information Commissioner (**OVIC**) must inform the person who made the public interest disclosure about the results of their investigation.⁶⁷ However, OVIC must not disclose information if they believe the disclosure would:

⁶⁷ *Freedom of Information Act 1982 (Vic)*, section 61TG(1).

- not be in the public interest or in the interests of justice; or
- put a person’s safety at risk; or
- cause unreasonable damage to a person’s reputation; or
- prejudice any criminal proceedings or criminal investigations, or investigations by the Ombudsman, the Independent Broad-based Anti-corruption Commission or the Victorian Inspectorate; or
- otherwise does not comply with statutory secrecy obligations or involve the unreasonable disclosure of information relating to the personal affairs of any person.⁶⁸

⁶⁸ [Freedom of Information Act 1982 \(Vic\)](#), section 61TG(2).

Section 61TH – Information Commissioner must not disclose certain information

Extract of legislation

61TH Information Commissioner must not disclose certain information

- (1) If a public interest complaint is referred by the IBAC to the Information Commissioner for investigation, the Information Commissioner, the Public Access Commissioner or any officer of the Office of the Victorian Information Commissioner must not disclose any information that—
 - (a) is likely to lead to the identification of a person who has made an assessable disclosure; and
 - (b) is not information to which section 53(2)(a), (c) or (d) of the **Public Interest Disclosures Act 2012** applies.

Guidelines

Protecting the identity of the person who made the assessable disclosure

- 1.1. The identity of a person who made an assessable disclosure that led to the public interest complaint is protected.⁶⁹ The Office of the Victorian Information Commissioner (**OVIC**) must not disclose any information that is likely to lead to the identification of a person who made an assessable disclosure, unless an exception applies.
- 1.2. Whether a person may be identified from information depends on a range of factors such as the nature and volume of the information, the way it is disclosed, and to whom it is disclosed. A person may be identified even where their name does not appear in the information.

For guidance on whether a person may be identifiable from information, see OVIC's guidance on '[personal information](#)' under the [Privacy and Data Protection Act 2014 \(Vic\)](#).

⁶⁹ Similarly, section 53(1) of the [Public Interest Disclosures Act 2012 \(Vic\)](#) creates an offence for a person or body to disclose information that is likely to lead to the identification of a person who made an assessable disclosure.

The Privacy and Data Protection Act regulates the handling of ‘personal information’. Personal information is, in summary, information about an individual who is identified or whose identity is reasonably ascertainable.

Disclosing identifiable information

1.3. OVIC may disclose information that is likely to lead to the identification of a person who made an assessable disclosure where:

- the person has given written consent to OVIC to disclose that information;⁷⁰
- IBAC, the Victorian Inspectorate or the Integrity and Oversight Committee decides the disclosure is not a public interest complaint and OVIC discloses the information after that decision;⁷¹
- an investigating entity publishes identifiable information in a report to Parliament or otherwise makes the information public (acting consistently with their confidentiality obligations) and OVIC discloses the information after that publication.⁷²

More information

For more information on public interest disclosures, see the Independent Broad-based Anti-corruption Commission’s [Guidelines for handling public interest disclosures](#).

⁷⁰ [Public Interest Disclosures Act 2012 \(Vic\)](#), section 53(2)(a).

⁷¹ [Public Interest Disclosures Act 2012 \(Vic\)](#), section 53(2)(c).

⁷² [Public Interest Disclosures Act 2012 \(Vic\)](#), section 53(2)(d).

