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NSW Police Force

CONFIDENTIALITY GUIDELINES

Section 169A of the *Police Act 1990* &
clause 54 of the *Police Regulation 2015*

Professional Standards Command

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Summary

These confidentiality guidelines describe the circumstances in which the identity of a complainant or witness may be disclosed in compliance with the *Police Act 1990* and *Police Regulation 2015*.

Section 169A of the *Police Act 1990* (**Police Act**) and clause 54 of the *Police Regulation 2015* (**Police Regulation**) reflect the public interest in non-disclosure of the identity of complainants and witnesses who make allegations about police and administrative member misconduct or maladministration.

The Commissioner of Police (or the Commissioner's delegate) must not disclose to any other person the identity of a complainant, or a witness in a Part 8A investigation, unless:

- the complainant or witness consents
- in accordance with the Police Act or any other Act
- for the purpose of any legal proceedings before a court or tribunal, including the Industrial Relations Commission; or
- the disclosure is necessary for the effective conduct of a Part 8A investigation, in accordance with these guidelines.

Document Control Sheet

Document Properties

Title	Confidentiality Guidelines: Section 169A of the <i>Police Act 1990</i> & clause 54 of the <i>Police Regulation 2015</i>
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2	May 2022	Professional Standards Command	<ul style="list-style-type: none">• Change administrative officer to administrative employee.• Update police to police officer• Minor changes in accordance with document standards and to add cover sheet
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1. Purpose

To permit the disclosure of the identity of complainants and witnesses in Part 8A investigations in a limited set of circumstances.

2. Scope

These guidelines apply to all NSW Police Force members (police officers and administrative members), including those who are suspended, or on any type of leave.

3. Roles & responsibilities

[Please refer to sections 4.3 and 4.4 for clearly defined roles , responsibilities and processes](#)

4. Confidentiality Guidelines

Section 169A of the *Police Act 1990* (**Police Act**) and clause 54 of the *Police Regulation 2015* (**Police Regulation**) reflect the public interest in non-disclosure of the identity of complainants and witnesses who make allegations about police officer and administrative member misconduct or maladministration.

4.1 What is protected?

Section 169A of the Police Act seeks to protect the identity of a person who makes a complaint about the conduct of a police officer or administrative member. This protection is afforded regardless of the likely managerial outcome for the subject of the complaint if the allegation were to be sustained. Clause 54 of the Police Regulation seeks to protect the identity of a witness who makes an allegation about the conduct of a police officer (but not an administrative member) that, if proven, would reasonably lead to a view that the alleged conduct:

- would be a criminal offence
- would give rise to a Probationary Constable's dismissal under s80 of the Police Act
- would give rise to reviewable or non-reviewable action under s173 of the Police Act; or
- would give rise to dismissal under s181D of the Police Act.

By way of example, a member of the NSW Police Force who is directed to answer questions, and in doing so makes an allegation (or corroborates an allegation) of police misconduct that would be expected to give rise to reviewable action under the Police Act, may have their identity protected by clause 54 of the Police Regulation.¹

It is NSW Police Force policy that the same protections will apply where the allegations concern the conduct of an administrative member.

¹ *Summersford v Commissioner of Police* [2018] NSWCA 115

4.2 What are the exceptions?

The Commissioner of Police (or the Commissioner's delegate) must not disclose to any other person the identity of a complainant, or a witness in a Part 8A investigation, unless:

- the complainant or witness consents; or
- in accordance with the Police Act or any other Act; or
- for the purpose of any legal proceedings before a court or tribunal, including the Industrial Relations Commission; or
- the disclosure is necessary for the effective conduct of a Part 8A investigation, in accordance with these guidelines.

4.3 When is disclosure required for 'an effective investigation'?

It is only the identity of the complainant or witness that is protected by the Police Act and Police Regulation. Any evidence given by the complainant or witness is not subject to the same restrictions.

