



# Whistleblowers Protection Act, 1993 - Implications for Records Management

## Outline of the *Whistleblowers Protection Act, 1993*

The *Whistleblowers Protection Act, 1993* (“the Whistleblowers Act”) aids the investigation of allegations of maladministration, waste, corruption and illegal conduct in the public sector. A person who makes an allegation is protected from having their identity divulged, to persons outside of the investigation.

### How does this affect Records Management procedures?

Under section 7 of the Whistleblowers Act, the identity of the person (“whistleblower”), who has instigated an investigation is to be kept confidential. Section 7 states:

- (1) *A person to whom another makes an appropriate disclosure of public interest information must not, without the consent of that person, divulge the identity of that other person except so far as may be necessary to ensure that the matters to which the information relates are properly investigated.*
- (2) *The obligation to maintain confidentiality imposed by this section applies despite any other statutory provision, or a common law rule, to the contrary.*

When an agency receives a document, regarding a complaint made under the Whistleblowers Act, the agency or authority must ensure that the record is managed in accordance with section 7 of the Whistleblowers Act and the *State Records Act, 1997*.

### Mail Opening

Correspondence on such a topic would generally be marked “confidential”. An agency’s procedure for handling confidential mail would apply. However, should the correspondence be received without specifying its confidentiality, staff responsible for opening mail must be made aware that the documents should be handled in the strictest confidence.

### Capture

The correspondence must be captured in a secure area within an agency’s recordkeeping system, where access to the record and any information pertaining to the record is restricted. The system must be capable of capturing when the record was accessed and by whom. Records must also exist on who has access rights to the information.

Although it is desirable to enter relevant information into a recordkeeping system to facilitate an easy search process, the identity of the whistleblower must remain undisclosed in the system. This includes within the file title/description or document title/description or any other associated metadata.

Information that can and should be captured is:

- Date received;
- Correspondence dated;
- Addressed to;
- Complaint against/regarding (including the name of the person/organisation the subject of the complaint);
- Location;
- Linked Documents;
- Response due by;
- Date completed; and
- Disposal Sentence.

## **Storage**

Similar to the restrictions the record has within the recordkeeping system, the physical record must also be maintained in a secure environment, for example in a locked cabinet, with only appropriate employees having access.

## **Access**

### *Freedom Of Information*

If an agency receives a Freedom of Information application that captures documents relating to a complaint made pursuant to the Whistleblowers Act, the agency or authority should take steps to protect the identity of the whistleblower whilst meeting its obligations under the *Freedom of Information Act*.

Unless a whistleblower has given consent for their identity to be disclosed to an accredited FOI Officer, agencies should direct an officer who originally investigated the disclosure to consider the contents of the documents and mask any of their contents that identify the whistleblower. The Accredited FOI Officer should only view the documents for the purpose of determining an FOI application after the documents have been masked to protect the identity of the whistleblower.

If the original investigating officer is not currently employed by the agency or authority, the documents should be considered by a senior executive officer of the agency or authority. This will minimise the possibility of a breach.

If agencies are unsure at any step in the process, they should seek advice from State Records. State Government agencies can also seek advice from the Crown Solicitor's Office, and Local Government from their own solicitor, before processing the FOI application.

### *Public Access Determinations*

The Whistleblowers Act does not indicate that the confidentiality of a whistleblower's identity can ever be lifted, other than when consent has been given or for investigation purposes. Therefore public access determinations, made by agencies or authorities for whistleblower records are to stipulate that the records are 'closed indefinitely'. Great care must be taken when sentencing records to ensure that any whistleblower records are not transferred to State Records in a consignment that may have open access.

Advice on how to manage records to be 'closed indefinitely' can be found in State Records' *Public Access Determinations Guideline*. Alternatively, a member of State Records Reference and Access Services team can provide advice.

## **Disposal**

### *State Government Agencies*

Under General Disposal 15 (GDS 15) for State Government agencies, whistleblower records relating to complaints made against the agency's personnel and or agency operations are considered to be permanent records. Records of a permanent value are required to be transferred to State Records once they reach 15 years of age or are no longer required for current administrative practices, whichever occurs first. For information relating to other agencies records or reference materials, please refer to GDS 15.

### *Local Government Organisations*

Currently General Disposal 20 (GDS 20) does not specifically mention records that were generated as a result of the Whistleblowers Act. Advice should be sought from State Records with regard to appropriate retention periods for these records until GDS 20 adequately reflects this.

## **Further Information**

*Adequate Records Management Standard*, State Records of South Australia

*Legal Bulletin No. 14, Whistleblowers Protection Act 1993*, Crown Solicitor