

Protected Information Policy

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Policy

1 Introduction

Commission staff handle a large amount of information about people, approved providers, service providers and applicants for approval as providers in the exercise of the Aged Care Quality and Safety Commissioner's functions and powers under the [Aged Care Quality and Safety Commission Act 2018](#) (Commission Act) and the [Aged Care Quality and Safety Commission Rules 2018](#) (Commission Rules). This kind of information is usually 'protected information' as defined by section 60(2) of the Commission Act.

The protected information provisions in Part 7, Division 4 of the Commission Act place certain privacy obligations on individuals in their handling of protected information and provide for the prosecution of individuals for the unauthorised recording, use or disclosure of such information. It should be noted that commission of an offence under section 60 or 62 carries a penalty of 2 years imprisonment. This protection ensures that the expectations of those who provide information to the Commission are met and encourages full and proper disclosure of all relevant information. It is balanced with the need to maintain appropriate information sharing between entities and to promote open and accountable government through appropriate access to information.

This document sets out the Commission's policy for dealing with protected information and is supported by the Disclosure of Protected Information under Section 61 of the Commission Act Standard Operating Procedure (SOP).

The policy and supporting resources aim to:

- ensure that individual conduct with respect to protected information is lawful
- reduce the risk of harm to individuals, organisations, Commission staff and the Commission that could arise from the unauthorised disclosure of protected information.

1.1 Scope

This document applies to the recording, use and disclosure of protected information under the Commission Act by Commission staff (including APS and non-APS (consultant and labour hire contractor) employees/workers). It does not:

- Relate to information sharing between the Commissioner, Minister and the Secretary of the Department of Health and Aged Care (Secretary) for the purposes of their functions or powers under sections 56 – 58 of the Commission Act.
- Describe agreed arrangements for the sharing of information and data between the Commission and other entities. These arrangements are usually described in [Memorandums of Understanding, which do not override the protected information provisions](#).



- Relate to the Commission's publication of information about aged care services (refer to [RB 2020-11 Publication of provider performance information](#)).
- Detail the Commission's other information privacy and access obligations, such as those in the [Freedom of Information Act 1982](#) and the [Privacy Act 1988](#) (Privacy Act) or describe its procedures for implementing those obligations.
- Relate to protected information held by another entity.

1.2 Definitions

De-identification is a process involving the removal or replacing of direct identifiers in a dataset, followed by the application of any additional techniques or controls required to remove, obscure, aggregate, alter and/or protect data in some way so that it is no longer about an identifiable or reasonably identifiable individual.¹

Personal information means information or an opinion (including information or an opinion forming part of a database), whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion.

(Section 7 of the Commission Act) *Note:* The definition of 'personal information' set out in the Commission Act is different from the definition of personal information set out in s 6(1) of the Privacy Act. This policy uses the definition set out in section 7 of the Commission Act to maintain consistency with other Commission Act references made in this document and relevant procedures.

Protected information is information acquired under, or for the purposes of, the Commission Act or the Commission Rules that:

- a) is personal information; or
- b) relates to the affairs of an approved provider or a service provider of a Commonwealth funded aged care service; or
- c) relates to the affairs of an applicant for approval under section 63B.

(Section 60(2) of the Commission Act.)

Protected information provisions refers to Part 7, Division 4 of the Commission Act, and section 111 of the Commission Rules.

2 Definition of protected information

Most Commission staff members will handle protected information while performing their roles, whether those staff are in operational, stakeholder engagement, advisory and support, data and intelligence, or corporate roles.

Staff must handle information acquired in the exercise of the Commissioner's functions with care and diligence, and in accordance with all applicable Australian laws. The

¹ [The Deidentification Decision-Making Framework](#), CSIRO, 2017, p 67; [De-identification and the Privacy Act](#), Office of the Australian Information Commissioner (OAIC), 2018. <https://www.legislation.gov.au/Details/C2021C00344>



recording, use and disclosure of information that may be 'protected information' must comply with the protected information provisions, this policy and associated procedures.

The definition of 'protected information' under s 60(1) of the Commission Act (see the [Definitions](#) section above) contains the following elements:

- The information must have been acquired under, or for the purposes of, the Commission Act or Rules. Information the Commission obtains through the exercise of its regulatory activities or other legislative functions will often meet this requirement.
- The information must also be one or more of the following:
 - personal information;
 - information that 'relates to the affairs of an approved provider or a service provider of a Commonwealth funded aged care service;' or
 - information that relates to the affairs of an applicant for approval as a provider of aged care.

