



**PUBLIC
INTEREST
DISCLOSURE
SCHEME**

CHAPTER 7: Conducting an investigation

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AGENCY GUIDE TO THE *PUBLIC INTEREST DISCLOSURE ACT 2013*

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7 Conducting an investigation

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7.1 GENERAL REQUIREMENT TO INVESTIGATE AN INTERNAL DISCLOSURE

Section 47 of the PID Act requires the principal officer of an agency, or their delegate, to investigate a disclosure allocated to that agency under the PID Act. This includes when a disclosure has been reallocated to the agency in accordance with s 45 of the PID Act.

There are 2 circumstances in which a principal officer, or their delegate, is not required to investigate such disclosures, being:

- » where the principal officer or their delegate decides not to investigate the disclosure in accordance with s 48 of the PID Act. Chapter 6 of this guide explains the circumstances in which a principal officer or their delegate may decide not to investigate a disclosure and the associated notification and referral (if relevant) requirements.
- » where the Commissioner of the NACC has issued a stop action direction under the NACC Act, directing that the agency does not commence or continue with the investigation.

This chapter explains the formal procedural requirements for conducting an investigation under the PID Act. It does not explain the actual process for investigating a disclosure, although some of the pitfalls to avoid are highlighted in this Chapter.

The principal officer may delegate, in writing, any of their functions or powers to a public official who belongs to their agency (s 77(1)). This includes delegating the function of investigating a disclosure. References to the principal officer in this chapter include references to their delegates, including an investigator.

7.1.1 Initial advice to the discloser about the investigation

Unless the principal officer has decided not to investigate the disclosure under s 48 (see Chapter 6), they must, as soon as reasonably practicable, notify the discloser in writing that they are required to investigate the disclosure (s 50(1)(a)). The investigator should check whether the discloser has already been informed about the principal officer's powers to not investigate the disclosure (or investigate it under a separate investigative law or power) as required by the PID Standard (see 6.1.1 of this guide). That advice should be provided to the discloser within 14 days after the disclosure is allocated to the agency, if it is reasonably practicable to do so.

The investigator must also advise the discloser of the estimated length of their investigation (s 50(1A)). This is an important part of managing the discloser's expectations. Regardless of the estimation provided, the PID Act requires an investigation to be completed within 90 days of allocation, reallocation, a decision to reinvestigate or, if relevant, when a stop action direction under the NACC Act no longer applies (see 7.3.3.1 of this guide). If a longer time is required, the agency should seek an extension of time from the Ombudsman or the IGIS, as appropriate (see 9.1.4 of this guide).¹

The notice of the allocation of the disclosure and the requirement to investigate it, along with the estimated length of the investigation, may be given to the discloser in the same document (s 50(4)). However, this will only be

¹ To enable sufficient time to decide the request, an extension request to the Ombudsman is to be made 10 business days before the current investigation end date.

possible if the agency allocating the disclosure is the same as the agency that will investigate the disclosure (see 5.4.5.3 of this guide).

7.2 WHAT SORT OF INVESTIGATION IS REQUIRED?

An internal disclosure allocated to an agency under the PID Act may be investigated in one of 2 ways:

- » under a separate investigate power
- » under the PID Act.

7.2.1 Investigations under a separate investigative power

Investigation under a 'separate investigative power' is only relevant for disclosures allocated to an 'investigative agency' – these are the Ombudsman, the IGIS or a prescribed investigative agency.²

7.2.1.1 What is a separate investigative power?

If the disclosure has been allocated to an investigative agency, it may use its own separate investigative powers and framework to investigate a disclosure, rather than investigating under the PID Act (s 49(1)). For example, the Ombudsman has powers to investigate under the *Ombudsman Act 1976* (Ombudsman Act), and the IGIS has powers to inquire under the *Inspector-General of Intelligence and Security Act 1986* (IGIS Act). The circumstances in which the Ombudsman or the IGIS will investigate, whether under the PID Act or their separate investigative powers, are set out in 9.1.3 and 9.2.1 (respectively) of this guide.

7.2.1.2 Effect of using a separate investigative power

Conducting the investigation under a law other than the PID Act does not alter the protections for the discloser or witnesses (see Chapter 8 of this guide). The confidentiality provisions in the PID Act also continue to apply, as well as any confidentiality provisions in the legislation under which the investigation is conducted.

The time limits and reporting provisions discussed in 7.3.3.1 and 7.3.5 of this guide do not apply to an investigation conducted under a separate investigative power. Rather, the investigation, including any discretion not to investigate further, must be conducted in accordance with the legislation under which the agency is acting.

7.2.1.3 Notifying the discloser of the decision to use a separate investigative power

If the Ombudsman, the IGIS or a prescribed investigative agency decides to investigate a disclosure under a separate investigative power, they must, as soon as reasonably practicable, give written notice to the discloser (s 50). That notice must provide reasons for the decision and should explain that the discloser remains entitled to the PID Act protections, even though the disclosure is being investigated under a different law.

7.3 INVESTIGATIONS UNDER THE PID ACT

7.3.1 What does it mean to 'investigate' under the PID Act?

The purpose of a PID investigation is to establish whether one or more instances of disclosable conduct have occurred (s 47(2)). The starting point of the investigation is the conduct disclosed in the information provided by the discloser. The investigator may also consider whether the information they obtain during the investigation indicates that there are other, or different instances of disclosable conduct. However, these other instances of disclosable conduct should not be investigated under the PID Act if the information is tangential or remote to the disclosure (s 47(2)).

The investigator should also bear in mind that if one or more of the discretionary grounds in s 48 of the PID Act apply, it may be appropriate to discontinue the investigation under the PID Act (see 6.2 for more information about discontinuing a PID investigation). This includes considering whether it is appropriate for the subject matter of the disclosure to be investigated under another Commonwealth law (including procedures under such laws) or the Commonwealth's executive power (see 7.3.4 of this guide).

² There are no prescribed investigative agencies at the time of publication.

There are time limits for the investigation (see 7.3.3.1). At the conclusion of the investigation, the investigator must prepare a written report of their investigation (s 51). The investigation is completed when the report is prepared (s 52(2)). Requirements for the PID investigation report are discussed in 7.3.5 of this guide.

