

# Protected Disclosure Procedures

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RESPONSIBLE EXECUTIVE	General Manager Corporate Services
POLICY OWNER	Manager Governance

## 1. Purpose

Council is required to establish and publish procedures under s58 of the *Protected Disclosures Act 2012 (Vic)* Act and in accordance with the Guidelines of the IBAC published under s57 of the Act. Council is required to ensure these procedures are readily available to members of the public as well as to all Councillors and employees of Council.

These procedures establish a system to facilitate the making of disclosures of improper conduct or detrimental action by Council or its employees pursuant to the obligations on Council under the Act. It specifies the procedures for the handling of disclosures and, where appropriate, notification to the IBAC. It also provides for protection from detrimental action to any person affected by a protected disclosure whether it is a person who makes a disclosure, a witness, or a person who is the subject of an investigation.

## 2. Scope

Applies to all individuals both within and outside the organisation. Disclosures may be made by employees, Councillors or by members of the public. A disclosure cannot be made by a business or company.

This procedure only applies to disclosures of improper conduct or detrimental action by Council or its employees. It does not detract from Council's other complaint-handling procedures. Disclosures about improper conduct or detrimental action by Councillors must be made to the IBAC or to the Ombudsman.

## 3. Definitions

<b>Act:</b>	Protected Disclosure Act 2012
<b>Assessable disclosure:</b>	Any disclosure received by Council that must be notified to the IBAC under s 21 of the Act. This includes any disclosure that Council considers may be a protected disclosure
<b>CEO:</b>	Chief Executive Officer
<b>Council:</b>	Kingston City Council
<b>discloser:</b>	A person who (purports to) make(s) a complaint, allegation or disclosure (however described) under the Act
<b>disclosure:</b>	any complaint, concern, matter, allegation or disclosure (however described) purported to be made in accordance with Part 2 of the Act
<b>EAP:</b>	Employee Assistance Program
<b>Guidelines:</b>	The Guidelines published by the IBAC under s 57 of the Act, copies of which may be downloaded from <a href="http://www.ibac.vic.gov.au/reporting-corruption">http://www.ibac.vic.gov.au/reporting-corruption</a>

<b>IBAC Act:</b>	Independent Broad-based Anti-corruption Commission Act 2011
<b>IBAC:</b>	Independent Broad-based Ant-corruption Commission
<b>Manager:</b>	Manager of a Council department
<b>protected disclosure:</b>	Any complaint, concern, matter, allegation or disclosure (however described) made in accordance with Part 2 of the Act
<b>Regulations:</b>	Protected Disclosure Regulations 2013
<b>Supervisor:</b>	Employee's Team Leader or Coordinator

#### 4. Council Plan Alignment

Goal 6 - A Well Managed and Effective Organisation

Outcome 6.1 - A well-governed, efficient and responsive organisation.

#### 5. Related Documents

- *Protected Disclosure Act 2012 (Vic)*
- *Protected Disclosure Regulations 2013 (Vic)*
- *Freedom of Information Act 1982 (Vic)*
- *Independent Broad-based Anti-corruption Commission Guidelines for Making and Handling Protected Disclosures 2016*
- *Independent Broad-based Anti-corruption Commission Guidelines for Protected Disclosure Welfare Management 2016*
- Council's Disciplinary Policy
- Council's Resolving Workplace Grievances Policy

#### 6. Delegation Authority

There is no delegated authority for this Policy.

#### 7. Policy

Council is committed to the aims and objectives of the Act. It does not tolerate improper conduct by the organisation or its employees, nor the taking of detrimental action against those who come forward to disclose such conduct or those who co-operate with an investigation.

Council recognises the value of transparency and accountability in its administrative and management practices, and supports the making of disclosures that reveal improper conduct or the taking of reprisals against those who come forward to disclose such conduct.

Council will take all reasonable steps to protect people who make such disclosures from any detrimental action in reprisal for making the disclosure. It will also afford natural justice to the person or body who is the subject of the disclosure.

#### 8. Roles and Responsibilities

Employees and Councillors are encouraged to raise matters of concern in relation to Council, including about any employee or Councillors. In particular, employees and Councillors are encouraged to report known or suspected incidences of improper conduct or detrimental action in accordance with these procedures, whether such conduct or action has taken place, is suspected will take place, or is still occurring. Disclosures may also be made about conduct that occurred prior to the commencement of the Act on 10 February 2013.

All employees and Councillors have an important role to play in supporting those who have made a legitimate disclosure in accordance with the Act. All persons must refrain from any activity that is, or could be perceived to be, victimisation or harassment of a person who makes a disclosure. Furthermore, they should protect and maintain the confidentiality of a person they know or suspect to have made a disclosure.

## 8.1. CEO

The CEO:

- may receive oral or written disclosures (from internal or external sources);
- must refer the disclosure to the Protected Disclosure Coordinator immediately;
- must take all necessary steps to ensure the confidentiality of the identity of the person making the disclosure, the identity of the person who is the subject of the disclosure, and the content or information about the content of the disclosure; and
- may liaise with the Protected Disclosure Coordinator.

## 8.2. Protected Disclosure Coordinator

The Protected Disclosure Coordinator has a central role in the internal reporting system and maintains oversight over the system.

