

Memorandum of Understanding – NSW Information Commissioner and NSW Ombudsman

Purpose

This Memorandum of Understanding (‘MOU’) between the NSW Information Commissioner (‘Commissioner’) and the NSW Ombudsman (‘Ombudsman’) in accordance with the *Ombudsman Act 1974* (‘Ombudsman Act’) and the *Government Information (Information Commissioner) Act 2009* (‘GIIC Act’) sets out the arrangements for:

- (a) sharing information, and
- (b) transferring and referring complaints.

The MOU incorporates both a ***complaints referral arrangement*** under s 42 of the Ombudsman Act and an ***information sharing arrangement*** under s 43 of the Ombudsman Act. It also sets out the complaint referral requirement prescribed under s 40 of the GIIC Act.

The MOU commences upon execution by both the Commissioner and the Ombudsman, and supersedes the prior MOU made on 30 April 2014.

Definitions

In this MOU, the following definitions apply:

consent includes consent that is given orally.

sensitive personal information, in relation to a complainant, means information relating to the complainant’s ethnic or racial origin, political opinions, religious or philosophical beliefs, trade union membership, health or sexual activities.

Legislative framework

1. Sharing information

The Ombudsman may share with the Commissioner information obtained in discharging functions under the Ombudsman Act if, in the Ombudsman’s opinion, the information relates to the conduct of an agency that could be the subject of a complaint under the GIIC Act: GIIC Act s 34(1). However:

- the Ombudsman must not disclose information that could not otherwise be disclosed under the Ombudsman Act or be obtained by the Commissioner under the GIIC Act or any other Act (GIIC Act s 34(2)), and
- where the Ombudsman has obtained information from a complainant and has (or should have) reason to suspect the information is or includes *sensitive personal information* about the complainant, the Ombudsman must not disclose that information to the Commissioner without the *complainant's express consent*: Ombudsman Act s 43(6).

The Commissioner may share with the Ombudsman information obtained in the discharge of functions under any Act if, in the Commissioner's opinion, the information relates to the conduct of an agency that could be the subject of a complaint under the Ombudsman Act: GIIC Act s 31(1). However:

- the Commissioner must not disclose information that could not otherwise be disclosed under the GIIC Act or be obtained by the Ombudsman under the Ombudsman Act or any other Act (GIIC Act s 31(2)), and
- where the Commissioner has obtained information from a complainant and has (or should have) reason to suspect the information is or includes *sensitive personal information* about the complainant, the Commissioner must not disclose that information to the Ombudsman without the *complainant's express consent*: Ombudsman Act s 43(6).

2. Transferring complaints to the Commissioner

The Ombudsman must consult with the Commissioner if a complaint about an agency is made to the Ombudsman under the Ombudsman Act and it appears that the complaint, or part of it, could be the subject of a complaint to the Commissioner under the GIIC Act: GIIC Act s 40(1).

If the Commissioner decides to deal with the complaint under the GIIC Act, the Ombudsman is to transfer the complaint (or that part of the complaint that could be the subject of a complaint under the GIIC Act) to the Commissioner. The Ombudsman is not to investigate, and must discontinue any investigation already commenced into, a complaint (or part of a complaint) transferred to the Commissioner: GIIC Act s 40(2).

3. Referring complaints to the Ombudsman

The Commissioner may refer to the Ombudsman a complaint, or part of a complaint, that appears to be within the Ombudsman's jurisdiction. However, the Commissioner can only refer such a complaint (or part of a complaint) *with the express consent of the complainant*: Ombudsman Act s 42(1), (4).

Information sharing arrangement

4. Ombudsman may share information with the Commissioner

The Ombudsman may share information with the Commissioner if:

- (a) it appears to the Ombudsman that the information relates to conduct of an agency that could be the subject of a complaint under the GIIC Act, and
- (b) if the information was obtained by the Ombudsman by way of a complaint and the Ombudsman has or should have reason to suspect the information is or includes *sensitive personal information* about the complainant – the *complainant expressly consents* to the sharing of the information with the Commissioner.

Before providing this information, the Ombudsman will give the Commissioner written notice outlining the general nature of the information, including details as to whether and if so how the Ombudsman otherwise proposes to deal with the information and/or whether the information has been or is to be referred to any other agency for attention.

The Commissioner will advise the Ombudsman in writing whether the Commissioner wishes to receive the information. If the Commissioner wishes to receive the information, the Ombudsman may provide the Commissioner with copies of relevant documents setting out the information.