7.3.2 Who should investigate?

The principal officer is responsible for conducting investigations and may delegate the investigative function to an officer who belongs to their agency (s 77). The delegate could be a person already employed by the agency, or it could be a person contracted to conduct the particular investigation. Paragraph 7.3.2.1 of this guide explains considerations for principal officers before delegating the PID investigation function to a person who is not ordinarily employed by the agency.

Where possible, the investigator should have experience investigating the type of conduct the disclosure is about.³ Before commencing the investigation, they should become familiar with the PID Act and the agency's written procedures established under s 59(3). In particular, it is vital they understand and safeguard the confidentiality of investigative processes and give effect to the protections for disclosers and individuals who assist with PID investigations (that is, witnesses).

Investigators must ensure that they do not have an actual or perceived conflict of interest with people or issues that are likely to be involved in the investigation. Unless there are compelling reasons to justify a different approach, the investigator should not be a member of the workgroup where the alleged wrongdoing occurred.

7.3.2.1 Delegating the investigative function to a contractor

Delegating the principal officer's investigative function to a contractor may be appropriate and necessary to ensure a PID matter is handled properly. Circumstances which may warrant delegation to a contractor include:

- » when investigation of the disclosure requires a skillset or subject matter expertise beyond that available within the agency's internal pool of investigators
- » when the agency is handling a peak in PID investigations and internal investigations staff cannot be mobilised due to existing full caseloads
- » where the risk of real or perceived bias or conflict is most appropriately (and effectively) managed by engaging an external contractor.

When engaging a contractor to conduct an investigation, the principal officer should consider confining their delegation of the investigation power in s 53 by specifying terms of reference for the investigation. For example, the delegation could identify the investigator by name and clearly set out the scope of the investigation, including the issues they should cover and whether they will prepare the report under s 51 of the Act. The terms of reference might also specify particular actions to be taken, noting that a delegate must comply with any directions from the principal officer (s 77(2)). This should be supported by the terms of the contract agreed with the contractor.

7.3.3 PID investigation requirements

A PID investigation is conducted as the principal officer, or their delegate, sees fit (s 53), subject to compliance with the PID Standard (s 74). There are also special mandatory requirements for investigations into possible fraud (see 7.3.4.1 of this guide).

7.3.3.1 Time limit for investigations

Investigations under the PID Act must be completed within 90 days of:⁴

- » the day after the disclosure was initially allocated (s 52(1)(a)), or
- » the day after the disclosure was reallocated (s 52(1)(b)), or
- » the day after the principal officer decided to reinvestigate the disclosure (s 52(1)(c)), or

³ The PID investigation requirements are discussed from 7.3.3 onwards.

⁴ The day the event occurs is day zero of the 90 day timeframe for investigation.

- » if relevant, the day after the principal officer becomes aware that a stop action direction under the NACC Act no longer applies (s 52(1)(d)).

The effect of s 52(1)(d) is that once a stop action direction under the NACC Act is lifted, the 90-day investigation period restarts for the PID investigation (that is, the investigation 'clock' is reset). This is regardless of any period of investigation that occurred before the stop action direction was made. If, during the period that the stop action direction was in force, the NACC investigated the conduct that is the subject of the disclosure, it may be open to the principal officer to decide to not investigate (or not further investigate) the disclosure, on the basis that the conduct has been investigated under the NACC Act. To do so, the principal officer must be reasonably satisfied that there are no further matters concerning the disclosure that warrant investigation (s 48(1)(d)).

Agencies that investigate public interest disclosures under a separate investigative power (the Ombudsman, the IGIS and prescribed investigative agencies) are not bound by the time limits in the PID Act, but rather by the legislation under which they investigate.

The PID investigation is complete when a report of the investigation is prepared (s 52(2)). For the purposes of meeting time limit requirements, this means the report must be finalised to the point that no substantive changes will be made (that is, it should not be in draft form or remain subject to agency review processes).

If an agency is unable to complete the investigation within the 90-day period, the Ombudsman or the IGIS, as appropriate, may grant one or more extensions of time. The requirements for an extension of time are discussed in 9.1.4 of this guide.

If an extension is not granted, the agency is still required to complete the investigation and prepare a report. An agency's failure to complete an investigation within 90 days (or an approved extended timeframe) does not affect the validity of the investigation (s 52(6)). However, the failure to complete an investigation within the time limit is one of the criteria that, if collectively satisfied, will entitle the discloser to make an external disclosure (see 2.7.7 of this guide).

7.3.3.2 *An administrative investigation*

An investigation under the PID Act is an administrative investigation. This means that the person conducting the investigation must comply with administrative law principles of general application such as procedural fairness (7.3.3.8 of this guide). However, s 53 of the PID Act provides considerable latitude to an investigator to decide how to conduct the investigation, provided they comply with the PID Standard (7.3.3.3 of this guide) and, if relevant, observe the special requirements relating to fraud investigations (7.3.4.1 of this guide).

The formality of the investigation should be commensurate with the seriousness and nature of the alleged disclosable conduct and the importance of the particular evidence. The investigator's records should contain sufficient detail appropriate to the nature of the investigation.

General guidance for investigators can be found in the *Australian Government Investigation Standards 2022* (AGIS), published by the Australian Federal Police.⁵ The AGIS sets out minimum standards that must be followed by non-corporate Commonwealth entities when conducting investigations into programs and legislation they administer. However, it also has useful information on topics such as investigation planning, interviewing witnesses and finalising investigations, which can be applied to investigations more generally.

Investigators may also find it helpful to refer to the Administrative Review Council's Best Practice Guides on aspects of administrative decision-making including natural justice requirements (also known as 'procedural fairness'), assessing evidence, lawful decision making and providing reasons for decisions, available at www.ag.gov.au/legal-system/administrative-law/administrative-review-council-publications.

7.3.3.3 *PID Standards for conducting investigations*

Part 3 of the PID Standard (ss 8-12) sets out mandatory requirements for PID investigations. These apply to all investigations under the PID Act (s 8, PID Standard). The modified requirements for fraud investigations under the PID Act are discussed in 7.3.4.1 of this guide.

⁵ The Australian Government Investigation Standards 2022 is available on the AFP's website at <https://www.afp.gov.au/what-we-do/australian-government-investigations-standard>.

The requirement to provide information to the discloser about the principal officer's power to decide not to investigate a disclosure, or to investigate a disclosure under a separate investigative power, is described in 7.1.1 of this guide (s 9, PID Standard).