The Protected Disclosure Coordinator is:

- contactable by external and internal persons making disclosures and has the authority to make enquires of officers within Council
- to receive all disclosures forwarded from Council's Protected Disclosure Officer or other employees who receive disclosures;
- to impartially assess each disclosure to determine whether it should be notified to the IBAC for assessment under the Act ;
- responsible for coordinating Council's reporting system;
- the contact point for general advice about the operation of the Act and for integrity agencies such as the IBAC or the Ombudsman;
- responsible for ensuring Council carries out its responsibilities under the Act, any regulations made pursuant to the Act and any Guidelines issued by the IBAC;
- Council's chief liaison with the IBAC in regard to the Act;
- Responsible for arranging any necessary and appropriated welfare support for the discloser, including appointing a Welfare Manager to support the discloser and to protect him or her from any reprisals;
- to establish and manage a confidential filing system;
- to collate statistics on disclosures made;
- to take all necessary steps to ensure information received or obtained in connection with a disclosure, including the identities of the discloser and the person(s) to who the disclosure relate, are kept secured, private and confidential at all times;
- to advise the discloser, appropriately and in accordance with the Act, the stage at which the disclosure is at (whether it has been notified to the IBAC for assessment)
- to liaise with the CEO of Council.

The Protected Disclosure Coordinator appointed by Council is:

Phil De Losa, Manager Governance ☎ 9581 4710 📧 [protecteddisclosure@kingston.vic.gov.au](mailto:protecteddisclosure@kingston.vic.gov.au)

## 8.3. Protected Disclosure Officer

The Protected Disclosure Officer will:

- make arrangements for a disclosure to be made privately and discreetly and, if necessary, away from the workplace;
- receive any disclosure made orally or in writing (from internal and external sources);
- commit to writing any disclosure made orally;
- take all necessary steps to ensure the information disclosed, including the identity of the discloser and any persons on involved, is secure, remains private and confidential;
- forward all disclosures and supporting evidence to the Protected Disclosure Coordinator, unless the disclosure relates to the Protected Disclosure Coordinator;

- undertake the role of the Protected Disclosure Coordinator if the Protected Disclosure Coordinator is on leave or if the disclosure relates to the Protected Disclosure Coordinator; and
- offer to remain a support person for the discloser in dealing with the Protected Disclosure Coordinator.

The Protected Disclosure Officer appointed by Council is:

Angela Granter, Governance Officer, ☎ 9581 4904

#### **8.4. Welfare Manager**

The Welfare Manager is responsible for looking after the general welfare of a person making a protected disclosure. The Welfare Manager will:

- examine the immediate welfare and protection needs of a person who has made a disclosure and seek to foster a supportive work environment;
- advise a person making a protected disclosure of the legislative and administrative protections available to him or her;
- listen and respond to any concerns of detrimental action;
- keep a contemporaneous record of all aspects of the case management of a person making a protected disclosure, including all contact and follow up action;
- endeavour to ensure the expectations of a person making a protected disclosure are realistic;
- take all reasonable steps to ensure confidentiality of the identity of the person making a protected disclosure and the identity of the person who is the subject of the disclosure, and the content or information about the content, are kept confidential; and
- liaise with the Protected Disclosure Coordinator and/or CEO, as appropriate.

The Welfare Manager will be appointed from outside Council through the EAP.

A Welfare Manager may also be appointed for a person who is the subject of a protected disclosure (if they are aware of the disclosure) or they may be referred to the EAP.

#### **8.5. Managers and supervisors**

Managers and supervisors:

- may receive oral or email disclosures made about an employee who they are supervising;
- may receive oral or email disclosures from an employee who they are supervising, about another employee;
- must commit to writing down any disclosures made orally;
- must immediately refer the disclosure to the Protected Disclosure Coordinator for further action in accordance with the Act; and
- must take all necessary steps to ensure the confidentiality of the identity of the person making the disclosure, the identity of the person who is the subject of the disclosure, and the content or information about the content of the disclosure.

#### **8.6. Employees**

Employees:

- are encouraged to report known or suspected incidences of improper conduct or detrimental action in accordance with this procedure; and
- have an important role to play in supporting those who have made a legitimate disclosure. They must refrain from any activity that is, or could be perceived to be detrimental action against any person who makes a disclosure. Furthermore, they should protect and maintain the confidentiality of any person they know or suspect to have made a disclosure.

## 9. Making a Disclosure

### 9.1. What is a disclosure?

A disclosure may be made about two things under the Act:

- improper conduct of public bodies or public officers; and
- detrimental action taken by public bodies or public officers in reprisal against a person for the making of a protected disclosure.

The term disclosure is interpreted under the Act in the ordinary sense of the word, for example, as a "revelation" to the person receiving it. The IBAC considers that a complaint or allegation that is already in the public domain will not normally be a protected disclosure. Such material would, for example, include matters which have already been subject to media or other public commentary.

### 9.2. Who can make a disclosure

A disclosure may:

- Only be made by a natural person (or a group of individuals making joint disclosures);
- Cannot be made by a company or an organisation, but its officers or employees can;
- Be made anonymously;
- Be made even where the discloser is unable to identify precisely the individual or the organisation to which the disclosure relates; and
- Also be a complaint, notification or disclosure (or however described under another law).

Anonymous disclosures may create difficulties in Council being able to communicate with the discloser, and some of the notification requirements imposed on Council in relation to disclosures will not apply in relation to an anonymously made disclosure. In addition, it may impede Council's ability to properly assess whether the complaint or allegation is a protected disclosure for the purposes of the Act.

If Council receives any disclosures which do not meet all of the requirements of Part 2 of the Act or the prescribed procedures in the Regulations, Council will not be required to consider whether it is a protected disclosure under the Act. However, Council will always consider whether it would be appropriate to inform the discloser how to make the disclosure in a way that would comply with the requirements of the Act and the Regulations in order to ensure that persons are properly afforded the opportunity to receive any appropriate protections available to them under the Act.

In addition, Council is required to consider whether a disclosure that does not meet the requirements of the Act and the Regulations should be treated as a complaint, notification or referral to Council in accordance with any other laws or internal policies and procedures.