The delegate has authority to release the name of a complainant or witness. Before determining to do so, the delegate must balance the interests of the complainant or witness in having their identity protected, against the interest of the subject officer in having that identity disclosed to them so that procedural fairness is afforded.

Procedural fairness will not always require the disclosure of complainant or witness identities, provided sufficient other information is provided to the subject officer.

Any adverse material that is credible, relevant and significant must be put to the subject officer, so they understand and can adequately respond to the allegations against them.

Generally, the more serious the allegation is, the more likely it is that witness, and sometimes complainant, identities should be provided to the subject officer to satisfy the organisation's procedural fairness obligations.

If the delegate (with guidance from the Complaint Management Team) decides that procedural fairness does not require disclosure of the identity of the complainant or witness, the name of the complainant or witness should not be disclosed and should be redacted from all material released to the subject officer.

4.4 Who decides whether disclosure is appropriate?

Generally, disclosure of the identity of a complainant or witness can be made to the Commissioner of Police and/or those officers that:

- exercise the powers and duties of the Commissioner of Police under sections 173 and 80(3) of the Police Act
- administer Part 9 of the Police Act
- participate in or act as members of a Complaint Management Team
- are responsible for investigating or providing legal advice in relation to complaints under Part 8A of the Police Act

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- have the approval of the delegate (in consultation with the Complaint Management Team) to disclose the identity of the complainant or witness to enable the effective conduct of an investigation; and/or
- work within the Internal Witness Support Unit,
- provided the disclosure is made for a purpose connected with the performance of a duty or function related to the complainant, witness, complaint and/or investigation.

The delegate, with guidance from the Complaint Management Team, decides whether disclosure can be made to the subject officer.

4.5 Examples

Unredacted	Name of IPC removed only	Other identifying information also removed	Explanation
You were in the muster room with Constables Ellen Smith and James Rae and Senior Constables Bonnie Shore and Jake Armstrong when you allegedly took coins from the charity donation jar.	You were in the muster room with Constables [redacted] and James Rae and Senior Constables Bonnie Shore and Jake Armstrong when you allegedly took coins from the charity donation jar.	You were in the muster room with Constables Ellen Smith and James Rae and Senior Constables Bonnie Shore and Jake Armstrong when you allegedly took coins from the charity donation jar.	<i>Sometimes, only removing the name of the IPC actually identifies them as the IPC. In the example provided, it would not be clear to the subject officer which of the witnesses is the IPC, so their name does not need to be redacted.</i>

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<p>You were executing a search warrant with Constables Ellen Smith and James Rae and Senior Constables Bonnie Shore and Jake Armstrong when Senior Constable Rae states you asked him to take a picture of you holding a gun found at the premises, using your personal mobile phone.</p>	<p>You were executing a search warrant with Constables Ellen Smith and James Rae and Senior Constables Bonnie Shore and Jake Armstrong when [redacted] states you asked him to take a picture of you holding a gun found at the premises, using your personal mobile phone.</p>	<p>You were executing a search warrant with Constables Ellen Smith and James Rae and Senior Constables Bonnie Shore and Jake Armstrong when you allegedly asked Senior Constable Rae to take a picture of you holding a gun found at the premises using your personal mobile phone.</p>	<p><i>A slight change of the wording gets across the same information without making clear to the subject officer which of the officers present was the IPC.</i></p>
<p>While performing Brief Handling Manager duties on 4 March 2022, Senior Constable Bonnie Shore checked a criminal brief you had compiled and observed the charge had already become statute barred.</p>	<p>While performing Brief Handling Manager duties on 4 March 2022, [redacted] checked a criminal brief you had compiled and observed the charge had already become statute barred.</p>	<p>A check of the criminal briefs assigned to you in March 2022 revealed you had allowed a charge to become statute barred.</p>	<p><i>Identifying the duties performed by an IPC may sometimes render them easily identifiable.</i></p>

Endnote References

Nil