



# LITHGOW CITY COUNCIL

Policy 9.13

PROTECTED DISCLOSURE POLICY

Version 1

## **9.13 PROTECTED DISCLOSURES POLICY**

### **OBJECTIVES:**

This policy provides appropriate avenues for the reporting and investigation of claims of corrupt conduct, maladministration or serious and substantial waste.

### **POLICY:**

#### **1. Support for persons who make disclosures**

Council does not tolerate corrupt conduct, maladministration or serious and substantial waste of public money.

Council is committed to the aims and objectives of the Protected Disclosures Act. It recognises the value and importance of contributions of staff to enhance administrative and management practices and strongly supports disclosures being made by staff or councillors which disclose corrupt conduct, maladministration or serious and substantial waste of public money.

Council will take all reasonable steps to provide protection to staff and councillors who make such disclosures from any detrimental action in reprisal for the making of the disclosure.

#### **2. Purpose of this policy**

This Policy establishes an internal reporting system for the reporting of disclosures of corrupt conduct, maladministration or serious and substantial waste of public money by Council, its staff and councillors. The system enables such internal disclosures to be made to the Mayor or to the General Manager.

This policy is designed to complement normal communication channels between supervisors and staff.

Staff are encouraged to continue to raise appropriate matters at any time with their supervisors, but as an alternative have the option of making a protected disclosure in accordance with this Policy.

#### **3. Object of the Act**

The Protected Disclosures Act 1995 commenced operation on 1 March 1995. The purpose of the Act is to ensure that public officials who wish to make disclosures under the legislation receive protection from reprisals and that the matters raised in the disclosures are properly investigated.

The Act aims to encourage and facilitate the disclosure – in the public interest – of corrupt conduct, maladministration and serious and substantial waste in the public sector. This is achieved by:

- enhancing and augmenting established procedures for making disclosures concerning such matters;

- protecting persons from reprisals that might otherwise be inflicted on them because of these disclosures; and
- providing for those disclosures to be properly investigated and dealt with.

## Definitions

Three key concepts in the internal reporting system are “*corrupt conduct*”, “*maladministration*” and “*serious and substantial waste of public money*”.

Definitions of these concepts are outlined below.

### 4.1 Corrupt Conduct

“*Corrupt conduct*” is defined in the *Independent Commission Against Corruption Act 1988 (Sections 8 and 9)*. The definition used in the Act is intentionally quite broad – corrupt conduct is defined to include the dishonest or partial exercise of official functions by a public official. Conduct of a person who is not a public official, when it adversely affects the impartial or honest exercise of official functions by a public official, also comes within the definition.

Corrupt conduct can take many forms i.e. taking or offering bribes, public officials dishonestly using influence, blackmail, fraud, election bribery and illegal gambling are some examples.

### 4.2 Maladministration

“*Maladministration*” is defined in the *Protected Disclosures Act* as conduct that involves action or inaction of a **serious nature** that is:

- Contrary to law, or
- Unreasonable, unjust, oppressive or improperly discriminatory, or
- Based wholly or partly on improper motives (s11).

The conduct covered by these terms includes:

- **contrary to law** – e.g.:
  - a decision or action contrary to the law
  - a decision or action ultra vires (i.e. the decision-maker had no power to make the decision or to do the act)
  - a decision or action contrary to lawful and reasonable orders from persons or agencies with authority to make or give such orders
  - breach of natural justice or procedural fairness
  - unauthorised disclosure of confidential information
  - a decision or action included or affected by fraud.
- **unreasonable** – e.g.:
  - a decision or action inconsistent with adopted guidelines or policies or with a decision of action which involves similar facts or circumstances

not justified by any evidence, or so unreasonable that no reasonable person could so decide or act (e.g. irrational)