### 9.3. How can a disclosure be made?

A disclosure must be made in accordance with Part 2 of the Act. Part 2 of the Act permits disclosures to be made anonymously, orally or in writing and need not identify the person or organisation being complained about.

Generally:

- verbal disclosure may be made:
  - in person;
  - by telephone;
  - by leaving a voicemail message on a particular telephone answering machine; or
  - by any other form of non-written electronic communication.
- a written disclosure to the IBAC and the Ombudsman can be made via an online form available at each of their respective websites:
  - [www.ibac.vic.gov.au/reporting-corruption/complaints-form](http://www.ibac.vic.gov.au/reporting-corruption/complaints-form)
  - [www.ombudsman.gov.au/making-a-complaint](http://www.ombudsman.gov.au/making-a-complaint)

Disclosures cannot be made by fax.

A disclosure made by email from an address from which the identity of the discloser cannot be ascertained will be treated as an anonymous disclosure.

An oral disclosure **must** be made in private. This means the discloser must reasonably believe that only the following people are present or able to listen to the conversation:

- the discloser him or herself (including any other individuals making a joint disclosure at the same time);
- any lawyer representing the discloser; and
- one or more people to whom a disclosure is permitted to be made under the Act or the Regulations (see 9.5).

#### **9.4. The disclosure must be made to a body authorised to receive it**

One of the requirements in Part 2 of the Act is that the disclosure has been made to a body authorised under the Act to receive the disclosure.

Council can only deal with disclosures which concern Council and its employees.

**Disclosures about improper conduct or detrimental action by Council's Councillors must be made to the IBAC or to the Ombudsman. Those disclosures may not be made to the Council.**

Disclosures about improper conduct or detrimental action by Council or its employees and staff may be made to Council or one of four external authorities:

- the IBAC;
- the Ombudsman in relation to limited types of disclosures;
- the Victorian Inspectorate in relation to limited types of disclosures; or
- The Chief Commissioner of Police in relation to limited types of disclosures.

#### **9.5. Making a disclosure to the Council**

Council can only address disclosures that relate to Council or an employee of Council. Disclosures about Councillors must be made to the IBAC or the Ombudsman.

In accordance with the **Regulations** an oral disclosure must be made in private, either in person, by telephone or some form of electronic communication not involving writing, to:

- the CEO; or
- Council's Protected Disclosure Coordinator or Council's Protected Disclosure Officer; or
- the person's supervisor or manager (if the person making the disclosure is an employee of Council, or the disclosure relates to a person who is an employee of Council).

A written disclosure must be:

- delivered personally to the office of Council;
- sent by post addressed to Council's office; or
- emailed to the CEO or Council's Protected Disclosure Officer at [protecteddisclosure@kingston.vic.gov.au](mailto:protecteddisclosure@kingston.vic.gov.au) or to Council at [info@kingston.vic.gov.au](mailto:info@kingston.vic.gov.au).

Where a person is contemplating making a disclosure and is concerned about approaching the Protected Disclosure Coordinator or Protected Disclosure Officer in the workplace, he or she can call the relevant officer and request a meeting in a discreet location away from the workplace. The person can also call the IBAC for advice (on the number below).

#### **9.6. Making a disclosure to the IBAC**

##### **9.6.1. Oral disclosures**

An oral disclosure to the IBAC must be made in private and may be made:

- in person;
- by telephone, to 1300 735 135;
- by leaving a voicemail message on the telephone number of one of the specified individuals below to whom an oral disclosure may be made; or
- by some other form of non-written electronic communication.

The oral disclosure must be made to one of the following persons:

- the Commissioner of the IBAC;
- the Deputy Commissioner of the IBAC;
- the CEO of the IBAC;
- an employee referred to in s 35(1) of the IBAC Act; or
- any staff referred to in s 35(2) of the IBAC Act.

#### 9.6.2. Written disclosures

A written disclosure to the IBAC must be:

- delivered personally to the office of the IBAC, at Level 1, North Tower, 459 Collins Street, Melbourne, VIC 3001; or
- sent by post addressed to the office of the IBAC, at GPO Box 24234, Melbourne, VIC 3000; or
- sent by email to the official email address of a person specified above to whom an oral disclosure may be made (i.e., the Commissioner, the Deputy Commissioner, the CEO, or employee or staff referred to in s 35 of the IBAC Act); or
- submitted by an online form available from <https://www.ibac.vic.gov.au/reporting-corruption/complaints-form>

### 9.7. Making a disclosure to the Ombudsman

#### 9.7.1. Oral disclosures

An oral disclosure to the Ombudsman must be made in private and may be made:

- in person;
- by telephone, to 9613 6222 or toll free to 1800 806 314;
- by leaving a voicemail message on the telephone number of any Ombudsman officer; or
- by some other form of non-written electronic communication.

The oral disclosure may be made to an Ombudsman officer.

#### 9.7.2. Written disclosures

A written disclosure to the Ombudsman must be:

- delivered personally to the office of the Ombudsman, at Level 9, North Tower, 459 Collins Street, Melbourne, VIC 3001; or
- sent by post addressed to the office of the Ombudsman, as above; or
- sent by email to the office of the Ombudsman at: [ombudvic@ombudsman.vic.gov.au](mailto:ombudvic@ombudsman.vic.gov.au); or
- sent by email to the official email address of any Ombudsman officer; or
- submitted by an online form (if any) identified in the procedures established by the Ombudsman under s58(1) of the Act.

## 10. Handling disclosures

### 10.1. Receiving a disclosure

When Council receives a complaint, report or allegation of improper conduct or detrimental action, the first step will be to ascertain whether it has been made in accordance with Part 2 of the Act.

If the disclosure satisfies Part 2 of the Act, the discloser is entitled to receive protections under Part 6 of the Act (see section 11 of these procedures).