Discussed below are the PID Standard requirements for:

- » interviewing witnesses (see 7.3.3.5 of this guide)
- » standard of proof (see 7.3.3.6 of this guide)
- » the evidence that can be taken into account (see 7.3.3.7 of this guide).

7.3.3.4 *What legal power does the investigator have to obtain information?*

When investigating a disclosure, the investigator may obtain information from such persons and make such inquiries as they think fit (s 53(2)). All current public officials (including contractors) are obliged to use their best endeavours to assist the principal officer, or their delegate, in a PID investigation (s 61(1)). A public official must also use their best endeavours to assist any other public official to exercise a right, or perform a duty or function, under the PID Act (s 61(4)).

The investigator may wish to draw this obligation to the attention of any public official who is reluctant to provide information or answer questions relevant to the investigation. The PID Act does not give investigators any powers to compel witnesses to attend interviews, answer questions or produce documents. However, a principal officer may be able to rely upon other legislation to obtain the cooperation of staff members (for example, legislation relating to a person's employment responsibilities).

Informing witnesses of the immunities under s 12A the PID Act could also help to alleviate any concerns they may have about providing information to the investigator (see 7.3.3.5 below). Further, a person is not liable to any criminal or civil proceedings, or any disciplinary action (including any action that involves imposing any detriment), for anything done in good faith to assist a principal officer or their delegate to perform functions or exercise powers under the PID Act (s 78(1)(f)).

It is permissible for an investigator, or an official assisting with a PID investigation, to disclose, record or use information in connection with that investigation which would otherwise be protected by secrecy or confidentiality provisions in most Commonwealth laws, unless that would breach a designated publication restriction⁶ (s 75(1)) or some other Commonwealth law enacted after 15 January 2014 which expressly prevails over s 75 of the PID Act.

In the case of intelligence information obtained in the course of a disclosure investigation, it is recommended the investigator contacts the relevant intelligence agency and/or the IGIS to discuss how that information should be protected and, if necessary, how it might be further investigated.

In some cases, it will be possible to investigate an internal disclosure by obtaining and examining existing agency records. The investigator may also seek general background information (e.g., advice from a business line about the agency's usual processes, or copies of written procedures). This can be done informally, without following the formal requirements for conducting a PID interview.

However, it will usually be necessary for the investigator to obtain additional information from the discloser and other possible witnesses. This could be done by way of a list of written questions, or in an interview conducted by telephone or in person. Whether they are provided in writing or in person, the PID investigator's requests for specific information from an individual should be regarded as an interview in connection with a PID investigation. These interviews are subject to specific requirements, discussed in 7.3.3.5 of this guide.

7.3.3.5 *Interviewing a witness (including the discloser)*

As discussed in 7.3.3.4, the PID investigator may obtain information from such persons and make such inquiries as they think fit. This can include seeking further information from the discloser or any other person. If the investigator decides to conduct an interview to seek specific information from a person for the purposes of the PID investigation, they must comply with s 10 of the PID Standard. These requirements apply even if the interview is conducted in a relatively informal way, for example, by telephone or using virtual (video) platforms. They should

⁶ A 'designated publication restriction' means certain restrictions listed in the PID Act (s 8). They generally concern protecting the identity of people by such means as court or tribunal orders that information not be published (such as under the *Family Law Act 1975* and the *Migration Act 1958*), witness protection and law enforcement mechanisms (see the full definition in s 8).

also be followed when an investigator decides to seek information from a person in the form of written answers to questions, whether those questions are asked orally or in writing.

The person being interviewed must be informed (s 10(1), PID Standard):

- » of the name of any person conducting the interview (including anyone who may be present in an assistance or record keeping capacity)
- » of the function that each of the people present is performing in the investigation
- » that the principal officer is required to investigate a disclosure to establish whether there has been disclosable conduct
- » of the legal authority for the investigator to conduct the investigation (for example, where the principal officer's investigative function under the PID Act has been delegated)
- » of general information about the process of conducting a PID investigation, including the confidentiality of investigative processes and protection of the discloser's identity.

The person being interviewed should also be advised of the protections they have under Part 2 of the PID Act in relation to the information they provide at the interview (s 10(1)(d), PID Standard). In summary, s 12A provides immunities for giving information or producing a document (or other thing), or answering an investigator's question, if they consider the information or answer they provide to be relevant to an investigation (see 8.3.1 of this guide). Protections against reprisal under the PID Act also apply to witnesses.

All interviews should be conducted in private. The people present at any interview should be limited to those people whose presence is necessary to conduct the interview. Those who are interviewed should be advised that information about the matter is confidential, that release of information may jeopardise an investigation, and that they may be committing an offence if they divulge any information that is likely to identify the discloser. See 7.3.3.10 and 8.1 of this guide for more information about the confidentiality of the investigation.

The investigator should keep written records of the interview. Audio or visual recordings of the interview must not be made without the prior knowledge and consent of the person being interviewed (s 10(2)(a), PID Standard).

At the conclusion of the interview, the investigator should ask the person if they wish to make a final statement or comment or express a position about the matters being investigated (s 10(2)(b), PID Standard). The person's response, and any final statement or comment they make must also be included in the record of interview (s 10(2)(c), PID Standard). Additionally, as soon as reasonably practicable, the witness should be provided with a copy of the interview transcript (if an audio or visual recording was made) or the interviewer's written summary of the evidence provided during interview and given an opportunity to clarify any information or to correct any errors.

7.3.3.6 *Standard of proof*

The standard of proof in a PID investigation is the civil standard: a fact is only taken to be proved if there is sufficient evidence to prove it 'on the balance of probabilities' (s 11, PID Standard). This means that the principal officer, or their delegate, cannot make a finding that there has been disclosable conduct unless they are satisfied, on the basis of the evidence gathered during the investigation, it is more likely than not that the disclosable conduct occurred.

It is not necessary for the principal officer to positively identify a person or persons responsible for the conduct. It is enough to be satisfied that the conduct was engaged in by an official belonging to the agency, or the agency more broadly. Paragraph 7.3.6 of this guide explains the action that is required if the investigator concludes there is evidence of the commission of a criminal offence.

7.3.3.7 *Evidence*

The evidence relied upon in a PID investigation must be relevant (s 12(2), PID Standard).

The investigator must not place any weight on information they might obtain during the investigation unless it is of consequence to one of the matters under investigation and tends to make it more or less probable that a relevant fact exists. Any finding of fact in a PID investigation must be based on logically probative evidence (s 12(1), PID Standard).