5. Commissioner may share information with the Ombudsman

The Commissioner may share information with the Ombudsman if:

- (a) it appears to the Commissioner the information relates to conduct of an agency that could be the subject of a complaint under the Ombudsman Act, and
- (b) the information was obtained by the Commissioner by way of a complaint and the Ombudsman has or should have reason to suspect the information is or includes *sensitive personal information* about the complainant – the *complainant expressly consents* to the sharing of the information with the Ombudsman.

Before providing this information, the Commissioner will give the Ombudsman written notice outlining the general nature of the information, including details as to whether and if so how the Commissioner otherwise proposes to deal with the information and/or whether the information has been or is to be referred to any other agency for attention.

The Ombudsman will advise the Commissioner whether the Ombudsman wishes to receive the information. If the Ombudsman wishes to receive the information, the Commissioner may provide to the Ombudsman copies of relevant documents setting out the information.

Transfer and referral arrangement

6. Ombudsman must transfer complaints to the Commissioner

If the Ombudsman receives a complaint under the Ombudsman Act about conduct of an agency that it appears could be the subject of a complaint to the Commissioner under the GIIC Act, the Ombudsman must provide written notice to the Commissioner about the complaint (or that part of the complaint that relates to that conduct). The notice will include copies of all documents held by the Ombudsman setting out the complaint (or that part of the complaint that relates to the relevant conduct).

If the Commissioner advises the Ombudsman in writing that the Commissioner will deal with the relevant conduct as a complaint under the GIIC Act, the Ombudsman must transfer the complaint, or the relevant part of that complaint, to the Commissioner to be dealt with as a complaint made to the Commissioner under the GIIC Act. The Ombudsman is not to investigate the matter (and is to discontinue any investigation already commenced) to the extent that it relates to conduct that could be the subject of a complaint under this Act.

7. Commissioner may refer complaints to the Ombudsman

If it appears to the Commissioner that all or part of a complaint about an agency's conduct made to the Commissioner under the GIIC Act could be the subject of a complaint under the Ombudsman Act, and the complainant agrees to the transfer of the complaint (or part of the complaint) to the Ombudsman, the Commissioner will provide written notice of the complaint (or part of the complaint) to the Ombudsman.

The notice will include:

- Copies of all documents held by the Commissioner setting out the complaint (or that part of the complaint that could be the subject of complaint under the Ombudsman Act).
- Advice as to whether the Commissioner proposes to deal with the complaint, or any part of the complaint, and/or to refer the complaint, or any part of the complaint, to any other agency.

Upon receipt of the notice, the Ombudsman will provide written advice to the Commissioner as to whether the Ombudsman wishes the Commissioner to transfer the complaint in whole or in part to the Ombudsman.

Active consideration of information sharing

The Ombudsman and the Commissioner will ensure that:

- (a) relevant staff are made aware, in general terms, of the type of conduct that could be the subject of a complaint to the other agency, and
- (b) procedures are in place to ensure that conduct that could be the subject of a complaint to the other agency is identified and escalated to the attention of relevant senior officers so that a decision may be made as to whether the information or complaint should be brought to the attention of the other agency in accordance with this MOU.

Arrangements to resolve disputes

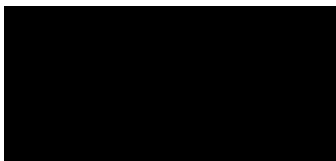
Any disagreement about the application of this MOU will be referred to the Commissioner and the Ombudsman for resolution.

Review of this MOU

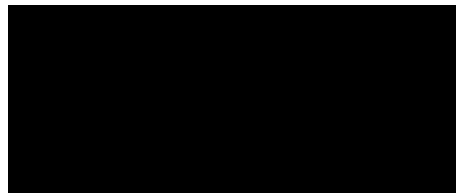
The parties will review the operation and effectiveness of this MOU every three years, or such other period as may be agreed by the parties.

Public availability of MOU

This MOU is open access information under s 6 of the *Government Information (Public Access) Act 2009* and is also required to be made publicly available in accordance with s 45 of the Ombudsman Act. It will be made publicly available on the websites of the Commissioner and the Ombudsman.



Elizabeth Tydd
NSW Information Commissioner



Michael Barnes
NSW Ombudsman

Date 15 June 2020