Section 61TI – Disclosure of information by Information Commissioner

Extract of legislation

61TI Disclosure of information by Information Commissioner

- (1) At any time, the Information Commissioner may provide or disclose any information received or obtained in the course of an investigation of an assessable disclosure to a person or body specified in subsection (3) if the Information Commissioner considers that—
 - (a) the information is relevant to the performance of the duties and functions or the exercise of the powers of the person or body; and
 - (b) it is appropriate for the information to be brought to the attention of the person or body, having regard to the nature of the information.
- (2) Despite subsection (1), the Information Commissioner must not provide or disclose any information to a person or body if—
 - (a) the person or body, or an employee of the person or body, is the subject of an assessable disclosure; and
 - (b) the information—
 - (i) would be likely to lead to the identification of a person who made the assessable disclosure; and
 - (ii) is not information to which section 53(2)(a), (c) or (d) of the Public Interest Disclosures Act 2012 applies.
- (3) For the purposes of subsection (1), the following persons and bodies are specified—
 - (a) the IBAC;
 - (b) the Victorian Inspectorate;
 - (c) the Ombudsman;
 - (d) the Auditor-General;
 - (e) Victoria Police;
 - (f) the Director of Public Prosecutions;
 - (g) the Commission for Children and Young People established under section 6 of the Commission for Children and Young People Act 2012;
 - (h) the Australian Federal Police constituted under section 6 of the Australian Federal Police Act 1979 of the Commonwealth;

- (i) the police force or police service (however described) of another State or a Territory;
 - (j) a prescribed person or body.
- (4) Subsection (1) applies subject to any restriction on the provision or disclosure of information under this Act or any other Act (including any Commonwealth Act).

Guidelines

Disclosing information to other persons or bodies

- 1.1. The Office of the Victorian Information Commissioner (**OVIC**) may disclose information received or obtained in investigating a public interest complaint to a specific person or body if it considers:
- the information is relevant to the body’s performance and functions; and
 - it is appropriate to be brought to that person or body’s attention, having regard to the nature of the information.⁷³
- 1.2. However, OVIC cannot provide or disclose information to a person or body if that person or body is the subject of a complaint and the information would be likely to identify the person who made the complaint.⁷⁴ This is unless an exception in the [Public Interest Disclosures Act 2012 \(Vic\)](#) applies.
- 1.3. OVIC may disclose information that is likely to lead to the identification of a person who made an assessable disclosure where:
- the person has given written consent to OVIC to disclose that information;⁷⁵
 - IBAC, the Victorian Inspectorate or the Integrity and Oversight Committee decides the disclosure is not a public interest complaint and OVIC discloses the information after that decision;⁷⁶

⁷³ [Freedom of Information Act 1982 \(Vic\)](#), section 61TI(1).

⁷⁴ [Freedom of Information Act 1982 \(Vic\)](#), section 61TI(2).

⁷⁵ [Public Interest Disclosures Act 2012 \(Vic\)](#), section 53(2)(a).

⁷⁶ [Public Interest Disclosures Act 2012 \(Vic\)](#), section 53(2)(c).

- an investigating entity publishes identifiable information in a report to Parliament or otherwise makes the information public (acting consistently with their confidentiality obligations) and OVIC discloses the information after that publication.⁷⁷

Who can OVIC disclose information to?

1.4. The specific persons and bodies that the Information Commissioner may disclose information about a public interest complaint to include:

- IBAC;
- the Victorian Inspectorate;
- the Ombudsman;
- the Auditor-General;
- Victoria Police;
- the Director of Public Prosecutions;
- the Commission for Children and Young People established under section 6 of the *Commission for Children and Young People Act 2012* (Vic);
- the Australian Federal Police constituted under section 6 of the *Australian Federal Police Act 1979* (Cth);
- the police force or police service of another State or a Territory;
- a prescribed person or body.

Operation with other Acts

1.5. Section 61TI applies subject to any restriction on disclosure under the Act or any other Act, including a Commonwealth Act.⁷⁸ For example, this section may yield to the confidentiality provisions contained in Part 7 of the [Public Interest Disclosures Act 2012 \(Vic\)](#).⁷⁹

⁷⁷ [Public Interest Disclosures Act 2012 \(Vic\)](#), section 53(2)(d).

⁷⁸ [Freedom of Information Act 1982 \(Vic\)](#), section 61TI(4).

⁷⁹ [Public Interest Disclosures Act 2012 \(Vic\)](#), section 53.