- an arbitrary, partial, unfair or inequitable decision or action
  - a policy that is applied inflexibly and without regard to the merits of an individual case
  - a decision or action that does not take into account all relevant considerations or that takes into account irrelevant considerations
  - serious delays in making decisions or taking action
  - failing to give notice of rights
  - giving wrong, inaccurate or misleading advice leading to detriment
  - failure to rectify identified mistakes, errors, oversights or improprieties
  - failing to properly investigate.
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- **unjust** – e.g.:
    - a decision or action not justified by any evidence or that is unreasonable
    - a partial, unfair, inequitable or unconscionable decision or action
  - **oppressive** - eg;
    - an unconscionable decision or action
    - where the means used are not reasonably proportional to the ends to be achieved
    - an abuse of power, intimidation or harassment
  - **improperly discriminatory** - eg;
    - inconsistent application of laws, policies or practices when there is no reasonable, justifiable or appropriate reason to do so
    - distinctions applied not authorised by law, or failure to make a distinction which is authorised or required by law
  - **based wholly or partly on improper motives** - eg;
    - \* a decision or action for a purpose other than that for which power conferred
    - \* a conflict of interest
    - \* bad faith or dishonesty
    - \* seeking or accepting gifts or benefits in connection with performance of official duties
    - \* misusing public property, official services or facilities

## 5. Serious and Substantial Waste

The term “*serious and substantial waste*” is not defined in the *Protected Disclosures Act*. The Auditor-General provides following working definition:

*Serious and substantial waste refers to the uneconomical, inefficient or ineffective use of resources, authorised or unauthorised, which results in a loss/wastage of public funds/resources.*

*In addressing any complaint of serious and substantial waste regard will be had, to the nature and materiality of the waste.*

*The following delineation of the definition of serious and substantial waste may be of assistance to public officials and/or public authorities.*

### **Types:**

<i>Absolute -</i>	<i>Serious and substantial waste might be regarded in absolute terms where the waste is regarded as significant, for example, \$200,000.</i>
<i>Systemic -</i>	<i>The waste indicates a pattern which results from a system weakness within the public authority.</i>
<i>Material -</i>	<i>The serious and substantial waste is/was material in terms of the public authority’s expenditure or a particular item of expenditure or is/was material to such an extent so as to effect a public authority’s capacity to perform its primary functions.</i>
<i>Material By Nature No Amount -</i>	<i>The serious and substantial waste may not be material in financial terms but may be significant by nature. That is it may be improper or inappropriate (alternatively, this type of waste may constitute “maladministration” as defined in the Protected Disclosures Act).</i>

Waste can take many forms, for example:

- misappropriation or misuse of public property;
- the purchase of unnecessary or inadequate goods and services;
- too many personnel being employed in a particular area, incurring costs which might otherwise have been avoided;
- personnel being remunerated for skills that they do not have, but are required to have under the terms or conditions of their employment;
- programs not achieving their objectives and therefore the costs being clearly ineffective and inefficient.

Waste can result from such things as:

- the absence of appropriate safeguards to prevent the theft or misuse of public property;
- purchasing procedures and practices which fail to ensure that goods and services are necessary and adequate for their intended purpose; and
- purchasing practices where the lowest price is not obtained for comparable goods or services without adequate and appropriate justification.

## **6. What disclosures are protected under the Act**

### **(1) What disclosures are protected?**

Disclosures are protected under the Act if they:

- a) are made –
  - in accordance with this Internal Reporting Policy; or
  - to the General Manager; or
  - to one of the investigating authorities nominated in the Act;  
AND
- b) **show or tend to show corrupt, maladministration, or serious and substantial waste of public money by Council or any of its staff or councillors; AND**
- c) **are made voluntarily.**

### **(2) What disclosures are not protected?**

A disclosure is not protected under the Act if it is made by a public official in the exercise of a duty imposed by or under an Act.

Protection is also not available for disclosures which:

- are made frivolously or vexatiously;
- primarily question the merits of government policy; or
- are made solely or substantially with the motive of avoiding dismissal or other disciplinary action.

It is an offence to wilfully make a false or misleading statement when making a disclosure.

## **7. Reporting under the internal reporting system**

The persons or positions to whom internal disclosures can be made in accordance with the Internal Reporting System (as shown on the attached diagram) are:

- the Disclosure Co-ordinator (Group Manager – Community and Corporate, Council’s Administration Centre in Mort Street, Lithgow, telephone (02) 635 9950 ); or
- the General Manager; or
- the Mayor (if the disclosure concerns or involves the General Manager or a councillor).

**Notes:**

**Where persons contemplating making a disclosure are concerned about publicly approaching the Mayor or the General Manager they can ring the relevant official and request a meeting in a discreet location away from the workplace.**

- (1) A council officer who wishes to make a protected disclosure which involves a councillor may do so to the Mayor, the General Manager, or an investigating authority (i.e. the Director-General of the Department of Local Government, ICAC, or Ombudsman).
- (2) A councillor who wishes to make a protected disclosure which involves another councillor may do so to the Mayor, the General Manager, or an investigating authority (i.e. Director-General of the Department of Local Government, ICAC, Ombudsman).
- (3) If the Mayor wishes to make a protected disclosure he or she may do so to the General Manager or an investigating authority (i.e. Director-General of the Department of Local Government, the ICAC or Ombudsman).

