

Protected Disclosures - intelligence and security or classified information

This guide covers protected disclosures involving intelligence and security or classified information under the Protected Disclosures (Protection of Whistleblowers) Act 2022.

For guidance on protected disclosures that do not relate to these types of information see www.publicservice.govt.nz/resources/protected-disclosures-act-2022.

This guide covers:

- [What a protected disclosure is](#)
- [How a protected disclosure about intelligence and security or classified information can be made](#)
- [The role of the Inspector-General in receiving protected disclosures](#)
- [What protections are available for someone who makes a protected disclosure](#)
- [A public sector agency's obligation to have protected disclosure procedures](#)

If you have any questions about the contents of this guide or protected disclosures, contact the Office of the Inspector-General of Intelligence and Security at +64 4 460 0030.

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WHAT IS A PROTECTED DISCLOSURE?

The Protected Disclosures (Protection of Whistleblowers) Act 2022 ('the Protected Disclosures Act') protects current and past employees who make disclosures of **serious wrongdoing** in or by their organisation. These are called "protected disclosures" and are sometimes referred to as public interest disclosures or whistleblowing. An employee includes a secondee, contractor, board member, member of the Armed Forces, and a volunteer.

The Protected Disclosures Act is intended to:

- facilitate the disclosure and timely investigation of serious wrongdoing by any organisation; and
- protect people who make disclosures under the Act.

People who make protected disclosures in accordance with the Act are immune from civil, criminal, or disciplinary proceedings. Disclosers are also protected from retaliation by their employer and from being treated unfavourably for having made a protected disclosure. This guide provides more information on how to make a protected disclosure (page 3) and the protections available (page 8).

This protection also applies to current and former employees of public sector organisations whose disclosure relates to classified information or information about intelligence and security agencies. There is a special procedure for these situations.

What is serious wrongdoing?

A disclosure of information is a protected disclosure if a discloser believes in good faith that there is or has been serious wrongdoing by their organisation and they disclose it in the ways permitted by the Act (see page 3).

Serious wrongdoing is any action, omission, or conduct that is one or more of the following:

- a. an offence
- b. a serious risk to public health, public safety, the health or safety of an individual, or the environment
- c. a serious risk to the maintenance of the law, including the prevention, investigation and detection of offences, or the right to a fair trial
- d. an unlawful, a corrupt, or an irregular use of public funds or public resources
- e. oppressive, unlawfully discriminatory, or grossly negligent, or that is gross mismanagement, and is done (or is an omission) by:
 - i. an employee of a public sector organisation
 - ii. a person performing (or purporting to perform) a function or duty or exercising (or purporting to exercise) a power on behalf of a public sector organisation or the Government.

HOW TO MAKE A PROTECTED DISCLOSURE THAT RELATES TO INTELLIGENCE AND SECURITY OR CLASSIFIED INFORMATION

The first question is whether a disclosure relates to:

- intelligence and security information; or
- classified information.

Intelligence and security information is any information that relates to the activities of the New Zealand Security Intelligence Service (NZSIS) or the Government Communications Security Bureau (GCSB).

Classified information is any official information which is classified under the New Zealand Government Security Classification System as being accessible only to those who have a national security clearance (ie CONFIDENTIAL or above).

If a disclosure relates to either **intelligence and security information** or **classified information**, the discloser can make a protected disclosure:

1. in accordance with their organisation's protected disclosures procedures; or
2. to the head or deputy head of the organisation; or
3. to the Inspector-General of Intelligence and Security at any time.

A person can contact the Inspector-General at any time for information and guidance about how to make a protected disclosure.

If a disclosure does not relate to intelligence and security information or classified information, the discloser can seek guidance from the Ombudsman on how to make a protected disclosure.

Checklist: Is it an intelligence and security protected disclosure?

1. Are you are a current or past employee of the organisation your disclosure relates to?
2. Is your concern about serious wrongdoing in your organisation?
3. Does your protected disclosure relate to the GCSB or NZSIS, or involve classified information from any other agency?

If you answer 'yes' to these three questions, you can make a protected disclosure in accordance with your agency's procedures, or to the head or deputy head of your organisation, or to the Inspector-General.

THE ROLE OF THE INSPECTOR-GENERAL

The Inspector-General is an independent statutory officer. This means the Inspector-General is separate from the intelligence and security agencies and responsible Ministers.

The Inspector-General decides independently whether to make inquiries and investigate complaints about the NZSIS or GCSB. The office is funded and administered separately from the intelligence and security agencies. The Inspector-General has facilities for handling information classified at all levels.

The Inspector-General can receive protected disclosures relating to classified information held by any government agency.