7.3.3.8 Procedural fairness

In an administrative investigation, the investigator must ensure that a person against whom allegations are made is accorded procedural fairness (also known as ‘natural justice’). If adverse information comes to light about others in the course of the investigation, those persons are also entitled to procedural fairness. This could include the discloser.

What procedural fairness requires varies with the circumstances, but essentially it means that the person is entitled to:

- » have a decision-maker act fairly and without bias
- » if an adverse finding is going to be made about their conduct – know the substance of allegations and evidence against them and have a reasonable opportunity to respond.

A person does not need to be told about allegations made about them that the agency decides are of no substance (for example if the agency decides not to investigate a disclosure, or stop the investigation, on the basis that the disclosure is clearly frivolous or vexatious). However, see 7.4.1 of this guide for information about when it is appropriate to notify a person of the outcome of an investigation about them.

Further, unless there is adverse information relating to the discloser’s own conduct, procedural fairness does not require that the discloser is given an opportunity to comment on evidence obtained and considered by the investigator, or their preliminary (draft) views, before the investigator makes findings and prepares the s 51 report.

7.3.3.9 What must the official who is the subject of the disclosure be told?

The PID Act does not require the investigator to give a copy of a public interest disclosure to the person who is the subject of that disclosure or tell them the identity of the person who made the disclosure. The information that the subject of the disclosure is entitled to be told will depend on what is necessary to investigate the allegations in a way that observes procedural fairness.

Given the special protection of the discloser’s identity in the PID Act, it is appropriate to protect the discloser’s identity as far as possible, unless identifying them is necessary to investigate the disclosure, or the discloser has consented to being identified or acted in a way that is inconsistent with keeping their identity confidential. Protecting the discloser’s identity is discussed further in 8.1 of this guide.

Procedural fairness does not mean that a person must be told about any allegations made about them as soon as the disclosure is received, or an investigation is commenced. There may be good reasons to carry out certain investigations before interviewing a person who is suspected of wrongdoing, particularly if there are concerns that they may collude with others or evidence may be destroyed if they are alerted.

A person who is subject to allegations of wrongdoing should be given information about their rights and obligations under the PID Act, and about the agency’s investigation procedures and any other relevant matter, such as Code of Conduct proceedings. A key principle to bear in mind is that anyone who is subject to allegations or an investigation is assumed innocent of any wrongdoing unless proven otherwise.

Agencies should consider support for any official who is the subject of an allegation made in a public interest disclosure, noting they are likely to find the experience stressful. Agencies should also ensure the official knows how to access employee assistance programs or other support if they need it.

7.3.3.10 Ensuring confidentiality of the investigation

Agency procedures must provide for confidentiality of investigative processes (s 59(4)(b)).

Disclosures should be assessed and investigated discreetly, with a strong emphasis on maintaining confidentiality of both the discloser and any person who is the subject of the disclosure.

To satisfy these confidentiality requirements, and to minimise the possibility of detrimental action against the discloser and others, including witnesses, agencies should establish a secure record system to deal with internal disclosures. Agencies should ensure that:

- » all paper and electronic documents and files, including audio or video files, are secure and only able to be accessed by authorised officers, investigators and other officers involved in managing the disclosure.

- » other materials such as interview tapes or external data storage (USB) drives are stored securely with access only by officers involved in handling the disclosure.
- » communications and documents relating to the investigation are not sent to an email address to which other staff have access or to a printer or fax machine in an open area.

The identity of a person who is the subject of allegations or an investigation should be protected as much as practicable. Information that identifies them should only be passed to those involved in the investigation or in taking other necessary action under the PID Act (such as action to minimise the risk of reprisal against the discloser, a witness or any other person).

Confidentiality of investigative processes should be maintained when information and documents are shared between agencies under s 65 of the PID Act. Agencies should ensure communications are directed only to relevant personnel in the receiving agency – this can be achieved by contacting the agency to confirm relevant email or mailing addresses before sharing information or documents. See 8.1.2 for more information about authorised information sharing.

7.3.4 Is a different type of investigation appropriate?

After the investigator has commenced investigating the disclosure, they may decide that it would be more appropriate for the matter to be investigated under another Commonwealth law. That investigation, or reinvestigation, may be conducted by another person within the same agency, or by another appropriate body under a Commonwealth law other than the PID Act, (s 47(3)). Some examples of other types of investigations that might be appropriate at the conclusion of a PID investigation are listed in 6.2.4.3 of this guide. Also see 7.3.4.1 for information about investigating alleged fraud.

If another type of investigation is more appropriate, the investigator may stop investigating under the PID Act (s 48(1)(ga)) and refer the conduct for investigation under the other law or power (s 50AA). If the investigator exercises this discretion, they must, as soon as reasonably practicable, take reasonable steps to refer the conduct disclosed or facilitate its referral. They must also notify both the discloser and the Ombudsman or the IGIS (as appropriate) that the PID investigation has stopped and provide details of the referral, including the steps taken or proposed to be taken by the investigator to refer the conduct or facilitate referral (ss 50, 50A – see chapter 6 for more detailed information on the referral and notification requirements).⁷

A principal officer or their delegate could decide a different investigation is appropriate at any point during a PID investigation. If the investigator has gathered sufficient evidence to make findings of fact about whether disclosable conduct has occurred, it would be more appropriate to complete the PID investigation by preparing a s 51 report that includes a recommendation that a different type of investigation should be conducted. Consistent with requirements for s 51 reports, that report should provide details of what action has been taken, or will need to be taken, to refer on the information to be dealt with under another Commonwealth law or power.

It is legally permissible for an agency to conduct the entire investigation under the framework of the PID Act, and this may be convenient and efficient in some cases. However, it is generally preferable for the PID investigation to be stopped or completed, with appropriate steps taken to commence a separate, subsequent investigation, such as a fraud or Code of Conduct investigation. This avoids the confusion of 2 sets of legal requirements applying to a combined investigation. It is also likely that the more formal requirements of a Code of Conduct or fraud investigation will make it difficult to complete the combined investigation within the usual 90-day time frame for a PID investigation (see 7.3.3.1 of this guide). Additionally, if wrongdoing is identified, a PID Act investigation cannot apply disciplinary sanctions. In these circumstances, it may be necessary to recommend that a Code of Conduct or other investigation occurs.