Where a disclosure is received by a Protected Disclosure Officer, the Protected Disclosure Officer will make an initial assessment about whether it is a protected disclosure. The disclosure will then be referred to the Protected Disclosure Coordinator, together with the determination of the Protected Disclosure Officer, for final assessment. The Protected Disclosure Coordinator will finally determine whether the disclosure may be a protected disclosure. This assessment and determination will be made within 28 days of the receipt of the disclosure.

## 10.2. Assessing a disclosure

If the disclosure satisfies the requirements of Part 2 of the Act, Council is required to determine whether the disclosure may be a protected disclosure by going through the 2 step assessment process recommended by the IBAC as follows.

This will be the case even if the discloser does not refer to the Act or require the protections of the Act. The initial assessment is made on the nature of the information disclosed or on the belief that the discloser has about the nature of the information, and not the discloser's intention.

### 10.2.1. First step

The first question Council must answer is whether the information disclosed shows, or tends to show, that there is improper conduct or detrimental action taken in reprisal for the making of a protected disclosure.

This requires the Council to ascertain whether the information satisfies the 'elements' of improper conduct or detrimental action, as defined in the Act and whether any of the relevant exceptions apply. This may require the Council to:

- seek further information;
- conduct a discreet initial enquiry;
- seek (further) evidence from the discloser;
- ascertain whether there is sufficient supporting material to demonstrate that the conduct or actions covered by the Act have occurred, are occurring or are likely to occur.

**If it is not clear that the information disclosed does show or tend to show that there is improper conduct or detrimental action, then Council will go on to the second step below.**

### 10.2.2. Second step

This requires Council to ask whether the discloser believes on reasonable grounds that the information shows or tends to show there is improper conduct or detrimental action. That is, does the person actually believe that the information shows, or tends to show, there is improper conduct or detrimental action? A reasonable belief requires the belief to be based on facts that would be sufficient to make a reasonable person believe there was improper conduct or detrimental action.

This reasonable belief does not have to be based on actual proof that the improper conduct or detrimental action in fact occurred, is occurring, or will occur, but there must be some information supporting this belief. The grounds for the reasonable belief can leave something to surmise or conjecture, but it must be more than just a reasonable suspicion, and the belief must be probable.

According to the IBAC, simply stating that improper conduct or detrimental action is occurring, without providing any supporting information, would not be a sufficient basis for having a reasonable belief. In the IBAC's view, a belief cannot be based on a mere allegation or conclusion unsupported by any further facts or circumstances.

Other matters that the IBAC suggests Council can consider are:

- the reliability of the information provided by the discloser, even if it is second or third-hand. For example, how would the discloser have obtained the information?
- the amount of detail that has been provided in the information disclosed; and
- the credibility of the discloser, or of those people who have provided the discloser with information.

### 10.2.3. Where urgent action is required while an assessment is still being made

In some circumstances, the disclosure may be about improper conduct that may pose an immediate threat to health and safety of individuals, preservation of property, or may consist of serious criminal conduct.



Examples of this provided by the IBAC include where the disclosure may be about:

- a child protection worker allegedly sexually assaulting children in care;
- a council worker allegedly lighting bush fires; or
- a person threatening to poison the water supply.

In these cases Council can take immediate action while considering whether or not it is an assessable disclosure that must be notified to the IBAC or awaiting the IBAC's decision on a notified matter.

It may also be necessary to report criminal conduct to Victoria Police for immediate investigation, or take management action against an employee to prevent future conduct. The Act allows Council to disclose the content of the disclosure by a person or body "to the extent necessary for the purpose of taking lawful action in relation to the conduct that is the subject of an assessable disclosure including disciplinary process or action". However, the IBAC notes that this does not allow the identity of the discloser to be revealed. Reporting the alleged conduct to the Victoria Police as criminal conduct, or taking legitimate management action against the subject of the disclosure in order to prevent future conduct, may be appropriate courses of action in these circumstances.

#### 10.2.4. Assessment decisions

At the conclusion of the assessment, Council must decide whether it considers the disclosure to be a protected disclosure. If Council decides it may be a protected disclosure, it must notify the IBAC of the disclosure. If Council does not consider it to be a protected disclosure, then it may be a matter that Council otherwise deals with through any other relevant internal complaint or grievance management process.

### 10.3. Notifications

#### 10.3.1. If Council does not consider the disclosure to be a protected disclosure

If Council determines the disclosure is not a protected disclosure, and the discloser has indicated to Council (or it otherwise appears to Council) that he / she wishes to receive the protections that apply to a protected disclosure under the Act, the discloser will be notified in writing, within 28 days of Council receiving the disclosure, that:

- Council considers the disclosure is not a protected disclosure;
- the disclosure has not been notified to the IBAC for assessment under the Act; and
- regardless of whether the disclosure is notified to the IBAC for assessment under the Act, the protections under Part 6 of the Act apply.

Notifications to a discloser do not need to be provided by Council in response to an anonymously made disclosure.

#### 10.3.2. If Council considers the disclosure may be a protected disclosure

If Council considers the disclosure may be a protected disclosure under the Act, Council will, within 28 days of receiving the disclosure:

- notify the IBAC that:
  - Council considers the disclosure may be a protected disclosure; and
  - Council is notifying the disclosure to the IBAC for assessment under s 21 of the Act; and
- notify the discloser that:
  - the disclosure has been notified to the IBAC for assessment under the Act; and
  - it is an offence under s 74 of the Act to disclose that the disclosure has been notified to the IBAC for assessment under the Act.

In addition, at the time of notifying the IBAC under s 21 of the Act or at any later time, Council may also provide the IBAC with any information obtained by Council regarding the disclosure in the course of its enquiries leading up to its notification of the disclosure to the IBAC.