## **8. Roles and responsibilities**

This Internal Reporting Policy places responsibilities upon people at all levels within Council.

### **(1) Employees**

Employees are encouraged to report known or suspected incidences of corrupt conduct, maladministration or serious and substantial waste in accordance with this Policy.

All employees of Council have an important role to play in supporting those who have made legitimate disclosures. They may abstain from any activity that is or could be perceived to be victimisation or harassment of persons who make protected disclosures. Further, they should protect/maintain the confidentiality of persons they know or suspect to have made disclosures.

### **(2) Disclosure Co-ordinator**

The Disclosure Co-ordinator has a pivotal position in the internal reporting system and acts as a clearing house for disclosures. The Disclosure Co-ordinator will:

- a) provide an alternative internal reporting channel to Nominated Disclosure Officers and to the General Manager;
- b) impartially assess each disclosure to determine -
  - i) whether the disclosure appears to be a protected disclosure within the meaning of the Act;
  - ii) whether the disclosure covers another agency and should therefore be referred to the principal officer of that agency;
  - iii) the appropriate action to be taken in relation to the disclosure, for example -

- no action/decline;
  - the appropriate person to take responsibility for dealing with the disclosure;
  - preliminary or informal investigation;
  - formal investigation;
  - prosecution or disciplinary action;
  - referral to an investigating authority for investigation or other appropriate action; or
  - referral to the police (if a criminal matter) or the ICAC (if the matter concerns corrupt conduct).
- c) consult with the General Manager about all disclosures, other than where a disclosure concerns the General Manager;
- d) be responsible for carrying out or co-ordinating any internal investigation arising out of a disclosure, subject to the direction of the General Manager;
- e) report to the General Manager on the findings of any investigation and recommended remedial action;
- f) take all necessary and reasonable steps to ensure that the identity of persons who make disclosures, (where this is practical and reasonable) and persons the subject of the disclosures, are kept confidential;
- g) support persons who make disclosures and actively protect them from victimisation, harassment or any other form of reprisal; and
- h) report actual or suspected corrupt conduct to the General Manager in a timely manner to enable that officer to comply with the *ICAC Act*.

### **(3) General Manager**

Disclosures may be made direct to the General Manager. The General Manager will:

- a) impartially assess each disclosure to determine:
- i) whether the disclosure appears to be a protected disclosure within the meaning of the Act;
  - ii) whether the disclosure concerns another agency and should therefore be referred to the principal office of that agency;
  - iii) the appropriate action to be taken in relation to the disclosure, for e.g.:
    - no action/decline;
    - the appropriate person to take responsibility for dealing with the disclosure;
    - preliminary or informal investigation;
    - formal investigation;

- prosecution or disciplinary action;
  - referral to an investigating authority for investigation or other appropriate action; or
  - referral to the police (if a criminal matter) or the ICAC (if the matter concerns corrupt conduct).
- b) receive reports for the Disclosure Co-ordinator on the findings of any investigation and any recommendations for remedial action and determine what action should be taken;
- c) take all necessary and reasonable steps to ensure that the identity of persons who make disclosures, and the persons the subject of disclosures, are kept confidential (where reasonable and practical), and
- d) have primary responsibility for protecting staff who make disclosures, or provide information to any internal or external investigation of a disclosure, from victimisation, harassment or any other form of reprisal;
- e) be responsible for implementing organisational reform identified as necessary following investigation of a disclosure; and
- f) report criminal offences to the Police and actual or suspected corrupt conduct to ICAC (under s.11 of the *ICAC Act*).