2.1 Personal information

The definition of 'personal information' is included in the [Definitions](#) section above. Effectively, any information the Commission holds about a person who can reasonably be identified from that information is likely to be 'personal information.'

'Personal information' relates to living individuals, so the protection of personal information is not ongoing after death. That said, staff must exercise care in recording, using and disclosing information relating to a deceased person, to ensure any cultural considerations are observed and the person's personal information is treated with dignity and respect, noting that their information may also be mixed with protected information about other individuals or organisations.

Examples of personal information often handled by the Commission include:

- An individual's identifiers, such as name and contact details, collected to handle an allegation, enquiry or complaint.
- Information or opinions (whether true or not) about the care and services an individual has received, recorded and used in a range of contexts including handling complaints, undertaking site visits and interviews, undertaking investigations relating to reportable incidents or conduct of individuals, assessing the risk of harm to individuals and determining appropriateness of compliance action.
- A consumer's clinical documents and care records (such as progress notes, care plans and medication charts), extracts or copies of which may be recorded by the Commission in exercising a range of regulatory functions.
- Details of a consumer's next of kin or legal representative, including their contact details, opinions about the delivery of care and services to the consumer and their status as a representative for the consumer
- Information about identifiable third parties in a service's records, including the names, professional opinions and actions of health professionals and service staff.



- Information or allegations (whether true or not) about an individual's conduct, provided in a reportable incident notification, in a complaint, or in allegations about an aged care worker or governing person under the Code of Conduct.

2.2 Information that relates to the affairs of a provider

For ease of reference the term 'provider' is used below to refer to: an approved provider or a service provider of a Commonwealth-funded aged care service; and an applicant for approval under section 63B of the Commission Act.

It is important to note that the phrase 'relates to the affairs of an approved provider' is not defined in legislation. The information in this document is derived from case law on secrecy/protected information provisions and on the interpretation of this phrase in the Commission Act and *Aged Care Act 1997* (Aged Care Act). While staff may have regard to this information, they must consider the words used in the Commission Act and seek advice from Legal Services where necessary.

2.2.1 Examples of information that relates to the affairs of a provider

The phrase 'relates to the affairs' of a provider has a general and broad meaning. Information that relates to an identifiable provider's business or professional activities, status and obligations under the Aged Care Act and associated Aged Care Principles (Principles), including in relation to the investigation, monitoring and approval of a provider, is considered to relate to the provider's affairs.

The following kinds of information handled by the Commission will usually be viewed as relating to the affairs of a provider:

- Information about the delivery of Commonwealth-funded aged care at a residential aged care service or as part of a home care service, recorded by a quality assessor while undertaking an assessment or monitoring activity. This includes information in any form, including details documented by the quality assessor in their notes, copies of documentation taken while on site or information supplied by the approved provider in connection with the activity (in writing or verbally).
- Information recorded or used in an investigation of a provider's compliance with its obligations under the Aged Care Act and Principles, including in an investigation report or notice of decision describing an assessment of compliance and the information upon which that assessment is based.
- Information about a provider obtained in the course of handling a complaint including, for example, a complainant's concerns about an identifiable provider.
- Information about a provider's actions described in a feedback letter on a complaint.
- A reportable incident notification, which may include information about the provider's handling of the incident as well individuals' personal information.
- A provider's financial and prudential records.



- A copy of an application to become an approved provider and associated documents, and any information relating to the assessment and outcome of that application.

2.3 Joint or mixed information

Information the Commission acquires under or for the purposes of the Commission Act or Rules will often contain more than one type of protected information. Multiple individuals or providers may be referenced in the same record. As a result, the Commission staff must be mindful of 'mixed' protected information in a record when considering how it can be handled. This concept is discussed later in this policy in relation to the disclosure of protected information.

2.4 Data and de-identification

Data about individuals or providers may also be protected information if the data includes identifying information. This will include data relating, for example, to the number of complaints or compliance notices in relation to a named provider. Data that is not de-identified must be handled in accordance with the protected information provisions and this policy.

Information that has undergone an appropriate and robust de-identification process is not protected information and is therefore not subject to the protected information provisions (or Privacy Act). Information will be de-identified where there is no reasonable likelihood of re-identification of an individual or provider occurring.²

3 Commission's approach to protected information

3.1 General prohibition

With some exceptions, a person commits an offence if they obtain protected information in the course of performing functions, or exercising powers, under or for the purposes of the Commission Act or Rules, and they:

- make a record of the information;
- use the information; or
- disclose the information to another person (section 60(1) of the Commission Act).

