



information
and privacy
commission
new south wales

Enquiries: [REDACTED]
Telephone: 1800 472 679

Our reference: Container [REDACTED]
Document: [REDACTED]

Professor John McMillan
Acting Ombudsman
NSW Ombudsman
Level 24, 580 George Street
SYDNEY NSW 2000

By email: mbritton@ombo.nsw.gov.au

Dear Professor McMillan

Discussion Paper: The use of external investigators by NSW Government Agencies

The opportunity to make a submission on the *Discussion Paper: The use of external investigators by NSW Government Agencies* is appreciated.

This submission addresses the following:

1. Deciding when an external investigation is required
2. Clarity about the scope of the investigation
3. Qualifications and experience of the appointed investigators
4. Maintaining records of investigations
5. Investigative guidance and standards

I approach these issues from both experience and perspective as the NSW Information Commissioner and my role of Chief Executive Officer of the Information and Privacy Commission.

The Information Commissioner is appointed under the *Government Information (Information Commissioner) Act 2009* (GIIC Act) and may, in accordance with section 21 of the GIIC Act, undertake investigations and report on the exercise of any functions of one or more agencies under an Information Act. Additionally, section 16 of the GIIC Act enables the Information Commissioner to engage the services of any person for the purposes of getting expert advice.

Under the *Public Interest Disclosures Act 1994* (PID Act), the Information Commissioner is also a principal officer of a public authority and is defined as an investigating authority under section 4(1) of the PID Act.

In the last year the IPC has developed a range of resources to support and guide good practice in investigation. In particular, the IPC has developed its case management policies with respect to the conduct of its external review functions under the *Government Information (Public Access) Act 2009* (GIPA Act) and the conduct of investigations under the GIIC Act. These are under trial until December 2016, prior to finalisation.

They are designed to support the IPC's officers in the application of procedural fairness, a proportionate regulatory response, investigative integrity and good decision making. They provide direction on key matters to be considered in the planning and conduct of an investigation and are read in conjunction with the specific authorising legislation applicable to the particular investigation being conducted.

Although the resources remain in draft during the trial period, I have attached a copy of the policies for your information.

Issue 1 - Deciding when an external investigation is required

Agencies conduct external investigations for a range of purposes. The determination to proceed by way of external investigation should be clear and well-founded. The development of guidance to assist agencies in making an assessment to determine whether a matter should be subject to external investigation is supported. In particular, guidance for agencies in identifying and considering relevant factors would support greater accountability, transparency and integrity of the process.

Creation of guidance material would assist an agency in considering the key factors to be considered when faced with a decision on whether an investigation is required and whether that investigation is best conducted externally to the agency. This guidance can take into account the range of circumstances in which an agency may be required to investigate an issue. The guidance can also be useful to an agency in an assessment and mitigation of risks in the appointment of an internal or external investigator, enabling the agency to make an informed decision having regard to the costs associated with the choice and nature of any investigation.

Appointment of an external investigator should not be the default position of an agency. Rather the decision should be an informed one which takes into account the particular nature of the issues, the purpose of the investigation, the need for arms-length consideration, and the expertise within the agency to undertake the investigation.

The IPC would welcome the opportunity to contribute to the development of such guidance.

Issue 2 – Clarity about the scope of the investigation

The establishment of well-crafted terms of reference provides clarity for the parties to an investigation on the scope, purpose and limitations of the investigation.

Terms of reference provide a foundation for the commencement of any investigation and should encompass the core people and process components of the investigation. Properly defined terms of reference are central to a successful investigation. They provide a framework for the development of the more detailed investigation plan.

In addition to those minimum content items listed in the discussion paper, well-drafted terms of reference should:

- address the source of any legislative power that is relied upon to initiate and conduct the investigation,
- define and clarify the exercise of any delegation or authority that has been issued for the purposes of the conduct of the investigation, and
- transparently identify the decision maker in the process.

Inclusion of these additional factors will ensure that the investigation is properly authorised and established, is conducted within the limits of the terms of reference, and with informed and accountable making of decisions.

In addition well-drafted terms of reference should ensure appropriate oversight of the management and control of the investigation by the agency ensuring accountability, process integrity and transparency.

I note the valuable work of the NSW Ombudsman and the Independent Commission Against Corruption in the development of guidance in the area of investigations that may be of assistance to other agencies in developing appropriate scope and terms of reference for investigations.

Issue 3 – Qualifications and experience of the appointed investigators

The general principle of obtaining the service of an investigator who is competent and experienced is supported.

The Department of Finance, Services and Innovation's prequalification scheme provides a model for consistently setting guidelines and rules to manage the relevant risks and provide a consistent level of assurance for all agencies when procuring particular goods and services. Ensuring all investigators delivering services to agencies hold a core set of capabilities would be of value. These should include as a minimum:

- a good understanding of the NSW Government Sector operational environment
- expertise in conducting administrative investigations,
- a good understanding of administrative decision making,
- sound analytical skills, strong communications skills and skills in conducting interviews and
- extensive experience in conducting investigations and writing reports.

However, the requirement for a set of formal qualifications should not limit the ability of an agency to appoint an investigator who holds relevant experience and knowledge of a particular legislative regime.

For example, as an investigating authority under the PID Act and under the GIIC Act, the Information Commissioner receives complaints about government information contraventions and the conduct of agencies under the *Government Information (Public Access) Act 2009* (GIPA Act). The investigation of these complaints is undertaken by staff with diverse experience in complaint handling and investigations, including those with formal qualifications.

It is also important that an agency retain sufficient flexibility in the selection of an investigator, consider the needs of each investigation on a case-by-case basis and the relevant legislative requirements that underpins the investigation.