#### **(4) The Mayor**

The Mayor may receive internal disclosures from any member of staff of the council or any councillor concerning the General Manager or a councillor. The Mayor will:

- a) impartially assess each disclosure made to him/her about the General Manager or a councillor to determine –
- i) whether the disclosure appears to be a protected disclosure within the meaning of the Act;

*Note: In making this assessment the Mayor may seek guidance from: the General Manager (if appropriate) or an investigating authority (i.e. the Director General of DLG, the ICAC, or Ombudsman).*

- ii) the appropriate course of action to be taken in relation to the disclosure (in consultation with the General Manager, if appropriate), for e.g.:
- no action/decline;
  - the appropriate person to take responsibility for dealing with the disclosure;
  - preliminary or informal investigation;
  - formal investigation;
  - prosecution or disciplinary action;

- referral to an investigating authority for investigation or other appropriate action; or
  - referral to the police (if a criminal matter) or the ICAC (if the matter concerns corrupt conduct);
- b) refer disclosures to the General Manager for appropriate action if they concern the council's administration, within the day to day responsibilities of the General Manager.
- c) take all necessary and reasonable steps to ensure that the identity of the person who has made a disclosure, and any person to whom he subject of a disclosure, are kept confidential (where this is practical and reasonable).

## **9. Alternative avenues for disclosures**

Alternative avenues available to staff and councillors for making a protected disclosure under the Act (other than by means of the internal reporting system created under this Policy), are as follows:

- To the General Manager; or
- To one of the investigating authorities under the Act (eg the Director-General of DLG, ICAC and Ombudsman)
- To a journalist or a member of Parliament (where the following pre-conditions apply):
  - the person making the disclosure to a journalist or member of Parliament must have already made substantially the same disclosure through the internal reporting system, or to the General Manager or an investigating authority in accordance with the Act;
  - the person making the disclosure must have reasonable grounds for believing that the disclosure is substantially true and the disclosure must in fact be substantially true; and
  - the investigating authority, public authority or officer to whom the matter was originally referred has –
    - a) decided not to investigate the matter; or
    - b) decided to investigate the matter but not completed the investigation within 6 months of the original disclosure; or
    - c) investigated the matter but not recommended any action in respect of the matter; or
    - d) failed to notify the person making the disclosure, within 6 months of the disclosure, of whether the matter is to be investigated.

## **10. Rights of persons the subject of disclosures**

The rights of persons the subject of disclosures will also be protected. In this regard:

- (1) the confidentiality of the identity of persons the subject of disclosures will be protected/maintained (where this is possible and reasonable);
- (2) disclosures will be assessed and acted on impartially, fairly and reasonably;
- (3) responsible officials who receive disclosures in accordance with this Policy are obliged to–
  - protect/maintain the confidentiality of the identity of persons the subject of the disclosures (where this is practical and reasonable);
  - assess disclosures impartially; and
  - act fairly to persons the subject of disclosures;
- (4) disclosures will be investigated as discreetly as possible, with a strong emphasis on maintaining confidentiality both as to the identity of persons making protected disclosures and the persons the subject of disclosures (where this is practical and reasonable);
- (5) where investigations or other enquiries do not substantiate disclosures, the fact the investigation/enquiry has been carried out, the results of the investigation/enquiry, and the identity of persons the subject of the disclosures will be kept confidential, unless the persons the subject of the disclosures request otherwise;
- (6) the persons the subject of disclosures (whether protected disclosures under the Act or otherwise) which are investigated by or on behalf of a council, have the right to –
  - a) be informed as to the substance of the allegations;
  - b) be informed as to the substance of any adverse comment that may be included in a report/memorandum/letter or the like arising out of any such investigation; and
  - c) be given a reasonable opportunity to put their case (either orally or in writing) to the persons carrying out the investigation for or on behalf of the council,

before any decision/determination/report/memorandum/letter or the like is made ;
- (7) where the allegations in a disclosure have been investigated by or on behalf of a council, and the person the subject of the allegations is aware of the substance of the allegations, the substance of any adverse comment, or the fact of the investigation, he or she should be formally advised as to the outcome of the investigation, regardless of the outcome; and
- (8) where the allegations contained in a disclosure are clearly wrong or unsubstantiated, the person the subject of the disclosure is entitled to the support of the council and its senior management (the nature of the support that would be reasonable and appropriate would depend on the circumstances of the case, but could include a public statement of support or a letter setting out the council's views that the allegations were either clearly wrong or unsubstantiated).

## **11. Protection available under the Act**

### **(1) Protection against reprisals**

The Act provides protection by imposing penalties on a person who takes “*detrimental action*” against another person substantially in reprisal for a protected disclosure. Penalties can be imposed by means of fines and imprisonment. “*Detrimental action*” means action causing, comprising or involving any of the following:

- injury, damage or loss;
- intimidation or harassment;
- discrimination, disadvantage or adverse treatment in relation to employment;
- dismissal from, or prejudice in, employment; or
- disciplinary proceeding.