The Inspector-General is the only appropriate authority, outside of a discloser's organisation, that a discloser may seek advice and guidance from when considering making a protected disclosure about intelligence and security or classified information.

The Inspector-General can investigate a complaint about a discloser being punished or discriminated against for making an intelligence and security protected disclosure.

For more general information about the role of the Inspector-General, please visit www.igis.govt.nz/about

Contacting the Inspector-General

Phone: +64 4 460 0030

Email: enquiries@igis.govt.nz

Post: PO Box 5609, Wellington

Meet: The Inspector-General can arrange a meeting at an off-site location if necessary.

All staff at the Office of the Inspector-General are trained in receiving inquiries about disclosures and providing information and guidance.

Process once a protected disclosure is received

There are no set legal requirements for how a protected disclosure must be dealt with by an appropriate receiving agency. The Protected Disclosures Act provides guidance to receivers, however, about what should be done.

If a person is making a disclosure in accordance with an organisation's internal procedures, they should check what these procedures say about what the organisation will do when receiving a disclosure.

The Inspector-General will follow this process when receiving a protected disclosure:

1. acknowledge the date the disclosure was received and, if the disclosure was received orally, summarise our understanding of the disclosure

2. check with the discloser whether the disclosure has been made elsewhere (and any outcome)
3. deal with the disclosure by:
 - a. investigating it; or
 - b. referring it to another appropriate authority; or
 - c. deciding that no action is required
4. inform the discloser (with reasons) about what we have done or are doing to deal with the matter.

We will inform the discloser how long we expect it will take to deal with the matter. We will endeavour to update the discloser of progress as appropriate.

Referral of protected disclosure

If a protected disclosure is made in accordance with an organisation's internal procedures, or to the head or deputy head of the organisation, the organisation can refer the protected disclosure to the Inspector-General.

The Inspector-General may refer a protected disclosure to another appropriate authority listed in the Protected Disclosures Act, if the disclosure more closely concerns the functions and expertise of that authority, for example, to the Auditor-General if the disclosure concerns a serious financial wrongdoing.

Before transferring a disclosure, the discloser and the intended recipient must be consulted on the proposed referral. The Inspector-General will always contact the discloser about this course of action in the first instance.

What if a discloser is unhappy with how a protected disclosure has been handled?

If a discloser reasonably believes the organisation they made a protected disclosure to has not acted as it should have under the Act, or has not addressed serious wrongdoing, the discloser may further disclose their information to:

- the Prime Minister; or
- the Minister responsible for an intelligence and security agency, where it relates to the GCSB or NZSIS.

This includes where a discloser is dissatisfied with how the Inspector-General has handled a disclosure.

The discloser is entitled to the same protections for a disclosure to these Ministers as for a disclosure to the appropriate authorities.

The process set out above does not limit the ability of a discloser to make a protected disclosure to the Inspector-General at any time.

PROTECTIONS FOR A PERSON WHO MAKES A PROTECTED DISCLOSURE

A person who in good faith makes a protected disclosure is entitled under the Protected Disclosures Act to the following protections:

- there can be no [retaliation against a discloser's employment](#)
- a discloser or someone who supports them cannot be [treated less favourably](#) in their employment
- a discloser is [immune from civil, criminal, or disciplinary proceeding](#) for the disclosure.

A discloser is entitled to these protections even if:

- they are mistaken and there is no serious wrongdoing
- they do not refer to the name of the Protected Disclosures Act when making a disclosure
- they technically fail to comply with the requirements around how to make a protected disclosure (as long as they have substantially complied)
- they also make a disclosure to another person, as long as they do so on a confidential basis and for the purpose of seeking advice about whether and how to make a protected disclosure.

An organisation cannot contract out of the Protected Disclosures Act or have procedures that are inconsistent with it. The receiver of the protected disclosure must also use their best endeavours to keep [confidential](#) any information that may reveal the identity of the discloser (with some exceptions).

A public sector organisation must provide practical assistance and advice to the discloser in relation to making a disclosure about serious wrongdoing in that organisation. A public sector organisation must also have internal procedures for making protected disclosures within that organisation (see page 10 below).

Confidentiality

Every receiver of a protected disclosure must keep any information that may reveal a discloser's identity confidential. However, a receiver does not need to keep a discloser's identity confidential if:

- they consent to the release of the identifying information
- there are reasonable grounds to believe that the release of the identifying information is essential:
 - a) for the effective investigation of the disclosure; or
 - b) to comply with the principles of natural justice; or

- c) to prevent a serious risk to public health, public safety, the health and safety of any individual, or the environment
- d) to an investigation by a law enforcement or regulatory agency for the purpose of law enforcement.