Section 61TJ – Confidentiality notice

Extract of legislation

61TJ Confidentiality notice

- (1) During an investigation on a public interest complaint—
 - (a) if the Information Commissioner considers on reasonable grounds that the disclosure of one or more restricted matters would be likely to prejudice—
 - (i) an investigation by the IBAC or the Victorian Inspectorate; or
 - (ii) the safety or reputation of a person; or
 - (iii) the fair trial of a person who has been, or may be, charged with an offence—

the Information Commissioner must issue a confidentiality notice in respect of the investigation to a person (other than an IBAC Officer or a Victorian Inspectorate Officer) specifying the restricted matter or restricted matters in accordance with this section.
 - (b) If the Information Commissioner considers on reasonable grounds that the disclosure of one or more restricted matters would be likely to prejudice the investigation by the Information Commissioner, the Information Commissioner may issue a confidentiality notice in respect of the investigation to a person (other than an IBAC officer or a Victorian Inspectorate officer) specifying the restricted matter or restricted matters in accordance with this section.
- (2) A confidentiality notice must—
 - (a) be in the prescribed form; and
 - (b) specify the restricted matter or restricted matters in respect of which the confidentiality notice is issued; and
 - (c) include a copy of the provisions of subsections (3) to (7) and sections 61TK and 61TM and an explanation of the effect of those provisions; and
 - (d) include a statement—
 - (i) advising the person to whom the confidentiality notice is issued that additional obligations under the **Public Interest Disclosures Act 2012** relating to confidentiality may apply to the person; and
 - (ii) directing the person to the provisions of that Act which impose those obligations
- (3) If at any time the Information Commissioner considers on reasonable grounds that it is necessary to restrict disclosure of a different restricted matter from any of those specified in a confidentiality notice in respect of a particular investigation to ensure that

the disclosure would not be likely to have the effect specified in subsection (1)(a) or (b), the Information Commissioner must issue to the person to whom the confidentiality notice was issued—

- (a) a notice cancelling the previous confidentiality notice; and
 - (b) a new confidentiality notice in respect of that investigation under subsection (1).
- (4) If at any time the Information Commissioner considers on reasonable grounds that disclosure of a particular restricted matter specified in a confidentiality notice in respect of a particular investigation would no longer be likely to have the effect specified in subsection (1)(a) or (b), the Information Commissioner must issue to the person to whom the confidentiality notice was issued—
- (a) a notice cancelling the previous confidentiality notice; and
 - (b) a new confidentiality notice in respect of that investigation under subsection (1).
- (5) If at any time the Information Commissioner considers on reasonable grounds that disclosure of the restricted matter or restricted matters specified in a confidentiality notice in respect of a particular investigation would no longer be likely to have the effect specified in subsection (1)(a) or (b), the Information Commissioner must issue to the person to whom the confidentiality notice was issued a notice cancelling the confidentiality notice.
- (6) At the conclusion of an investigation in respect of which a confidentiality notice was issued, the Information Commissioner must issue to the person to whom the confidentiality notice was issued a notice cancelling the confidentiality notice, unless—
- (a) the Information Commissioner has applied for an order under section 61TK extending the confidentiality notice and the application has not been determined; or
 - (b) the Supreme Court has made an order under section 61TK extending the confidentiality notice; or
 - (c) the confidentiality notice has already been cancelled under subsection (3), (4) or (5) or section 61TK(3).
- (7) A confidentiality notice in respect of a particular investigation ceases to have effect on whichever of the following occurs first—
- (a) the date on which the Information Commissioner issues a notice cancelling the confidentiality notice under subsection (3), (4), (5) or (6) or section 61TK(3);
 - (b) the date specified in an order under section 61TK extending the confidentiality notice.
- (8) A confidentiality notice under subsection (1) or a notice cancelling a confidentiality notice under subsection (3), (4), (5) or (6) may be issued to a person by serving a copy on the person in accordance with section 61W.

Guidelines

When will a confidentiality notice for public interest complaint investigations be issued?