Any member of staff or councillor who believes that “*detrimental action*” is being taken against them substantially in reprisal for the making of an internal disclosure in accordance with this Policy should immediately bring the allegations to the attention of the General Manager or Mayor (as appropriate).

If a member of staff or councillor who made an internal disclosure feels that such reprisals are not being effectively dealt with, they should contact the Director-General of DLG, the Ombudsman or ICAC.

If an external disclosure was made to an investigating authority, that body will either deal with the allegation or provide advice and guidance to the person concerned.

### **(2) Protection against actions etc.**

The Act provides that a person is not subject to any liability for making a protected disclosure and no action, claim or demand may be taken or made of or against the person for making the disclosure. This provision has effect despite any duty of secrecy or confidentiality or any other restriction on disclosure by a public official.

A person who has made a protected disclosure has a defence of absolute privilege in proceedings for defamation.

A person who has made a protected disclosure is taken not to have committed any offence against an Act which imposes a duty to maintain confidentiality with respect to any information disclosed.

### **(3) Confidentiality**

The Act requires investigating authorities, public authorities and public officials to whom protected disclosures are made or referred, not to disclose

information that might identify or tend to identify the person who made the disclosures. The exceptions to the confidential requirement are where:

- the person consents in writing to the disclosure of that information; or
- it is essential, having regard to the principles of natural justice, that the identifying information be disclosed to a person whom the information provided by the disclosure may concern; or
- the investigating authority, public authority, officer or public official is of the opinion that disclosure of the identifying information is necessary to investigate the matter effectively; or disclosure is otherwise in the public interest.

Decisions about natural justice, effective investigation and public interest will be made by the General Manager or Mayor (as appropriate). In all cases the person who made the disclosure will be consulted before such a decision is made.

**Note:** If guidance is needed in relation to the requirements of natural justice, effective investigation and public interest, this may be sought from an investigating authority.

#### **(4) Freedom of information exemption**

Under the *Freedom of Information Act 1989* a document is exempt from release if it contains matter the disclosure of which would disclose matters relating to a protected disclosure within the meaning of the Act.

## **12. Notification of action taken or proposed**

A person who makes a protected disclosure must be notified, within 6 months of the disclosure being made, of the action taken or proposed to be taken in respect of the disclosure.

If a disclosure is made in accordance with this Policy, either the General Manager or disclosure coordinator is responsible for the 6 month notification to the person who made the disclosure.

If a disclosure is made to the Mayor under this Policy, the Mayor is responsible for such notification to the person who made the disclosure, unless he or she directs the General Manager to assume this responsibility.

The notification provided to the person who made the disclosure should contain sufficient information to demonstrate that adequate and appropriate action was taken, or is proposed to be taken, in respect of the disclosure. **This should include a statement of the reasons for the decisions made or action taken in response to the disclosure.**

The notification should include sufficient information to enable the person who made the disclosure to make an assessment as to whether the circumstances

listed in Section 19(3)(a)-(c) of the Act (relating to disclosures to members of Parliament and journalists) apply ie whether :

- (1) a decision was made not to investigate the matter; or
- (2) a decision was made to investigate the matter, but the investigation was not completed within 6 months of the original decision being made; or
- (3) a decision was made to investigate the matter, but the investigation has not been completed within 6 months of the original decision being made; or
- (4) the matter was investigated but no recommendation was made for the taking of any action in respect of the matter.

One of the purposes of this is to give the whistleblower enough information to be able to properly assess whether it is appropriate or warranted to make a disclosure to a member of parliament or a journalist.

### 13. Review

This Policy shall be reviewed annually to ensure that it meets the object of the legislation and facilitates the making of disclosures under the Act.

<b>Maintained by Department:</b>	Development	<b>Approved by:</b>	Council		
<b>Reference:</b>	Dataworks: Policy Register	<b>Council Policy No:</b>	9.13	<b>Effective Date:</b>	16/10/2006
<b>Min No:</b>	06-349	<b>Version No:</b>	1	<b>Review Date:</b>	Oct 2007
<b>Attachments:</b>					

COUNCIL'S INTERNAL REPORTING SYSTEM

