

# Entities and individuals providing services and exercising functions on behalf of an agency under contract or as volunteers

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## What this guideline covers

This guideline provides guidance to agencies who engage contracted entities, individual contractors and volunteers to provide services on behalf of an agency or to exercise the functions of an agency.

Throughout this guideline, contractors, subcontractors and volunteers, and employees, partners and officers of contracted entities that provide services on behalf of an agency or exercise functions of an agency are referred to as **public officials providing contracted-out services**.

# When are persons not employed by agencies considered public officials under the PID Act?

The *Public Interest Disclosures Act 2022* (**PID Act**) is designed to encourage ‘public officials’ to report serious wrongdoing and to protect them when they do.

Whether a person is a ‘public official’ is therefore a central concept in the PID Act. When a report of wrongdoing is made, it is essential to consider whether the person making the report is a ‘public official’, because if they are the PID Act applies, so long as the report has the features of a PID.

Mostly, public officials are those who are employed by agencies. Guidance on the term ‘public official’ can be found in the guideline *Core Concepts in the PID Act*.

However, the following people are also considered ‘public officials’ under the PID Act:

1. Contractors, subcontractors and volunteers who are engaged to deliver services on behalf of the agency or to exercise the functions<sup>1</sup> of that agency if they themselves deliver those services or exercise those functions.<sup>2</sup>

Examples will include:

- a volunteer rural fire fighter who is an officer of the NSW Rural Fire Service
- a volunteer officer or member of an SES unit (within the meaning of the *State Emergency Act 1989*)
- a person who has been engaged as a contractor to work as a lecturer at a university.

2. A person who is employed by an entity, where the entity has a contract to deliver services on behalf of an agency or exercise the functions of an agency, if the person provides those services or exercises those functions, or if they are involved in the provision of that work.<sup>3</sup>

Examples will include:

- staff of a specialist homelessness service that provides accommodation or support services under a contract with the Department of Communities and Justice
- staff of an NGO that provides out-of-home care services for children in the child protection system, under a contract with the Department of Communities and Justice
- employees of private management companies or private health care providers that are contracted by Corrective Services NSW to manage correctional facilities or provide health care services in those facilities
- in the examples above, people working in head office, or in corporate or other support roles, will also be public officials if their work is connected to the provision of the relevant services or the exercise of the relevant functions, such that they can be said to be ‘involved’ in them.

Accordingly, contractors, subcontractors, volunteers and employees of contracted entities are able to make a voluntary public interest disclosure (**PID**) and they receive the protections of a voluntary PID maker when they do. Further guidance on protections can be found in the guideline *Protections in the PID Act*.

Given this, it is important for agencies to be aware of who is a public official associated with their agency (in addition to their employees), as agencies have the same obligations under the PID Act towards public officials providing contracted-out services as they do to employees of the agency.

However, providers of contracted-out services will be covered by the PID Act as public officials only if the services they are providing are being provided *on behalf of* an agency, or where they are *exercising functions of* an agency. If neither of these is the case, and instead services are merely being provided under *contract to an agency*, then the extended definition of public official will not apply. For example, an entity that has a contract to clean the offices of an agency would likely be considered to be providing a service *to* that agency, and would not be providing services *on behalf of* the agency or to be *exercising functions of* the agency – so its staff would not be covered by the extended definition of public official in the PID Act.

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1. Functions of an agency can include a power, authority or duty.

2. *Public Interest Disclosures Act 2022* s 14(1)(e).

3. *Public Interest Disclosures Act 2022* s 14(1)(f).

There will likely be circumstances where it will be unclear whether services are covered by the extended meaning of public official above and agencies may need to obtain independent legal advice.

The PID Act also provides that the definition of public official can be extended or narrowed by Regulation, by specifying particular persons who are, or are not, public officials. If it is unclear whether a contracted-out service does trigger the extended definition of public official in the PID Act, an agency may wish to consider writing to the responsible Minister to recommend that a Regulation be made to expressly specify whether those who are providing those services are, or are not, public officials for the purpose of the PID Act.

**Important note:** The head of an agency should also consider whether it is appropriate to deem a disclosure to be a voluntary PID in circumstances where there is uncertainty about whether a person providing contracted-out services meets the definition of public official under the PID Act and where a disclosure is received from them or their staff that shows or tends to show serious wrongdoing. Guidance can be found in the guideline *Deeming that a disclosure is a voluntary PID*.

## Who can a public official providing contracted-out services make a disclosure to?

Public officials providing contracted-out services can make a disclosure to:

- the head of any agency
- a disclosure officer of any agency – these are people identified as disclosure officers in an agency’s PID policy which can be found on an agency’s public website and intranet site
- any integrity agency
- a Minister or Minister’s office (but only if in writing)
- the relevant manager – this means the person working in the contracting agency who is responsible for overseeing the provision of the services or the exercise of the functions, or for managing the contract or arrangement

Further guidance on recipients of disclosures can be found in the guideline *Core Concepts in the PID Act*.

Further guidance on making a voluntary PID can be found in the guideline *What is a public interest disclosure?*

**Important note:** For staff of entities that provide contracted-out services to an agency, their ‘manager’ for the purposes of the PID Act is taken to be the person working in the agency who manages the service contract with the entity. Staff of contracted entities’ ‘manager’ within the contracted entity is not their manager for the purpose of receiving a disclosure under the PID Act.