1.1. If, during an investigation of a public interest complaint, the Information Commissioner considers on reasonable grounds that the disclosure of one or more restricted matters would be likely to prejudice:

- an investigation by the Independent Broad-based Anti-corruption Commission (**IBAC**) or the Victorian Inspectorate; or
- the safety or reputation of a person; or
- the fair trial of a person who has been, or may be, charged with an offence—

the Information Commissioner **must** issue a confidentiality notice to a person (other than an IBAC Officer or a Victorian Inspectorate Officer) specifying the restricted matter or restricted matters.⁸⁰

1.2. If, during an investigation of a public interest complaint, the Information Commissioner considers on reasonable grounds that the disclosure of one or more restricted matters would be likely to prejudice:

- the Information Commissioner’s investigation of that public interest complaint—

the Information Commissioner **may** issue a confidentiality notice to a person (other than an IBAC Officer or a Victorian Inspectorate Officer) specifying the restricted matter or restricted matters.⁸¹

What is the effect of a confidentiality notice?

1.3. A person who receives a confidentiality notice cannot disclose the restricted matter that is outlined in the notice, unless an exception applies. Any exceptions to disclosing a restricted matter will be outlined in the notice. There are penalties for disclosing a restricted matter when not permitted.⁸²

1.4. There are circumstances where confidentiality notices may be disclosed. This is outlined below.

⁸⁰ [Freedom of Information Act 1982 \(Vic\)](#), section 61TJ(1)(a).

⁸¹ [Freedom of Information Act 1982 \(Vic\)](#), section 61TJ(1)(b).

⁸² [Freedom of Information Act 1982 \(Vic\)](#), section 61TM(1).

- 1.5. The confidentiality notice will outline the restricted matter or matters which the notice covers and include information about when the confidentiality notice ends.⁸³

See Schedule 3 the [Freedom of Information Regulations 2019](#) to see the prescribed form for issuing a confidentiality notice.

What is a restricted matter?

- 1.6. 'Restricted matter' is defined in [section 5](#) as any one of the following:
- any evidence or information given to, or obtained by, OVIC;
 - the contents of any document produced to, or obtained by, OVIC;
 - the existence of, or any information about, a confidentiality notice or a requirement under section 61U(1)(a) to attend an examination before OVIC;
 - the subject matter of an investigation by OVIC;
 - any information that could enable a person who has been, or is proposed to be, examined by, or who has produced, or may produce, any document to OVIC, to be identified or located;
 - the fact that a person has been, or is proposed to be, examined by, or has produced, or may produce, any document to, OVIC;
 - the fact that a disclosure or related disclosure has been notified to an appropriate entity for assessment under Part 3 of the *Public Interest Disclosures Act 2012* (Vic);
 - the fact that a disclosure or related disclosure has been determined under Part 3 of the *Public Interest Disclosures Act 2012* (Vic) to be a public interest complaint;
 - the fact that OVIC intends to conduct an investigation on a public interest disclosure.

Updating or cancelling a confidentiality notice

- 1.7. OVIC must issue a new confidentiality notice if it believes on reasonable grounds that there is new information that must be restricted.⁸⁴ To update a confidentiality notice, OVIC must cancel the previous confidentiality notice and issue a new one.⁸⁵

⁸³ *Beckingham v Browne* [2021] VSCA 362 which considered section 42 of the [Independent Broad-based Anti-corruption Act 2011](#) (Vic) and what is required to 'specify the restricted matter'.

⁸⁴ [Freedom of Information Act 1982](#) (Vic), section 61TJ(3).

⁸⁵ [Freedom of Information Act 1982](#) (Vic), section 61TJ(3).

- 1.8. If OVIC considers on reasonable grounds that a restricted matter is no longer likely to prejudice:
- an investigation by the Independent Broad-based Anti-corruption Commission (**IBAC**) or the Victorian Inspectorate; or
 - the safety or reputation of a person; or
 - the fair trial of a person who has been, or may be, charged with an offence; or
 - the Information Commissioner’s investigation of the public interest complaint—
- OVIC must cancel the confidentiality notice.⁸⁶

What happens to a confidentiality notice after an investigation ends?