Consequently, Commission staff must not record, use or disclose protected information unless an exception applies. The onus of demonstrating that the exception applies will rest with the person seeking to rely on it (see the notes to subsections 60(3) and (4) of the Commission Act).

² This content is adapted from [De-identification and the Privacy Act](#), OAIC, 2018.



3.2 Exceptions to the prohibition

3.2.1 Conduct related to the exercise of the Commissioner's functions

The prohibition on the recording, use and disclosure of protected information does not apply if a person is doing so in the course of performing functions, or exercising powers, under or in relation to the Commission Act or Rules, the Aged Care Act or Principles (section 60(3)(a) of the Commission Act).

Activities that fall within this exception span the range of the Commission's functions and powers and are usually identifiable by reference to the requirements of the Commission's legislative functions and internal procedures that give effect to those requirements.

Examples of where this exception applies include:

- Complaints staff: using protected information to form the basis of a decision to take no further action or end a resolution process on a complaint; recording that information in a notice of decision on the complaint; and disclosing the protected information by giving a copy of the notice to the complainant or provider.
- An assessment team recording protected information gathered during a quality activity in quality assessor notes and in a site audit report or assessment contact report, using that information to assess the provider's performance against the Aged Care Quality Standards and disclosing the protected information to the provider by giving them a copy of the report.
- A staff member recording protected information in a file note describing allegations made about an aged care worker's conduct, using the protected information to assess the worker's compliance with the Code of Conduct, recording that information in a banning order and disclosing the protected information in a register of banning orders maintained by the Commission.
- A staff member recording in NCCIMS (National Complaints and Compliance Information Management System) information supplied by a person in applying for approval to provide aged care, using the information to assess whether the person is suitable to provide aged care, recording the protected information in a decision notice on the application and disclosing it by issuing a copy of the notification to the applicant.

The protected information included in a regulatory report or notice of decision should only be that needed to explain the conclusions reached or forming the basis of the decision.

Any disclosure of protected information in this context must be consistent with the relevant legislation, delegations, policy and procedures of the business area.

3.2.2 Conduct that is authorised by the subject of the information

Protected information may also be recorded, used or disclosed with the authorisation of the person or body to whom the information relates (section 60(3)(b) of the Commission Act). For example:



- With the provider's authorisation, a complaints officer may give a complainant a copy of a provider's response to their complaint.
- If a provider agrees to a copy of an assessment team's report (that would not normally be published) being given to a consumer's representative, then it may be permissible to provide the representative with a copy. Personal information of individuals other than the consumer would be de-identified.
- With a consumer's agreement, a complaints officer may disclose information about the care and services the consumer is receiving to a complainant who is not their representative, or to another interested party.
- A consumer may consent to the Commission using protected information about them to develop a de-identified case study or example for inclusion in materials for the public.

The application of this exception allows protected information to be recorded, used and disclosed in a broader range of circumstances if the relevant person or provider authorises this.

When relying on this exception, officers must take care to ensure that any person purporting to authorise a disclosure has the authority to do so, and that the authorisation relied upon constitutes valid consent. The four key elements of consent are:

- the individual is adequately informed before giving consent
- the individual gives consent voluntarily
- the consent is current and specific, and
- the individual has the capacity to understand and communicate their consent.³

It is preferable to obtain the authorisation in writing; at minimum it must be documented. Any decision to record, use or disclose protected information with authorisation must be cleared by a staff member at EL1 level or above and follow the Commission's protected information procedures.

Where the Commission has received a request for information from an external entity or organisation, the application of section 61 of the Commission Act (discussed below) is to be considered.

Where protected information being considered for disclosure is 'mixed,' such that editing of the document or complex consultations with a range of individuals or providers may be required, advice must be sought from the Freedom of Information section or Legal Services on how the matter should be handled.

3.2.3 Disclosure to the subject of the information

The prohibition on disclosure of protected information does not apply when the disclosure is to the person or body to whom the information relates (section 60(4)(a) of the Commission Act).

³ For more information on consent, see part B of the [Australian Privacy Principles Guidelines](#), Office of the Australian Information Commissioner (OAIC), 2019.



Simply put, Commission staff may disclose protected information to the individual or provider that the protected information is about in accordance with the Commission's policies and procedures. This will occur frequently in the exercise of the Commission's regulatory functions, some of which are referenced above.