7.3.4.1 Investigation of alleged fraud

The effect of s 21 of the *Public Governance, Performance and Accountability Act 2013* and the Commonwealth Fraud Control Policy is to require all non-corporate Commonwealth entities to report cases of serious or complex fraud to the Australian Federal Police for investigation, or otherwise comply with the Australian Government Investigations Standards (AGIS) when conducting investigations into fraud against them, or relating to the

⁷ Forms to notify the Ombudsman are available on the Ombudsman's website at <https://www.ombudsman.gov.au/industry-and-agency-oversight/public-interest-disclosure-whistleblowing>.

programs and legislation they administer.⁸ The AGIS sets out minimum case handling standards for fraud investigations, including minimum training requirements for investigators and requirements for conducting interviews and preparing briefs of evidence.

If the principal officer of a non-corporate Commonwealth entity is investigating a disclosure that concerns alleged fraud against the Commonwealth, the PID investigation must also comply with the Commonwealth Fraud Control Policy. The Commonwealth Fraud Control Policy highlights that the Australian Federal Police has primary law enforcement responsibility for investigating serious or complex fraud against the Commonwealth. If there is any inconsistency between the requirements of the Commonwealth Fraud Control Policy and the requirements of the PID Act and PID Standard, the PID requirements must be followed.⁹

Given the complexity of concurrently complying with the requirements of the PID Act and PID Standard, and the Commonwealth Fraud Control Policy, the recommended course of action when investigating a disclosure of alleged fraud is to stop the investigation and refer the disclosure for investigation under another law or power, as discussed in 7.3.4.

The person investigating the disclosure (whether under the PID Act and/or another law or power) should be aware of their obligation to notify the police of information that they suspect on reasonable grounds is evidence of a serious criminal offence (see 7.3.6 of this guide).

7.3.5 PID investigation report

After an internal disclosure has been investigated, the principal officer, or their delegate, must prepare a written report of the investigation (s 51(1)). The PID investigation is only completed when the principal officer has prepared the report (s 52(1)). As noted in 7.3.3.1 of this guide, a report is not considered to have been prepared until it is finalised to the point that no substantive changes will be made (that is, it should not be in draft form or remain subject to agency review processes).

The report is the agency's record of the investigation of the disclosure and the action to address any disclosable conduct that was found to have occurred. Additionally, the investigation report is a record of the agency's response to any claims of reprisal taken against the discloser or any other person (see 7.3.5.1 of this guide).

The PID investigation report must state:

- » the matters considered in the investigation (s 51(2)(a)), including (s 47(2)):
 - the disclosable conduct alleged by the discloser
 - any other possible disclosable conduct subsequently identified
- » how long the investigation took (s 51(2)(b)), that is, the number of days between allocation (or the date a stop action by the NACC was revoked) and the date the report was prepared (s 52)
- » the steps taken to gather evidence (s 13(c), PID Standard)
- » a summary of the evidence and how the evidence informed the findings (s 13(d), PID Standard)
- » the principal officer's findings, based on that evidence (s 51(2)(c) and s 13(d), PID Standard), including:
 - whether there was any disclosable conduct, and if so, what type (s 13(a), PID Standard)
 - the laws, rules procedures etc to which that disclosable conduct relates (s 13(b), PID Standard)
- » any action taken, or currently in train to address those findings (s 51(2)(d))
- » any recommendations about other action to address those findings (s 51(2)(d))
- » any claims of reprisal action taken against the discloser, or any other person, and related evidence (s 51(2)(e))

⁸ The Commonwealth Fraud Control Policy is available at <https://www.counterfraud.gov.au/library/commonwealth-fraud-control-framework> and the AGIS is available on the AFP's website at <https://www.afp.gov.au/what-we-do/australian-government-investigations-standard> [is](#)

⁹ When a PID investigation relates to fraud, Part 3 of the PID Standard (which deals with the conduct of interviews for a PID investigation) applies only to the extent that it is not inconsistent with s 10 of the *Public Governance, Performance and Accountability Rule 2014*, also known as the Fraud Rule (s 8(2), PID Standard). The Fraud Rule requires the accountable authority of a Commonwealth entity to take all reasonable measures to prevent, detect and deal with fraud relating to the entity, including by having an appropriate mechanism for investigating or otherwise dealing with incidents of fraud or suspected fraud.

- » the agency's response to any claims or evidence relating to reprisal (s 51(2)(f)).

The action to address the findings of the PID investigation could include a different type of investigation (see 7.3.4 above) or referring the matter to the police (see 7.3.6).

If the investigation was inconclusive in any respect, the report should say so and explain why.

7.3.5.1 *Reprisal against the discloser or any other person*

The PID investigation report must detail whether there were any claims, or evidence, of reprisal taken against the discloser or any other person, and how the agency responded to them (ss 51(2)(e)-(f)).

The PID investigation report must include (s 51(2)(e)-(f)):

- » any claims made about reprisal taken against the discloser or any other person
- » how the agency responded to those claims (e.g., investigation, support or protection for the discloser)
- » whether the agency found any evidence of reprisal against the discloser or any other person (not limited to claims of reprisal made by the discloser or others)
 - Sometimes, an agency may identify evidence of reprisal against a person even though that person has not raised concerns or alleged reprisal. In these situations, the agency should nevertheless examine the evidence, make findings and respond appropriately, in the same way as if a specific claim had been made.
- » the action taken or recommended to address any findings of reprisal against the discloser or any other person.

The person preparing the PID investigation report should consult with the authorised officer who allocated the disclosure and any person who was involved in the initial risk assessment for the discloser (see 5.6 of this guide) to ensure that they have all the relevant information to complete this part of the report. If a support person was appointed for the discloser, that support person should also be consulted.

7.3.5.2 *Findings of fact*

Any finding of fact in the report must be based on relevant evidence, sufficient to satisfy the principal officer or their delegate on the balance of probabilities of the existence of that fact (see 7.3.3.6 and 7.3.3.7 of this guide). Given the purpose of the PID investigation (to discern if there are one or more instances of disclosable conduct – s 47(2)), the primary finding to be made is whether there is one or more instances of disclosable conduct (see 7.3.1 of this guide).

7.3.5.3 *Copy for the discloser*

The principal officer must give a copy of the PID investigation report to the discloser within a reasonable time of preparing it (provided that contacting the discloser is reasonably practicable) (s 51(4)(a)).