1.9. Generally, when an investigation ends, OVIC must cancel the confidentiality notice.⁸⁷ However, there are exceptions to this.

1.10. OVIC does not have to cancel a confidentiality notice at the end of an investigation if:

- OVIC has applied for an order to extend the confidentiality notice and the application has not been determined;⁸⁸ or
- the Supreme Court has made an order to extend the confidentiality notice;⁸⁹ or
- the confidentiality notice has already been cancelled.⁹⁰

When does a confidentiality notice end?

1.11. A confidentiality notice will end (meaning the person no longer has to comply with it) on the date that OVIC cancels the confidentiality notice or, if the notice has been extended, on the date specified in the order extending the confidentiality notice.⁹¹ The confidentiality notice will end on whichever date is first.

⁸⁶ [Freedom of Information Act 1982 \(Vic\)](#), section 61TJ(5).

⁸⁷ [Freedom of Information Act 1982 \(Vic\)](#), section 61TJ(6).

⁸⁸ An order to extend a confidentiality notice may be made under section 61TK.

⁸⁹ Under section 61TK.

⁹⁰ [Freedom of Information Act 1982 \(Vic\)](#), section 61TJ(6). The Information Commissioner may cancel a confidentiality notice under section 61TJ(5).

⁹¹ [Freedom of Information Act 1982 \(Vic\)](#), section 61TJ(7).

1.12. However, confidentiality obligations in Part 7 of the [Public Interest Disclosures Act 2012 \(Vic\)](#) may still apply even where the confidentiality notice has ended.

Section 61TK – Extension of confidentiality notice

Extract of legislation

61TK Extension of confidentiality notice

- (1) If, before the conclusion of an investigation in respect of which a confidentiality notice has been issued, the Information Commissioner considers on reasonable grounds that it is necessary to extend the confidentiality notice for a period following the investigation, the Information Commissioner may apply to the Supreme Court for an order extending the confidentiality notice.
- (2) On an application under subsection (1), the Supreme Court may, by order, extend a confidentiality notice to a date specified in the order, if the Supreme Court is satisfied that disclosure of the restricted matter or restricted matters specified in the confidentiality notice before that date would be likely to have the effect specified in section 61TJ(1)(a) or (b).
- (3) If, on an application under subsection (1), the Supreme Court declines to make an order under subsection (2), the Information Commissioner must issue to the person to whom the confidentiality notice was issued a notice cancelling the confidentiality notice, unless the investigation in respect of which the confidentiality notice was issued has not concluded.

Note

Section 61TJ(6) provides for the issue of a notice cancelling a confidentiality notice at the conclusion of the investigation to which the confidentiality notice relates.

- (4) A notice cancelling a confidentiality notice under subsection (3) may be issued to a person by serving a copy on the person in accordance with section 61W.

Guidelines

Extending a confidentiality notice

- 1.1. The Office of the Victorian Information Commissioner (**OVIC**) may apply to the Supreme Court to extend a confidentiality notice if OVIC considers on reasonable grounds that it is necessary.⁹²

⁹² *Freedom of Information Act 1982 (Vic)*, section 61TK(1).

- 1.2. The Supreme Court can extend the date if they are satisfied that the disclosure of the restricted matters or matters would be likely to prejudice certain matters (investigations, safety or reputation, or a person's fair trial).⁹³

See [section 61TJ](#) for information on when OVIC can issue a confidentiality notices and what a 'restricted matter' is.

- 1.3. If the Supreme Court does not extend a confidentiality notice, OVIC must cancel the confidentiality notice and notify the person to whom it applies (unless the investigation has not concluded).⁹⁴

⁹³ [Freedom of Information Act 1982 \(Vic\)](#), section 61TK(2).

⁹⁴ [Freedom of Information Act 1982 \(Vic\)](#), section 61TK(3).