If the release of identifying information is related to a) or b) above, the receiver of the protected disclosure must consult with the discloser before releasing the information. Where release of information relates to c) or d), the receiver of the disclosure must consult with discloser only if it is practicable.

In either case a discloser must be informed about the release of the identifying information.

If identifying information is released in breach of these requirements, this may be an interference with the discloser's privacy under Part 5 of the Privacy Act 2020 and the discloser may be able to make a complaint to the Privacy Commissioner.

A discloser can seek information and guidance from the Inspector-General about confidentiality, particularly if they want to make an anonymous disclosure.

Protection from retaliation from employer

An employer must not retaliate, or threaten to retaliate against an employee because the employee intends to make or has made a protected disclosure.

If an employer retaliates or threatens to retaliate, the employee has a personal grievance under section 103(1)(k) of the Employment Relations Act 2000.

Retaliate means doing any of the following things:

- dismissing the employee
- refusing, or omitting to offer the same terms of employment, conditions of work, fringe benefits, or opportunities for training, promotion or transfer as are made available to employees of the same or substantially similar qualifications, experience, or skills employed in the same or substantially similar circumstances
- subjecting the employee to any detriment or disadvantage in circumstances in which other employees employed by the employer in work of that description are not or would not be subjected to such detriment or disadvantage
- retiring the employee, or requiring or causing the employee to retire or resign.

Protection from being treated less favourably

A person or their relative or associate is protected from being treated less favourably than someone in the same or similar circumstances, simply because they:

- intend to make, or have made, a protected disclosure; or
- have encouraged another person to make a protected disclosure; or
- have given information in support of, or relating to, a protected disclosure

If a person is treated less favourably in this way, this is a breach of the anti-victimisation provisions in the Human Rights Act 1993.

This protection does not apply, however, if a person has knowingly made a false allegation or otherwise acted in bad faith.

Immunity from civil, criminal or disciplinary proceedings

A person who makes a protected disclosure is not liable in any civil, criminal, or disciplinary proceedings because of making that protected disclosure in accordance with the Protected Disclosures Act.

This protection applies despite any prohibitions or restrictions on the disclosure of information at issue (eg despite the information being classified).

No contracting out of Protected Disclosure Act

No contract, agreement, or internal policy or procedure may change the application of the Protected Disclosures Act 2022.

Additional protections for GCSB and NZSIS employees under the Intelligence and Security Act

Employees of intelligence and security agencies are protected from being punished or discriminated against by their employer for bringing a matter to the attention of the Inspector-General. This protection is additional to the protections for protected disclosures and is provided by the Intelligence and Security Act 2017.

This protection can apply in circumstances where the matter does not amount to a protected disclosure, for example:

- if the information does not meet the definition of "serious wrongdoing" under the Protected Disclosures Act; or
- the person bringing the matter to the attention of the Inspector-General is not sure the information is true, but it would be very serious if it was.

An intelligence and security employee bringing a matter to the attention of the Inspector-General in good faith is protected from being subjected to any penalty or discriminatory treatment in relation to their employment for doing so. The protection does not apply if the Inspector-General decides the employee did not act in good faith, for example by providing information they knew to be false.

A person can also make a complaint to the Inspector-General if they have been punished or discriminated against because they have brought a matter to the attention of the

Inspector-General. The Inspector-General can investigate a complaint and make recommendations to an employer about what should be done about the complaint.

The Inspector-General can provide advice and guidance about bringing a matter to the attention of the Inspector-General. The Inspector-General will keep all requests for information and guidance confidential.

PUBLIC SECTOR ORGANISATIONS' PROTECTED DISCLOSURES PROCEDURES

All public sector organisations must have appropriate internal procedures relating to the Protected Disclosures Act 2022. These procedures must:

- comply with the principles of natural justice
- set out a process for protected disclosures consistent with the Act
- identify who in the organisation a protected disclosure may be made to
- include, in relation to a protected disclosure;
 - a reference to the requirement that the organisation not retaliate against a protected discloser
 - a reference to the requirement not to treat people less favourably in relation to a protected disclosure
 - a description of the circumstances in which a disclosure may be referred
 - a description of how the organisation will provide practical assistance and advice to disclosers
 - a description of how the organisation will meet the duty of confidentiality

A public sector organisation must publish widely information about the existence of the policies and adequate information about how to use the procedures.

If an organisation does not have an internal procedure, or its procedure does not meet the requirements of the Act, a person may wish to raise this with the organisation or with the Inspector-General, if the organisation is an intelligence and security agency.