The copy of the report given to the discloser may have some information deleted if it is likely to enable the identification of any person (the discloser or another person, such as someone who is under investigation or a witness), or if including the information would cause the document to:

- » be exempt under the *Freedom of Information Act 1982* (exempt material includes commercially valuable information, material obtained in confidence, Cabinet information, personal information whose disclosure would be unreasonable and contrary to the public interest, and information that could prejudice an investigation or affect the effectiveness of agency audit procedures)
- » have a national security or protective security classification
- » contain intelligence information (including sensitive law enforcement information), or
- » contravene a designated publication restriction.¹⁰

¹⁰ A 'designated publication restriction' means certain restrictions listed in the PID Act (s 8). They generally concern protecting the identity of people by such means as court or tribunal orders that information not be published (such as under the *Family Law Act 1975* and the *Migration Act 1958*), witness protection and law enforcement mechanisms (see the full definition in s 8).

7.3.5.4 Copy for the Ombudsman or the IGIS, or another agency

The principal officer must also give a copy of the PID investigation report to the Ombudsman (s 51(4)(b)), or the IGIS in the case of reports prepared by an intelligence agency or relating to the intelligence functions of the ACIC or AFP (s 51(4)(c)). The principal officer must do this within a reasonable time of preparing the report.

The principal officer may redact information from the copy of the report given to the Ombudsman or the IGIS if it is likely the information would enable the identification of the discloser or any other person, or if including the information would contravene a designated publication restriction (s 51(6)). However, in view of the oversight agencies' review functions under the PID Act (explained further below), agencies are encouraged to provide unredacted reports whenever possible – or to apply minimal redactions – to enable the Ombudsman or the IGIS to effectively assess the adequacy of investigations and the agency's compliance with the PID Act and PID Standard.

Upon receiving written notice¹¹ of completion of the investigation together with a copy of the report, the Ombudsman or the IGIS may review the agency's handling of the disclosure (s 55(3)). This includes the power to obtain information or documents from any such person, and to make such enquiries, as the Ombudsman or the IGIS thinks fit (s 55(4)).

Following any such review, the Ombudsman or the IGIS can make recommendations to the principal officer of the agency which completed the investigation or the agency to which the disclosure was made (or both) (s 55(5)). See 9.1.6 of this guide for further information about the powers of the Ombudsman and the IGIS to conduct reviews and make recommendations in relation to the handling of disclosures.

The requirement to provide a copy of the s 51 report to the Ombudsman or the IGIS does not limit the circumstances in which the report may be shared. A copy of the s 51 report may also be shared with another agency if the investigation concerns conduct related to that agency. While s 65 of the Act may authorise such sharing, it does not limit the extent to which the sharing may be authorised or permitted under any other law.

7.3.6 Criminal matters

7.3.6.1 Notifying the police

If an investigator suspects that information disclosed as part of an internal disclosure, or obtained during their investigation of a disclosure, is evidence of an offence against a Commonwealth, state or territory law, they may disclose that information to a member of a relevant Australian police force (s 56(2)).

Police notification is mandatory if the suspected offence is punishable by imprisonment for 2 years or more (s 56(3)). However, in limited circumstances, mandatory notification is not required, namely:

- » if the investigator believes on reasonably grounds that their own agency has the capacity and appropriate skills and resources needed to investigate the commission of the offence, and to meet the requirements of the Commonwealth Director of Public Prosecutions in gathering evidence and preparing briefs of evidence (s 56(4)(a)), or
- » if the investigator suspects on reasonable grounds that the relevant information raises a corruption issue within the meaning of the NACC Act, and it has been referred to the NACC or the IGIS (if the corruption issue concerns an intelligence agency or intelligence functions of an agency) or the NACC or the IGIS is already aware of the issue (s 56(4)(b)).

Notification to the police under s 56 of the Act does not, of itself, mean the PID investigation can or should stop. The police will assess the reported information and decide whether and how to investigate it in accordance with their usual operational priorities. The principal officer or their delegate must still consider whether other administrative or disciplinary action is also appropriate in response to the conduct, consistent with the integrity arrangements for the agency concerned and given the position of the official whose conduct is in question. Dialogue with the police will be important to ensure that whatever action the agency takes does not prejudice a potential criminal investigation or prosecution. In any case, the PID investigation will not be complete until the principal officer prepares their report under s 51 (see 7.3.5 of this guide).

In many cases, the suspected offence will be a crime under a Commonwealth law. If so, the information should be referred to the Australian Federal Police (AFP). The AFP's website contains information about the procedure for

¹¹ Forms to notify the Ombudsman are available on the Ombudsman's website at <https://www.ombudsman.gov.au/industry-and-agency-oversight/public-interest-disclosure-whistleblowing>.

government agencies to make reports, and contact details for initial enquiries or pre-referral advice.¹² However, depending on the particular offence involved, it may be appropriate to refer the information to a police force of an Australian state or territory.

Section 56 also applies where an investigative agency conducts a PID investigation using a 'separate investigative power' (see 7.2.1 of this guide) and in the case of an investigation of a disclosure under an agency's procedures relating to fraud (see 7.3.4.1 of this guide).

7.3.7 What impact can investigations have on the workplace?

If an investigation becomes generally known to staff (as is likely once interviews commence) people's reactions can vary considerably. Some staff may welcome action being taken, while others may not. As a result, workplace tensions may arise.

Managers can help by keeping the channels of communication open, while maintaining confidentiality as far as practicable. If the discloser's identity has already been disclosed or compromised, managers may:

- » let staff know that information about disclosable conduct has been provided
- » allow staff to air their feelings
- » provide information about the PID Act and agency procedures
- » explain the protections accorded to both disclosers and witnesses
- » highlight that taking a reprisal is a criminal offence
- » remind colleagues that public officials must use their best endeavours to assist the principal officer in the conduct of an investigation, and the Ombudsman or the IGIS (as relevant) in the performance of their functions under the PID Act (s 61), and
- » indicate when further information is likely to be available.

See 8.5 and 8.6 of this guide for information about supporting and protecting officials.

7.4 AFTER THE INVESTIGATION

7.4.1 What should a person be told if allegations were made against them?

While not a requirement under the PID Act, if the allegations in a disclosure have been investigated and the person who is the subject of them is aware of the allegations or that there has been an investigation, the s 51 report should include a recommendation the person is formally advised of the outcome of the investigation as it relates to them. It should be noted that this is not a procedural fairness requirement, and the person is not entitled to be told who made the disclosure (see 7.3.3.8 of this guide).