Section 61TL – Information Commissioner to provide the Victorian Inspectorate with copies

Extract of legislation

61TL Information Commissioner to provide the Victorian Inspectorate with copies

The Information Commissioner, as soon as reasonably practicable, must provide the Victorian Inspectorate with a copy of—

- (a) each confidentiality notice issued by the Information Commissioner;
- (b) each notice cancelling a confidentiality notice issued by the Information Commissioner under section 61TJ(3), (4), (5) or (6) or section 61TK(3);
- (c) each application to the Supreme Court under section 61TK(1) to extend a confidentiality notice;
- (d) each order of the Supreme Court under section 61TK(2) extending a confidentiality notice.

Guidelines

Providing copies of confidentiality notices and related documents to the Victorian Inspectorate

1.1. The Office of the Victorian Information Commissioner must provide the Victorian Inspectorate with copies of:

- confidentiality notices;
- notices cancelling confidentiality notices;
- applications to the Supreme Court to extend a confidentiality notice;
- each Supreme Court order extending a confidentiality notice.⁹⁵

⁹⁵ [Freedom of Information Act 1982 \(Vic\)](#), section 61TL.

Section 61TM – Disclosure subject to confidentiality notice

Extract of legislation

61TM Disclosure subject to confidentiality notice

- (1) Except as provided in this section, a person who—
- (a) is duly served with a confidentiality notice and, if applicable, a copy of any order extending the confidentiality notice; or
 - (b) receives a copy of a confidentiality notice under subsection (8) or (9) and, if applicable, a copy of any order extending the confidentiality notice—
- must not disclose a restricted matter specified in the confidentiality notice while it has effect.
- Penalty: 120 penalty units or imprisonment for 12 months or both.
- (2) A restricted matter specified in a confidentiality notice may be disclosed if the disclosure is made in any of the following circumstances—
- (a) in accordance with a direction or authorisation given by the Information Commissioner;
 - (b) to any person where necessary for the purposes of obtaining any information, document or other thing to comply with a witness summons or a confidentiality notice, a notice cancelling a confidentiality notice or an order extending a confidentiality notice, including—
 - (i) to an interpreter—if the person does not have a sufficient knowledge of the English language to understand the nature of the witness summons or confidentiality notice, notice cancelling the confidentiality notice or order extending the confidentiality notice;
 - (ii) to a parent, guardian or independent person—if the person is under the age of 18 years;
 - (iii) to an independent person—if the person is illiterate or has a mental, physical or other impairment which prevents the person from understanding the witness summons, confidentiality notice, notice cancelling the confidentiality notice or order extending the confidentiality notice without assistance;
 - (c) for the purposes of obtaining legal advice or representation in relation to—
 - (i) an investigation conducted by the Information Commissioner under this Act; or

- (ii) the person's rights, liabilities, obligations and privileges under this Act or a relevant Act;
 - (d) by a legal practitioner who receives a disclosure in the circumstances specified in paragraph (c), for the purposes of complying with a legal duty of disclosure or a professional obligation arising from their professional relationship with their client;
 - (e) to any of the following persons, unless the Information Commissioner directs that the restricted matter must not be disclosed to that person—
 - (i) the spouse or domestic partner of the person served with the confidentiality notice;
 - (ii) the employer or manager of the person served with the confidentiality notice, or both;
 - (f) in any of the following circumstances, unless the Information Commissioner directs that the restricted matter must not be disclosed in that circumstance—
 - (i) to any of the following for the purpose of assisting the person to seek advice or support in relation to the investigation in respect of which the confidentiality notice has been issued—
 - (A) a registered health practitioner;
 - (B) a trade union, within the meaning of section 93AB(11) of the Competition and Consumer Act 2010 of the Commonwealth, of which the person is a member;
 - (C) an employee assistance program;
 - (ii) to the Victorian WorkCover Authority for the purpose of a workers' compensation claim;
 - (iii) to a prescribed service for a purpose prescribed for that service;
 - (iv) for the purpose of an application to the Fair Work Commission, including any related proceeding;
 - (g) as is otherwise authorised or required to be made by or under this Act.
- (3) A restricted matter specified in a confidentiality notice may be disclosed to the IBAC if—
- (a) the IBAC referred the complaint to which restricted matter relates to the Information Commissioner under section 73A of the **Independent Broad-based Anti-corruption Commission Act 2011**; and
 - (b) the IBAC has withdrawn the referral in accordance with section 79 of that Act.
- (4) A restricted matter specified in a confidentiality notice may be disclosed to Victoria Police if—