### 10.4. Protections for public officers

Under s76 of the Act a public officer, being an employee of Council where Council receives a disclosure, is given specific protections under the Act to provide information to other public officers or to the IBAC in dealing with a disclosure they have received. When a public officer acts in good faith and in accordance with the Act, Regulations and the IBAC's Guidelines, the public officer does not commit an offence under laws imposing a duty to maintain confidentiality or restricting the disclosure of information.

## **11. Welfare Management**

### **11.1. Commitment to protecting people making protected disclosures**

Council is committed to the protection of genuine disclosures against detrimental action taken in reprisal for the making of a protected disclosure.

The protection of persons making genuine protected disclosures about improper conduct or detrimental action is essential for the effective implementation of the Act. In addition, the Act extends the need for welfare management to people who have cooperated or intend to cooperate with an investigation of a protected disclosure complaint ("cooperators"). Persons who are the subject of allegations will also have their welfare looked after.

Council must ensure disclosers and cooperators are protected from direct and indirect detrimental action being taken against them in reprisal for the protected disclosure. Council will ensure its workplace culture supports disclosers and cooperators. Such support will extend to the relevant persons regardless of whether they are internal to the organisation (e.g., employees, Councillors, other officers) or external members of the public. However, different legislative responsibilities (including those external to the Act) apply to persons internal to the organisation, and to persons who may be clients or users of Council's services. Those derive from various legislative and administrative obligations to:

- ensure the health and wellbeing of employees of a public sector body under laws including those relating to Occupational Health and Safety, the Charter of Human Rights and Responsibilities Act 2006, the Public Administration Act 2004, and various Victorian Public Sector Codes of Conduct (as relevant); and
- comply with various relevant laws, policies and practices when making administrative and other decisions or taking particular actions affecting a customer, client or user of the public body's services.

Generally, for employees, Council will ensure a supportive work environment and respond appropriately to any reports of intimidation or harassment against these persons. For external persons, Council will take reasonable steps to provide appropriate support. Council will discuss reasonable expectations with all persons receiving welfare management in connection with a protected disclosure.

### **11.2. Support available to disclosers and cooperators**

Council will support disclosers and cooperators by:

- keeping them informed, by providing:
  - confirmation that the disclosure has been received;
  - the legislative or administrative protections available to the person;
  - a description of any action proposed to be taken;
  - if action has been taken by Council, details about results of the action known to Council;
- providing active support by:
  - acknowledging the person for having come forward
  - assuring the discloser or cooperator that they have done the right thing, and Council appreciates it;
  - making a clear offer of support;
  - assuring them that all reasonable steps will be taken to protect them;
  - giving them an undertaking to keep them informed as far as Council is reasonably able to;
- managing their expectations by undertaking an early discussion with them about:
  - what outcome they seek;
  - whether their expectations are realistic;

- what Council will be able to deliver;
- maintaining confidentiality by:
  - ensuring as far as is possible that other people cannot infer the identity of the discloser or cooperator;
  - reminding the discloser or cooperator not to reveal themselves or to reveal any information that would enable others to identify them as a discloser or cooperator;
  - ensuring that hardcopy and electronic files relating to the disclosure are accessible only to those who are involved in managing disclosures in Council;
- proactively assessing the risk of detrimental action being taken in reprisal (rather than reactively waiting for a problem to arise and a complaint made by the discloser or cooperator), that is, actively monitor the workplace, anticipating problems and dealing with them before they develop as far as is possible;
- protecting the discloser or cooperator by:
  - examining the immediate welfare and protection needs of the person and seeking to foster a supportive work environment;
  - listening and responding to any concerns the person may have about harassment, intimidation or victimisation in reprisal for their actions;
- assessing whether the concerns the person may have about harassment, intimidation or victimisation might be due to other causes other than those related to the protected disclosure;
- preventing the spread of gossip and rumours about any investigation into the protected disclosure; and
- keeping contemporaneous records of all aspects of the case management of the person, including all contact and follow-up action.

### **11.3. Appointment of a Welfare Manager**

The Protected Disclosure Coordinator may appoint a Welfare Manager to protect a discloser, a cooperator and the person who is the subject of a protected disclosure. Where a discloser and the person who is the subject of a protected disclosure both require Welfare Managers, separate Welfare Managers will be appointed. The following matters will be taken into consideration when deciding whether to appoint a Welfare Manager in a particular case:

- are there any real risks of detrimental action against the discloser or cooperator, taking into account their particular circumstances?
- whether Council can take the discloser or cooperator seriously and treat them with respect?
- whether Council will give the discloser or cooperator effective support, including keeping the discloser informed of the status of the disclosure?
- can Council protect the person from suffering repercussions, by dealing with the matter discreetly and confidentially, and responding swiftly and fairly to any allegations that the discloser or cooperator has in fact suffered retribution?

If the answer to the first question is 'yes' then the IBAC recommends the appointment of a dedicated Welfare Manager. If the answer to the first question is 'no' and Council can meet the needs set out in the remainder of the questions, the IBAC suggests there may be no need for a dedicated Welfare Manager to be appointed for that particular case.

In most circumstances, a Welfare Manager will only be required where a protected disclosure complaint proceeds to investigation, but each protected disclosure received by Council will need to be assessed on its own merits.

The Welfare Manager will be sourced externally through the EAP provider where disclosures are made by employees to ensure a third party view is provided. The Welfare Manager will:

- examine the immediate welfare and protection needs of the person who has made a disclosure and, where the person is an employee, seek to foster a supportive work environment;
- advise the person making a protected disclosure of the legislative and administrative protections available to him or her;
- listen and respond to any concerns about, or allegations of, harassment, intimidation or victimisation in reprisal for making the disclosure;
- keep a contemporaneous record of all aspects of the case management of the person making a protected disclosure including all contact and follow-up action; and
- ensure the expectations of the person making a protected disclosure are realistic.