Agencies should consider how they will support the subject of a disclosure when allegations, which may have been publicly disclosed, are shown to be wrong or unsubstantiated.

7.4.2 What action does an agency need to take?

What happens at the end of an investigation will vary with the circumstances.

In circumstances where an investigation has been undertaken, in addition to providing a copy of the investigation report to the relevant oversight body and the discloser if reasonably practicable (s 51(4)) (see 7.3.5.4 in this guide), the principal officer must take appropriate action in response to recommendations and other matters contained in the investigation report. Actions might include:

- » commencing Code of Conduct proceedings under the Public Service Act or another disciplinary process
- » referring the matter to the police or another body that can take further action
- » mediating or conciliating a workplace conflict
- » an internal audit or other review of an issue or the operations of a particular unit

¹² <http://www.afp.gov.au/what-we-do/referrals>

- » implementing or changing policies, procedures or practices
- » conducting training and awareness sessions for staff.

The principal officer must also respond to any recommendations from the Ombudsman or the IGIS (as relevant) following a review of the investigation report. Further information on this requirement is at 9.1.6.2.

During an investigation, including at the end of an investigation, the principal officer must be mindful of the mandatory requirement to refer conduct which raises a serious or systemic corruption issue to the NACC, once they become aware of it (see Chapter 10).

7.4.3 What happens if the disclosure is not substantiated?

There may be a number of reasons why an allegation in a public interest disclosure is not substantiated, including insufficient evidence to find, on the balance of probabilities, that any disclosable conduct occurred. The discloser should be given as much information as possible about the outcome of the investigation, consistent with confidentiality limitations, and be assured that it does not mean that making a disclosure was not worthwhile. The information the discloser provided may be useful in making the agency aware of possible gaps in its policies or procedures, or lead to consideration of how to prevent similar issues in the future.

Regardless of the outcome, the discloser should be assured that, provided the disclosure of information was an internal disclosure for the purposes of the PID Act, they will still be protected under the PID Act for making a disclosure and the agency will continue to support them.

7.4.4 What if the discloser is not satisfied with the agency's action?

A public official who made an internal disclosure may be unhappy with the agency's decision not to investigate a matter. Alternatively, if the disclosure is investigated, they may believe the investigation or the agency's response to the investigation was inadequate. Principal officers should be mindful that a reasonable belief on the part of the discloser that an investigation under the PID Act, or the agency's response to the investigation, was inadequate is one of the conditions for making an external disclosure (see 2.7.7 of this guide).

A discloser who is unhappy with the process or how they have been treated may also complain to the Ombudsman (or the IGIS, in the case of intelligence agencies or in relation to the intelligence functions of the ACIC or AFP). Therefore, agencies may want to consider review or reconsideration measures to address situations where a discloser is not satisfied with the agency's handling of an internal disclosure.

In order to manage these possibilities well, it is essential that an agency's handling of a public interest disclosure is grounded in reason and effectively communicated to relevant parties. This includes managing the discloser's expectations from the outset. The information provided to the discloser at the time the disclosure is received, on allocation, and during an investigation should be clear that once an official has made an internal disclosure, it is up to the agency to determine how best to resolve matters by identifying problems and taking corrective action.

It is also important that explanations given to the discloser at the end of the investigation are as comprehensive as possible, allowing for privacy and confidentiality considerations, and consistent with the permissible redactions of information in s 51(5) (i.e., information that would identify the discloser or another person, be exempt from release under the Freedom of Information Act, is intelligence information or required to have a security classification, or would contravene a designated publication restriction). The discloser needs to feel the agency values their contribution in bringing the matter to their attention. Disclosers should be encouraged to approach the agency if they wish to discuss concerns about the process or the outcome. Agency procedures and all notices of decision relating to the disclosure should nominate who the discloser can contact in that case.

7.5 SOME ADMINISTRATIVE CONSIDERATIONS

7.5.1 Keeping the discloser informed

A discloser can become concerned or dissatisfied if they feel they are not being updated or nothing is happening. Agencies should seek to manage discloser expectations of notice early on, by informing them of the likely frequency and detail of updates, including that there may be instances in which an agency will not be able to provide detailed information about certain aspects of the investigation. It is important to balance the requirement to inform the discloser with the need to maintain confidentiality in the investigative process. The authorised officer and investigator need to be careful not to release information if doing so will impact on anyone's safety, the

ongoing investigation, or the confidentiality of anyone who is under investigation. It is also important to remind disclosers that they do not 'own' the investigation of their disclosure. It is up to agencies to determine how best to resolve matters by identifying problems and taking corrective action.

The PID Act requires the discloser to be notified at various stages in the process, provided the person's contact details are available. The discloser must be advised:

- » when the disclosure is made, that it could be treated as an internal disclosure and what that requires under the PID Act, including that it may be referred to another agency, as well as the protections available under the Act.
- » when the disclosure is either allocated for investigation, or not allocated because it has been determined not to be an internal disclosure or the conduct disclosed would be more appropriately investigated under another law or power.
- » of information about the principal officer's discretionary powers to not investigate within 14 days of the disclosure being allocated (s 9 of the PID Standard).
- » when the agency is required to investigate and, if the investigation is under the PID Act, the estimated length of the investigation.
- » If the agency decides not to investigate, the reasons for the decision and, if relevant, either the steps the agency has taken (or will take) to refer the disclosure for investigation under another law or power, or any action that might be available to the discloser under another law or power.
- » if a stop action direction from the NACC Commissioner prevents or stops an investigation, and also when such a direction no longer applies.
- » if an investigation is conducted under the PID Act and an extension of time is granted by the Ombudsman or the IGIS, the progress of the investigation.
- » written notice of the completion of the investigation, together with a copy of the report within a reasonable time (see 7.3.5 of this guide).

Apart from the legislative requirements, the agency should keep the discloser up to date with reasonable information on what is being done in response to their disclosure. Early in the process, an authorised officer should make sure the discloser understands:

- » what the agency intends to do
- » the likely timeframe for an investigation, including the availability and likelihood of extension requests
- » the discloser's responsibilities (such as maintaining confidentiality)
- » how they will be updated on progress and outcomes, and
- » who to contact if they want further information or are concerned about reprisal.