- (a) the Information Commissioner has disclosed information to the Chief Commissioner of Police under section 61TI relating to actual or potential criminal conduct; and
 - (b) the restricted matter is relevant to an investigation by Victoria Police of the actual or potential criminal conduct.
- (5) A restricted matter specified in a confidentiality notice may be disclosed if the disclosure is made for the purposes of making—
- (a) a complaint to the IBAC under the **Independent Broad-based Anti-corruption Commission Act 2011**; or
 - (b) a witness summons served on a person by the Victorian Inspectorate under the **Victorian Inspectorate Act 2011**.
- (7) A restricted matter specified in a confidentiality notice may be disclosed if the disclosure made is of information that has been published by an investigating entity or the Integrity and Oversight Committee in a report or has otherwise been made public in accordance with this or any other Act.
- (8) A person who makes a disclosure of information permitted by subsection (2) must, when making the disclosure, provide the person to whom the disclosure is made with a copy of the confidentiality notice and of any order extending the confidentiality notice, unless the person has a reasonable excuse for not doing so.
Penalty: 120 penalty units or imprisonment for 12 months or both.
- (9) If in respect of a particular investigation a person who makes a disclosure of information permitted by subsection (2) receives a new confidentiality notice, a notice cancelling the confidentiality notice or an order extending the confidentiality notice, the person must as soon as reasonably practicable provide a copy of the new confidentiality notice, notice cancelling the confidentiality notice or order extending the confidentiality notice to each person to whom the disclosure has been made, unless the person has a reasonable excuse for not doing so.
Penalty: 120 penalty units or imprisonment for 12 months or both.
- (10) Proceedings may only be instituted for an offence under subsection (1), (8) or (9)—
- (a) by the Information Commissioner; or
 - (b) by or with the consent of the Director of Public Prosecutions.
- (11) In this section—

Fair Work Commission means the body established under section 575 of the Fair Work Act 2009 of the Commonwealth;

investigating entity has the same meaning as in section 3 of the **Public Interest Disclosures Act 2012**;

registered health practitioner means a person registered under the Health Practitioner Regulation National Law to practise a health profession (other than as a student);

relevant Act means—

- (a) the **Public Interest Disclosures Act 2012**; or
- (b) the **Independent Broad-based Anticorruption Commission Act 2011**; or
- (c) the **Victorian Inspectorate Act 2011**; or
- (d) the **Ombudsman Act 1973**; or
- (e) the Fair Work Act 2009 of the Commonwealth;

Victorian WorkCover Authority has the same meaning as in the **Workplace Injury Rehabilitation and Compensation Act 2013**.

Guidelines

What happens if a person receives a confidentiality notice?

- 1.1. A person who is served with a confidentiality notice must not disclose any restricted matter in the confidentiality notice while it has effect.⁹⁶ There are penalties for breaching a confidentiality notice (120 penalty units or 12 months imprisonment, or both).⁹⁷

See [section 61TJ](#) for information on when OVIC can issue a confidentiality notices and what a 'restricted matter' is.

When is disclosing a restricted matter permitted?

- 1.2. There are certain circumstances where a person may disclose a restricted matter in a confidentiality notice. This includes disclosures:
 - in accordance with a direction or authorisation from the Office of the Victorian Information Commissioner (**OVIC**),⁹⁸

⁹⁶ [Freedom of Information Act 1982 \(Vic\)](#), section 61TM(1).

⁹⁷ [Freedom of Information Act 1982 \(Vic\)](#), section 61TM(1).

⁹⁸ [Freedom of Information Act 1982 \(Vic\)](#), section 61TM(2)(a).