All investigations should include a mechanism to monitor and evaluate the quality of the external investigation by persons with knowledge and experience to do so. This evaluation ensures that the investigator has fulfilled the contractual obligations of their appointment and ensures integrity of the process. For a small agency, this may be best achieved through the support of the cluster agency. However, a whole of government approach to the setting of standards, assessment and/or monitoring the quality of external investigations may be beneficial ensuring a consistent basis for government decision-making.

Requiring a particular formal qualification may impede the successful investigation of matters through the application of an overly prescriptive approach that may not be necessary in all circumstances. The appointment of an investigator should be 'fit for purpose'.

The GIIC Act recognises that the Information Commissioner may require specialist assistance in exercising the Commissioner's functions, and provides at section 16 for the Information Commissioner to engage the services of any person for the purposes of getting expert advice. Flexibility in the identification of relevant skills and experience rather than a formal qualification will enable agencies to tailor an investigation dependent on the nature and scope of the activities to be investigated. For example, an investigation into an alleged offence under the GIPA Act may require a specific type of investigative knowledge given the criminal nature of any prosecution action that may be taken. This can be distinguished from an examination of an agencies culture or practices in complying with the GIPA Act.

Issue 4 - Maintaining records of investigations

The GIPA Act provides a mechanism for an agency to enter into contractual arrangements with a private sector entity that provide services to the public on behalf of the agency to have an immediate right of access to information as set out in section 121 of the GIPA Act.

These provisions provide greater certainty, accountability and transparency about the public's right of access to government information. Section 121 however, is specific in its application to circumstances where private sector entity provides services to the public on behalf of the agency.

The specific limitations of section 121 may retard application of this provision by agencies seeking to obtain the records of a contractor engaged to investigate misconduct of an employee. The IPC is developing further regulatory guidance on the operation of section 121 to assist agencies with its application, as identified in the Information Commissioner's Regulatory Plan 2016-17.

The record keeping expectations and needs of the agency may be best met through the general appointment of the investigator and the clarification at the outset by the agency of the record keeping expectations and obligations that are to be met,

including through contractual arrangements. It is noteworthy, that such information once held by the agency would be subject to the GIPA Act.

Record keeping arrangements and terms of reference should be cognisant of the operation of the GIPA Act. Clarity as to the nature of the information contained in records will assist application of the public interest test under the GIPA Act in response to access applications. The most frequently applied public interest consideration against disclosure in 2014-15 was individual rights, judicial processes and natural justice across all regulated agencies accounting for application in 66% of refusals to release information.

In *Starr v Superannuation Administration Corporation [2015] NSWCATAD 76* usefully demonstrates the shift from the Freedom of Information regime and its focus on classes of documents to the GIPA regime and its application of the public interest test to information. The Tribunal highlighted that decision-makers must turn their minds to the detail of the information contained in the records. These considerations arise in relation to access applications for investigative reports. The drafting of the terms of reference will go to whether or not the records of the investigation including investigative reports may be characterised as 'excluded information' under s.43(1) of the GIPA Act. Schedule 2 of the GIPA Act prescribes 'excluded information' that relates to a range of prescribed investigative functions of agencies.

Sound record keeping and a good understanding of the statutory requirements of the *State Records Act 1998* supports the principles of natural justice and transparency of decision making. The provision of records obtained by the investigator to the agency enables the agency to take make appropriate decisions on actions that are required to be taken in response to the investigation as well as fulfilling their record keeping obligations.

Each investigation plan should identify the key decision points and documentation to be relied upon. This should be sufficiently flexible to recognise that individual investigators may adopt a different methodology as appropriate to the circumstances of the investigation at hand. Some general principles of investigative record keeping practices may be of assistance, in particular for smaller agencies.

Issue 5 – Investigative Guidance and Standards

The development of minimum standards for the conduct of investigations would support the effective and efficient management of investigations. For small agencies a requirement to comply with minimum standards could have the undesired effect of increasing the financial burden on the agency. However the cluster arrangements should support smaller agencies in establishing investigations and appropriate processes including accountabilities.

Any minimum standards that are developed should calibrate the application of those standards and retain sufficient flexibility to ensure that they do not unnecessarily result in an escalating financial burden in meeting those requirements. An alternative to engaging external investigators may be the option to leverage within their principal cluster or indeed other investigative agencies to meet a specific investigative need.

It may be beneficial for agencies within clusters to develop a mechanism for assessing, selecting, appointing and managing external investigators. Development of an activity based costing for external investigators would provide a benchmark for the activities and functions associated with an investigation that can inform the assessment and evaluation of the appointment of an external investigator. This would assist to address the variances in costs that may be experience by agencies. An activity based costing would also provide useful intelligence across a cluster on value for money considerations.

The adoption of a collaborative approach within the cluster in developing a list of experienced and knowledgeable investigators with proven expertise on particular issues would also be of assistance. Such an approach enables a holistic assessment of the quality and capability of external investigators to deliver services to the cluster as opposed to individual agencies assessing the quality of selected investigators. A strategic approach to the sharing of knowledge and experience can deliver economies of scale for government agencies as a whole without the need for individual agencies re- scoping and reassessing external investigators independently of each other.

Development of model policies, templates, guidelines and standards is instructive as a reference point for agencies. The IPC would welcome the opportunity to contribute to the development of useful, practical and informative resources for agencies.

I trust that these comments are of assistance to the NSW Ombudsman. Please do not hesitate to contact me should further information be required.

Yours sincerely



Elizabeth Tydd
Information Commissioner
CEO, NSW IPC,
NSW Open Data Advocate