Any questions or concerns the discloser raises should be addressed honestly and as soon as possible, including being clear when an agency cannot provide certain information and providing reasons for this. If the discloser has not heard anything within a reasonable period, they are entitled to ask for an update.

The agency should also inform the discloser if it becomes apparent during the investigation that it is likely to take longer than originally expected. If an extension of the investigation time is required (see 9.1.4 in this guide), the agency should inform the discloser before applying to the Ombudsman or the IGIS and provide an estimate of the date when the investigation will be completed, explaining the reasons for the extension request.

The discloser can also be referred to:

- » the agency's public interest disclosure procedures
- » support networks or services
- » information on the Ombudsman's website for disclosers and this guide, available at <https://www.ombudsman.gov.au/complaints/public-interest-disclosure-whistleblowing>.

7.5.2 Advice to the discloser of a stop action direction under the NACC Act

As provided in Chapter 10, the NACC Commissioner may direct an agency head (principal officer) to stop taking specified action (a stop action direction) in relation to a public interest disclosure which involves a corruption issue, unless the Commissioner permits the action (s 43 of the NACC Act). A direction could require the agency not to take particular actions set out in the direction, or not to take action of any kind in relation to a corruption issue. This may include or extend to preventing a principal officer from investigating, or further investigating a disclosure under the PID Act, or notifying a discloser about a stop action direction which is preventing the investigation of their disclosure under the PID Act.

If the investigation, or further investigation, of a disclosure is subject to a stop action direction under the NACC Act, the principal officer or their delegate must, as soon as reasonably practicable, provide notice to the discloser that they cannot investigate, or further investigate, the disclosure because of a stop action direction under the NACC Act (s 50(1)(c)). If that direction is revoked by the Commissioner, the principal officer or their delegate must, as soon as reasonably practicable, inform the discloser if they investigate, or further investigate, the disclosure (s 50(4A)).

If the principal officer is unclear whether the stop action direction would prevent notice being given to the discloser about the stop action direction under paragraph 50(1)(c), the principal officer should clarify the remit of the direction with the Commissioner.

If a stop action direction prevents notifying a discloser about the stop action direction, the principal officer may consider whether:

- » permission should be sought from the Commissioner under ss 43(3) of the NACC Act to provide notice of the direction to the discloser, or
- » the provision of notice would meet any of the relevant exceptions under ss 44(1) of the NACC Act (see Chapter 10).

7.5.3 Keeping records

Good records ensure that all action taken regarding the receipt and handling of a disclosure is reviewable (including by the Ombudsman or the IGIS).

Details about how and when a disclosure was made must be recorded and kept in a secure place. If the disclosure was made orally, it should be documented by the recipient and consideration should be given to asking the discloser to sign a record of the disclosure, or otherwise confirm in writing that the record is correct. Subsequent conversations where the disclosure is discussed should also be documented. Each disclosure should be registered and given a unique reference number. Details of the risk assessment of reprisal, allocation, investigation, and notifications to the discloser and others should also be kept. The records should be factual and free from unnecessary statements such as conjecture about the discloser's motives or personal opinion about the person(s) the disclosure concerns.

In addition to the requirement to notify the Ombudsman or the IGIS (as appropriate) of an allocation or investigation decision, and to provide a copy of an investigation report, agencies are required to provide to the Ombudsman certain information about disclosures they have handled for the purposes of the Ombudsman's six-monthly and annual report under the PID Act (PID Act, ss 76 and 76A and PID Standard, s 15). Information from the intelligence agencies for inclusion in the Ombudsman's annual report on the operation of the PID Act is coordinated by the IGIS, who provides the Ombudsman with an aggregated report. See also 7.5.5 of this guide.

7.5.4 Freedom of Information requests

Section 82(2) of the PID Act provides that the PID Act does not detract from any obligations imposed on an agency or a public official by any other law of the Commonwealth. Documents associated with a public interest disclosure do not attract any special exemption from the operation of the *Freedom of Information Act 1982*.

Requests for access to documents under the *Freedom of Information Act 1982* must be considered on a case by case basis. A range of exemptions may apply to certain agencies and to individual documents or parts of documents, particularly in relation to material received in confidence, personal information, operations of agencies, and law enforcement.

The principal officer should ensure that any agency officer handling freedom of information requests is aware of the confidentiality and secrecy provisions of the PID Act as they may apply to them, noting that s 20(3)(d) permits the use and disclosure of identifying information for the purposes of a law of the Commonwealth, such as the *Freedom of Information Act 1982*. The confidentiality provisions of the PID Act (ss 11A, 20, 21, 51, 76 and 76A) are not secrecy provisions for the purposes of s 38 of the *Freedom of Information Act 1982*, but they may be a relevant consideration in applying certain exemptions including the public interest test for conditional exemptions – for example, material that if released, would increase the risk of reprisal to the discloser or another person. If a document originates from another agency including the Ombudsman or the IGIS, the agency should contact that agency to seek their comment prior to deciding access.

7.5.5 Monitoring and evaluation

An agency should put in place an effective system for recording the numbers and types of disclosures received, the number of investigations, the outcomes (including agency action taken in response to investigation report findings and recommendations), and details of any support provided to a discloser and allegations of reprisal. Capturing data about the number of instances where a person has disclosed information to an authorised officer that was assessed not to meet the criteria for a PID, and the number of determinations under s 70 of the PID Act to deem a person to be a public official will also assist agencies to measure the extent of PID activity.

Much of this information will be needed to satisfy the principal officer's obligation to provide information to the Ombudsman for the six-monthly and annual reports on the operation of the PID Act (ss 76 and 76A of the PID Act, and s 15 of the PID Standard). It will also help agencies to evaluate the effectiveness of their procedures and identify any systemic issues.

The agency may wish to monitor the resources (financial and human) allocated to handling public interest disclosures, particularly in complex investigations. Once its procedures have been in place for some time, it may also be useful to survey staff about their awareness of, and trust in, the procedures, and the attitude of managers to the agency's process, so that improvements can be made. Regular and informed review of procedures and resources dedicated to the PID Act will aid principal officers in their obligation to take reasonable steps to provide ongoing training and education to public officials about the Act, and officers (namely authorised officers and supervisors) with duties under the Act (ss 59(7) and (8)). The updating of training, based on outcomes of regular reviews, would assist in demonstrating that 'reasonable steps' have been taken to fulfil this obligation.