- to any person where necessary for the purposes of obtaining any information to comply with a witness summons or confidentiality notice (for instance, to an interpreter);⁹⁹
- for the purpose of obtaining legal advice or representation;¹⁰⁰
- by a legal practitioner who receives the disclosure for the purpose of providing legal advice;¹⁰¹
- to a spouse, domestic partner, employer or manager unless the Commissioner has specified otherwise;¹⁰²
- to certain classes of professionals for the purpose of obtaining advice or support unless the Information Commissioner directs that it should not be;¹⁰³ and
- as is otherwise authorised or required to be made by or under the Act.¹⁰⁴

1.3. If a person makes a disclosure under one of the circumstances outlined above, they must provide the person to whom the disclosure is made with:

- a copy of the confidentiality notice and any order extending the confidentiality notice;¹⁰⁵
- any new confidentiality notice;¹⁰⁶ and/or
- notice cancelling the confidentiality notice.¹⁰⁷

1.4. A penalty may apply for not doing this.¹⁰⁸

⁹⁹ [Freedom of Information Act 1982 \(Vic\)](#), section 61TM(2)(b).

¹⁰⁰ [Freedom of Information Act 1982 \(Vic\)](#), section 61TM(2)(c).

¹⁰¹ [Freedom of Information Act 1982 \(Vic\)](#), section 61TM(2)(d).

¹⁰² [Freedom of Information Act 1982 \(Vic\)](#), section 61TM(2)(e).

¹⁰³ [Freedom of Information Act 1982 \(Vic\)](#), section 61TM(2)(f).

¹⁰⁴ [Freedom of Information Act 1982 \(Vic\)](#), section 61TM(2)(g).

¹⁰⁵ [Freedom of Information Act 1982 \(Vic\)](#), section 61TM(8).

¹⁰⁶ [Freedom of Information Act 1982 \(Vic\)](#), section 61TM(9).

¹⁰⁷ [Freedom of Information Act 1982 \(Vic\)](#), section 61TM(9).

¹⁰⁸ [Freedom of Information Act 1982 \(Vic\)](#), section 61TM(9).

Other circumstances where disclosing a restricted matter is permitted

1.5. A person may disclose a restricted matter:

- to the Independent Broad-based Anti-corruption Commission (**IBAC**) if IBAC originally referred the complaint to OVIC but then withdrew that referral;¹⁰⁹
- to Victoria Police if OVIC disclosed information to the Chief Commissioner of Police under [section 61TI](#) (relating to actual or potential criminal conduct) and the restricted matter is relevant to an investigation by Victoria Police of that conduct;¹¹⁰
- if the disclosure is made for the purposes of:
 - making a complaint to IBAC or the Victorian Inspectorate;¹¹¹ or
 - complying with a witness summons served by IBAC or the Victorian Inspectorate.¹¹²

1.6. A person may also disclose a restricted matter if the information has been published by an investigating entity (such as IBAC) or the Integrity and Oversight Committee in a report or has otherwise been made public in accordance with an Act.¹¹³

More information

For information on who oversees OVIC's investigations, see [section 61ZD – Office of the Information Commissioner to report to the Victorian Inspectorate on issue of notice to produce or attend](#).

¹⁰⁹ [Freedom of Information Act 1982 \(Vic\)](#), section 61TM(3). IBAC must have referred the complaint to the Information Commissioner under section 73A of the *Independent Broad-based Anti-corruption Commission Act 2011* (Vic) and then withdrew the referral under section 79 of that Act.

¹¹⁰ [Freedom of Information Act 1982 \(Vic\)](#), section 61TM(4).

¹¹¹ [Freedom of Information Act 1982 \(Vic\)](#), sections 61TM(5)(a) and 61TM(5)(b).

¹¹² [Freedom of Information Act 1982 \(Vic\)](#), sections 61TM(6)(a) and 61TM(6)(b).

¹¹³ [Freedom of Information Act 1982 \(Vic\)](#), section 61TM(7).

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