All employees will be advised that it is an offence for a person to take detrimental action in reprisal for a protected disclosure. Penalties can include fines and/or imprisonment. The taking of detrimental action in breach of the Act can also be grounds for making a disclosure under the Act and can result in an investigation.

#### **11.4. Protections for persons making a protected disclosure**

Part 6 of the Act sets out the protections provided to persons who make a disclosure that is a 'protected disclosure', i.e., one that is made in accordance with Part 2 of the Act. In summary, they are as follows:

- the discloser is not subject to any civil or criminal liability for making the protected disclosure;
- the discloser is not subject to any administrative action (including disciplinary action) for making the protected disclosure;
- by making the protected disclosure, the discloser is not committing an offence against the Constitution Act 1975 or any other law that imposes obligations of confidentiality or otherwise restricts the disclosure of information;
- by making the protected disclosure, the discloser is not breaching any other obligation (made by oath, rule of law or practice) requiring him or her to maintain confidentiality; and
- the discloser cannot be held liable for defamation in relation to information included in a protected disclosure made by him or her.

The protections in Part 6 apply from the time at which the disclosure is made by the discloser. They apply even if Council receiving the disclosure does not notify the disclosure to the IBAC, and even if the IBAC has determined that the protected disclosure is not a protected disclosure complaint.

The protections also apply to further information relating to a protected disclosure made by the original discloser, if the further information has been provided, verbally or in writing, to:

- the entity to which the protected disclosure was made;
- the IBAC; or any investigating entity investigating the protected disclosure.

Sections 52 and 53 of the Act refer specifically to confidentiality obligations of persons receiving information connected with an assessable disclosure, or leading to the identification of a discloser. Those confidentiality obligations do not apply to disclosers.

##### **11.4.1. Actions of the discloser constituting offences and leading to protections being lost**

A discloser is not protected if they commit an offence under s 72 or s 73 of Act, as follows:

- provide false or misleading information, or further information that relates to a protected disclosure, that the person knows to be false or misleading in a material particular, intending that the information be acted on as a protected disclosure;
- claim that a matter is the subject of a protected disclosure knowing the claim to be false;
- falsely claim that a matter is the subject of a disclosure that IBAC has determined to be a protected disclosure complaint.

Similar provisions set out in the IBAC Act, such as in s184, also makes it a criminal offence to disclose certain information received from the IBAC.

##### **11.4.2. Other limitations on protections afforded to disclosers**

A discloser is not protected against legitimate management action being taken by Council in accordance with the Act.

In addition, although the discloser of a protected disclosure is not subject to criminal or civil liability for making the disclosure, the Act specifically provides that a person remains liable for their own conduct even though the person has made a disclosure of that conduct under the Act. Therefore, the discloser will still be held liable for their own conduct that they disclose as part of making a protected disclosure.

##### **11.4.3. If the person making the disclosure is implicated in the improper conduct or detrimental action that is the subject of the disclosure**

Where a discloser is implicated in improper conduct, Council will handle the disclosure and protect the discloser from reprisals in accordance with the Act, the IBAC's guidelines and these procedures. Council acknowledges that the act of disclosing should not shield disclosers from the reasonable consequences flowing from any involvement in improper conduct. However, in some circumstances, an admission may be a mitigating factor when considering disciplinary or other action.

The management of the welfare of a discloser may become complicated when that person is implicated in misconduct, whether or not that misconduct is related to the disclosure.

Taking disciplinary or other action against a person who has made a protected disclosure invariably creates the perception that it is being taken in reprisal for the disclosure. The CEO will make the final decision on the advice of the Protected Disclosure Coordinator as to whether disciplinary or other action will be taken against a discloser. Where disciplinary or other action relates to conduct that is the subject of the disclosure, the disciplinary or other action will only be taken after the disclosed matter has been appropriately dealt with. In all cases where disciplinary or other action is being contemplated, any such action will not be taken without the CEO ensuring that:

- the fact that a person has made a protected disclosure is not a substantial reason for the Council taking the action against the employee;
- there are good and sufficient grounds that would fully justify action against any other person in the same circumstances;
- there are good and sufficient grounds that justify exercising any discretion to institute disciplinary or other action.

Council will take all reasonable steps to thoroughly document its decision-making process, including recording the reasons why the disciplinary or other action is being taken, and the reasons why the action is not being taken in retribution against the discloser for making the disclosure, so that it will be able to clearly demonstrate that the disciplinary or other action was taken for the appropriate and permitted reasons under the Act.

The discloser will be clearly informed of any action proposed to be taken, be afforded natural justice, and inform and be informed of any mitigating factors that have been taken into account. Such communications with the discloser will be made in plain English and reasonable steps to provide appropriate support will be offered where appropriate.

## **11.5. Welfare Management of persons who are the subject of protected disclosures**

Council will also meet the welfare needs of a person who is the subject of a protected disclosure. It is important to remember that until a protected disclosure complaint is resolved, the information about the person is only an allegation.

Council will make a decision about whether or when the subject of a disclosure will be informed about a protected disclosure involving an allegation made against him or her. It is possible that the subject of the disclosure may never be told about the disclosure if it is not determined to be a protected disclosure complaint, or if a decision is made to dismiss the disclosure.

The Act limits the disclosure of information about the content of an assessable disclosure and the identity of the discloser to certain specified circumstances set out in Part 7 of the Act. Council may give information about the disclosure to the subject of the disclosure if it is directed or authorised to do so by the investigative entity investigating the protected disclosure complaint, or for the purpose of taking action with respect to the conduct alleged, including disciplinary action.