## Determining if a disclosure relates to an agency

Agencies are required to assess and deal with disclosures received by public officials providing contracted-out services in the same way as they deal with disclosures received by public officials employed by the agency.

If an agency receives a disclosure from a public official providing contracted-out services, the agency will need to assess the disclosure to identify whether it has the features of a voluntary PID. Further guidance on assessing disclosures can be found in the guideline *Assessing a report of wrongdoing to identify if it is a voluntary PID*.

Once that assessment occurs, and if the disclosure is a voluntary PID, the agency will then need to determine if the serious wrongdoing contained in the disclosure *relates* to the receiving agency.

A voluntary PID relates to an agency if the disclosure is about serious wrongdoing:

1. by the agency – meaning the agency is alleged to have engaged in the serious wrongdoing
2. by a public official employed by, or otherwise associated with, the agency
3. that otherwise affects, or might affect, the exercise of the functions of the agency<sup>4</sup>

Public officials who provide contracted-out services are ‘associated with’ an agency if:

- a) they are a contractor, subcontractor or volunteer providing services on behalf of the agency or exercising functions on behalf of the agency, or
- b) an employee, partner or officer of an entity that provides services, under contract, subcontract or other arrangement, on behalf of the agency or exercises the function(s) of the agency and is involved in providing those services or exercising those functions. For example, employees of an NGO contracted to exercise functions on behalf of an agency.

If an agency (Agency A) receives a voluntary PID from a public official who is providing contracted-out services to that agency, then how Agency A deals with it will depend on whether the PID relates to Agency A – see section 55 (if it relates to Agency A) and section 56 (if it does not relate to Agency A):

- If the PID alleges wrongdoing by Agency A or its staff, then the PID relates to Agency A and it must decide how it will deal with the disclosure under section 55 of the PID Act.
- If the PID alleges wrongdoing by others (captured in either a) or b) above) who are providing contracted-out services to Agency A then, as those alleged wrongdoers are ‘associated with’ Agency A, the PID still ‘relates to’ Agency A. Again, in this case Agency A must decide how it will deal with the disclosure under section 55 of the PID Act.
- If the PID alleges wrongdoing by a different agency (Agency B) and does not otherwise affect the functions of Agency A, then it does not relate to Agency A and it must deal with the disclosure under section 56 of the PID Act. (For example, a person may be working in an NGO that provides services on behalf of Agency A and Agency B. The person makes a disclosure to Agency A when they witness wrongdoing by staff at Agency B (that does not otherwise affect Agency A). In that case, the PID, although received by Agency A, does not relate to Agency A and Agency A is required to deal with it under section 56. This may, for example, mean referring it to Agency B or to an integrity agency.)

Further detailed guidance on ways agencies can deal with disclosures that either relate or do not relate to the agency can be found in the guideline *Dealing with Voluntary PIDs*.

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4. *Public Interest Disclosures Act 2022*, s 20(3)(a)–(b).

# Contract clauses that must be included in agency service contracts

Under section 82(2) of the PID Act, a contracting agency, a person exercising the functions of an agency, or a head contractor cannot enter into an agency service contract unless the contract contains specific clauses relating to PIDs.

**Important note:** An agency service contract means the contract or sub-contract between the contracting agency and the contractor, volunteer or body that has been engaged to provide services on behalf of an agency or when an agency has contracted an entity under section 81(3) of the PID Act (the exercise of agency functions under the PID Act by an entity).

This requirement takes effect on 1 October 2023 and applies to all agency service contracts entered into by an agency with an individual or body from this date.

Agency service contracts must contain clauses that require the relevant person or body being contracted to ensure that all individuals involved in providing the relevant services on behalf of the agency are made aware of the following:

- the fact that they are public officials for the purposes of the PID Act
- how to make a voluntary PID
- the contracting agency's PID policy, and
- the fact that if they are dissatisfied with the way a PID has been dealt with they may be able to take further action under the PID Act (i.e. by seeking an internal review) or another Act or law.<sup>5</sup>

Agency service contracts must also contain clauses that require the contracted person or body to:

- notify the contracting agency when it becomes aware of a voluntary PID that relates to the contracted agency
- notify the contracting agency when serious wrongdoing has been committed or alleged by an individual providing services under the agency service contract
- use their best endeavours to assist in an investigation of serious wrongdoing if requested by the person dealing with the PID on behalf of the agency
- acknowledge the contracting agency's obligations to take corrective action where required
- acknowledge the contracting agency's right to terminate the contract in response to a finding of serious wrongdoing or other misconduct by a person providing services under the contract, and
- ensure that any subcontract entered into contains terms that bind the subcontractor to the same PID obligations as the contracting person or body.<sup>6</sup>

**Important note:** Agencies can use the standard section 82 clauses available on [buy.nsw.gov.au](http://buy.nsw.gov.au) that have been developed for the purpose of meeting this requirement under the PID Act.

5. *Public Interest Disclosures Act 2022* s 82(2)(a).

6. *Public Interest Disclosures Act 2022* s 82(2)(c)-(f).