Investigative entities may also inform the subject of the protected disclosure complaint in the course of their investigation for the purposes of conducting that investigation, or any actions that they propose to take as a result of the investigation.

### **11.5.1. Welfare services**

A person the subject of a disclosure who is made aware of their status as such may have a welfare manager appointed by Council through the EAP, or be referred to Council's EAP program for welfare assistance. Council will consider each matter on a case by case basis, taking into account the particular circumstances of the person and the protected disclosure complaint.

### 11.5.2. Confidentiality

Consistently with Council's confidentiality obligations under the Act as outlined in these procedures, the fact that a disclosure has been made, whether it has been notified to the IBAC for assessment, any information received from the IBAC or another investigative entity and the identities of persons involved will not be divulged.

Council will take all reasonable steps to ensure the confidentiality of the subject of a disclosure during any assessment and any ensuing investigation. Where the disclosure is dismissed or investigations do not substantiate the allegations made against the person, the fact that the investigation was undertaken, its results, and the identity of the person subject of the disclosure will still be kept confidential.

### 11.5.3. Natural justice

Council will afford natural justice to the subject of a disclosure prior to any decision being made about the allegations. If the matter has been investigated by an investigative entity, then the investigative entity will be responsible for ensuring consultations with the subject include the provision of natural justice to him or her. The IBAC has noted that affording a subject of a disclosure natural justice in this context means that if a decision is to be made about their conduct this person has the right to:

- be informed about the substance of the allegations against them;
- be given the opportunity to answer the allegations before a final decision is made;
- be informed about the substance of any adverse comment that may be included in any report arising
- from an investigation; and
- have his or her defence set out fairly in any report.

### 11.5.4. If the allegations are wrong or unsubstantiated

Council will give its full support to a person who is the subject of a disclosure where the allegations contained in a disclosure are wrong or unsubstantiated. In those circumstances, Council and any investigative entity involved will ensure that there are no adverse consequences for this person arising out of the disclosure or its investigation. This is particularly crucial in a situation where there has been publicly disclosed information identifying the subject, but also where such information has become well-known across Council and the subject is an employee or Councillor. Further, if the matter has been publicly disclosed by Council, the CEO will consider any request by that person to issue a statement of support setting out that the allegations were clearly wrong or unsubstantiated.

## 11.6. Occurrence of detrimental action

If a person who makes a protected disclosure reports an incident of harassment, discrimination or adverse treatment that may amount to detrimental action taken in reprisal for the making of the disclosure, the Welfare Manager or Protected Disclosure Coordinator will:

- record details of the incident;
- advise the person making the protected disclosure of his or her rights under the Act; and
- advise the Protected Disclosure Coordinator of the detrimental action.

The taking of detrimental action in reprisal for the making of a disclosure can be an offence against the Act as well as grounds for making a further disclosure. Where such detrimental action is reported, the Protected Disclosure Coordinator will assess the report as a new disclosure under the Act.

If the detrimental action is of a serious nature likely to amount to a criminal offence, the Protected Disclosure Coordinator will consider whether to report the matter to the police.

Where the Protected Disclosure Coordinator considers that the disclosure may be a protected disclosure, he or she will refer it to the IBAC. If the IBAC subsequently determines the matter to be a protected disclosure complaint, the IBAC may investigate the matter or refer it to another body for investigation as outlined in the Act.

## **11.7. Person making the Protected Disclosure implicated in improper conduct**

Where a person who makes a disclosure is implicated in misconduct, Council will handle the disclosure and protect the person making the disclosure from reprisals in accordance with the Act, the Guidelines and these procedures. Council acknowledges that the act of making a protected disclosure does not exclude the person making the protected disclosure from being subject to the reasonable consequences flowing from any involvement in improper conduct. Section 42 of the Act specifically provides that a person's liability for his or her own conduct is not affected by the person's disclosure of that conduct under the Act. However, in some circumstances, an admission may be a mitigating factor when considering disciplinary or other action.

The CEO will make the final decision in consultation with the Protected Disclosure Coordinator as to whether disciplinary or other action will be taken against a person making a protected disclosure in line with the Disciplinary Policy. Where disciplinary or other action relates to the conduct of the person making the protected disclosure, disciplinary or other action will only be taken after the disclosed matter has been appropriately dealt with.

In all cases where disciplinary or other action is being contemplated, the CEO must be satisfied that it has been clearly demonstrated that:

- the decision to proceed with disciplinary action is not causally connected to the making of the disclosure (as opposed to the content of the disclosure or other available information);
- there are good and sufficient grounds that would fully justify action against any other person not making a protected disclosure in the same circumstances; and
- there are good and sufficient grounds that justify exercising any discretion to institute disciplinary or other action.

The Protected Disclosure Coordinator will thoroughly document the process including recording the reasons why the disciplinary or other action is being taken, and the reasons why the action is not in reprisal for the making of the disclosure. The Protected Disclosure Coordinator will clearly advise the person making the protected disclosure of the proposed action to be taken, and of any mitigating factors that have been taken into account.

## **12. Confidentiality**

### **12.1. General obligation of confidentiality on Council and all individuals**

Council will take all reasonable steps to protect the identity of the discloser and the matters disclosed by the discloser. Maintaining confidentiality is crucial in ensuring reprisals are not made against a discloser.

Disclosers may consider whether it is in their best interests not to discuss any related matters other than with authorised persons within Council, officers of the IBAC, or other persons authorised by law.

### **12.2. Steps taken by Council to ensure confidentiality**

#### **12.2.1. Information Management**

Council will ensure all files, whether paper or electronic, are kept in a secure manner and can only be accessed by the Protected Disclosure Coordinator or Protected Disclosure Officer involved in a particular matter. Where necessary, a Welfare Manager may be able to gain access (where appropriate) to related welfare matters.

All printed material will be kept in files that are clearly marked as Protected Disclosure Act matters, and warn of the criminal penalties that apply to any unauthorised access, use or divulging of information concerning a protected disclosure.

All electronic files will be either password protected, stored separately or secured. All materials relevant to an investigation, such as tapes from interviews, will also be stored securely with access only by authorised officers, as listed above.

Council will not use unsecured email to transmit documents in connection with a disclosure and will ensure all telephone calls and meetings in connection to disclosures are conducted privately and in the strictest of confidence. Hard copy documents will not be delivered by internal mail to a

generally accessible area and, where possible, will be delivered in person by authorised officers where possible.

All phone calls and meetings will be conducted in private. Transmission of files containing sensitive information will not be sent to devices that have general staff access.

#### 12.2.2. Exemption from the Freedom of Information Act 1982 ("FOI Act")

The FOI Act provides a general right of access for any person to seek documents in the possession of Council. However, the Act provides that certain information related to protected disclosures as contained in documents in the possession of Council will be exempt from the application of the FOI Act.

Such information excluded from the operation of the FOI Act includes:

- any information relating to a disclosure made in accordance with the Act;
- any information relating to a disclosure notified to the IBAC by Council under s 21 of the Act for assessment; and
- any information that is likely to lead to the identification of a discloser.

Council is required to contact the IBAC prior to providing any document originating from the IBAC or relating to a protected disclosure, if that document is sought under the FOI Act.

#### 12.2.3. Penalties apply for unauthorised disclosure of confidentiality

The Act contains a number of offence provisions relating to unauthorised disclosure of information by either disclosers or persons who have received disclosures. The relevant penalties include imprisonment, financial payments or both.

The criminal offences set out in the Act relating to confidentiality include:

- divulging information obtained in connection or as a result of the handling or investigation of a protected disclosure without legislative authority.
- disclosing that a disclosure has been notified to the IBAC for assessment under the Act.
- disclosing that a disclosure has been assessed by the IBAC or the Victorian Inspectorate to be a protected disclosure complaint under the Act.

#### 12.2.4. Limited exceptions permitted by the Act

The Act makes it a crime to disclose information connected with a disclosure made in accordance with the Act. Limited exceptions to the prohibition on disclosure are specified by the Act, include circumstances such as:

- where disclosure is required by Council (or one of its employees) in the exercise of functions of Council under the Act;
- where necessary for the purpose of the exercise of functions under the Act;
- by an investigating entity for the purpose of exercising that entity's functions under the IBAC Act;
- in accordance with a direction or authorisation given by the investigating entity that is investigating the disclosure;
- to the extent necessary for the purpose of taking lawful action in relation to the conduct that is the subject of an assessable disclosure including a disciplinary process or action;
- where the IBAC or the Victorian Inspectorate has determined that the assessable disclosure is not a protected disclosure and the discloser or Council subsequently discloses the information;
- when an investigative entity had published a report to Parliament, in accordance with its confidentiality obligations;
- for the purpose of obtaining legal advice in relation to matters specified in the Act;
- in order to enable compliance with the Act:
  - where a person does not have a sufficient knowledge of the English language, to obtain a translation from an interpreter;
  - where a person is under 18 years of age, to a parent or guardian;
  - where a person is suffering a disability and is not able to understand, to an independent person;
- in disciplinary actions or legal proceedings for certain offences in the Act or other specified Acts.



It is important to note that the Act prohibits the inclusion of any details, in any report or recommendation, which is likely to lead to the identification of a discloser. The Act also prohibits the identification of the person who is the subject of the disclosure in any particulars included in an annual report or any reports to Parliament.

### **13. Training for all staff**

Council will:

- ensure that staff, employees, officers and members have access to a copy of these procedures in hard or soft copy;
- incorporate into its induction procedures training about Council's general obligations under the Act and the rights and obligations of all employees, staff and members;
- introduce periodic refresher courses for existing staff, employees and members about their rights and obligations under the Act;
- provide additional training and assistance to:
  - any members of the Council with specific responsibilities and functions to handle and manage protected disclosures under the Act, including the Protected Disclosure Coordinator and people involved in welfare management;
  - its complaint handling staff to ensure that any complaints received will be dealt with consistently and in accordance with the Act as required;
  - any staff with functions and duties under the FOI Act or with responsibilities for information management, to ensure that no prohibited information is disclosed under the Act and to ensure there is appropriate liaising with the staff of the IBAC or other investigative agencies where required in response to a request for access under the FOI Act; and
  - all staff and employees dealing with customers to ensure any potential disclosures received from external sources can be handled appropriately in accordance with the Act and these procedures.

### **14. Collating and Publishing Statistics**

Council is required to publish certain statistics about the Act in its annual reports. That information relates mainly to how these procedures may be accessed and the number of disclosures notified to the IBAC for assessment under s 21 of the Act during the financial year.

The Protected Disclosure Coordinator will establish a secure register to record the information required to be published in the Annual Report, and to generally keep account of the status of protected disclosures.

### **15. Criminal Offences**

The Act contains a number of offence provisions relating to unauthorised disclosure of information by either disclosers or persons who have received disclosures. The relevant penalties include imprisonment, financial payments or both.

The criminal offences set out in the Act relating to confidentiality include:

- divulging information obtained in connection or as a result of the handling or investigation of a protected disclosure without legislative authority.
- disclosing that a disclosure has been notified to the IBAC for assessment under the Act.
- disclosing that a disclosure has been assessed by the IBAC or the VI to be a protected disclosure

### **16. Decision Guidelines**

There are no exemptions permitted from this Policy.

### **17. Review**

These procedures will be reviewed as required to ensure they meet the objectives of the Act and accord with the Regulations and the Guidelines.