3.2.4 Disclosure to the Minister or Secretary

The prohibition also does not apply to a disclosure of protected information to the Minister or the Secretary of the Department of Health and Aged Care (section 60(4)(b) of the Commission Act.) in certain circumstances. Section 56 and 58 of the Commission Act require the Commission to provide information to the Minister and Secretary in certain specific circumstances. These provisions are specific to disclosures of information (including protected information) to the Minister and Secretary and *generally* do not extend to requests from Ministerial or Departmental staff. Any Commission staff considering such disclosures should escalate the matter to a director and/or seek advice from Legal Services and Parliamentary Services and Media.

3.2.5 Published documents containing protected information

Sometimes the Commission may receive a request for protected information that is publicly available. This can include, for example, performance reports published on the Commission's website, or information about sanctions notices made available on My Aged Care. Where a Commission officer receives a request for information that is already in the public domain, they will not breach the protected information provisions by referring the requestor to that information or supplying a copy to them.

4 Permitted disclosures of protected information

The prohibition on disclosure of protected information does not apply if the disclosure is authorised under the Commission Act, the Commission Rules or any other Act (section 60(3)(c). Section 61 of the Commission Act sets out permitted grounds for disclosing protected information. This provision does not apply to the recording or use of protected information.

Consideration of protected information disclosure under section 61 of the Commission Act can arise in a range of circumstances, including where:

- the information has been requested by an individual or organisation, as part of a referral under existing processes
- an external party is *requiring* the Commission to disclose information or documents containing protected information (for example, under subpoena)
- disclosure of protected information may be warranted because the circumstances give rise to the potential application of one of the permitted grounds for disclosure in section 61 of the Commission Act.

The Commission has specific business processes for handling certain types of protected information requests or compulsory notices. This policy sets out the general procedure, however all staff must consider the associated Standard Operating Procedure (SOP) and



business instructions to determine whether there is a designated business area (such as Legal Services) responsible for the handling certain protected information disclosures.

4.1 Delegation to disclose protected information under section 61

Disclosures under section 61 can only be made:

- by the Commissioner personally or by a delegate (under the Commissioner's [Instrument of Delegations](#));
- where the requirements of the relevant ground in section 61 have been met; and
- in cases where the delegate has doubt about the application of the grounds of disclosure or where there is more legal risk, after obtaining and considering relevant advice (for example from Legal Services and the Clinical Unit).

Before disclosing protected information under this section, a staff member must ensure that they have the appropriate delegation to disclose protected information under section 61 by referring to the Instrument of Delegations.

4.2 Business 'ownership' of protected information

To apply this policy and associated procedures, in each case where the disclosure of protected information under section 61 may be warranted (for example because another entity has requested the information), a decision must be made about the appropriate business area to handle the potential disclosure.

The general policy position is that the business area that primarily handled or used the information that has been requested is responsible for dealing with a potential disclosure.

The business owner is responsible for handling requests for disclosure of protected information, including gathering the requested information, making the disclosure decision, seeking policy or legal advice where necessary and preparing any documentation required under the Commission's procedures.

To make this assessment, the area that receives the request must identify:

- what protected information is being requested
- who is asking for it and the reason for the request
- why the Commission holds it, to make this assessment.

The answers to these questions, alongside the application of this policy, SOP and relevant business instructions, will assist to identify the business owner of the information.

4.2.1 Example of determining business ownership

A customer contact officer receives protected information when someone makes a complaint. The officer then sends that information to a complaints team, a complaints officer undertakes a resolution process and provides feedback on the outcome to the complainant. During the process, the complaints officer makes a referral to the Quality Assessment and Monitoring Group to inform its assessment and monitoring activity in relation to the relevant service.



The Commission then receives a request from a State health complaints body for information in the complaint and documents the Commission obtained in handling the complaint, pertaining to a named aged care consumer. In this scenario, the business owner is the complaints team, not the Customer Contact Team or Quality Assessment and Monitoring Group.

4.2.2 Exceptions

In some circumstances the Commission may set out business instructions requiring certain kinds of information requests to be referred to specific teams for handling. Where such instructions exist, the above business ownership policy will not apply.

Where the protected information relates to the responsibilities or activities of several business areas and it is difficult to identify which section holds ownership, internal consultation must take place to ensure that all relevant information is considered in determining the appropriate response. Ownership of aggregate data may sit with the business area and the Intelligence and Analysis Team of the Regulatory Policy and Intelligence Group at the same time. A coordinated response must be prepared to handle access requests for such information under the protected information procedures.

4.3 General requirements for disclosure under section 61

Before protected information is disclosed to an external party, consideration must be given to whether it would be appropriate to de-identify the information in full or in part. A disclosure of de-identified information does not have to comply with the protected information provisions.

Caution should be exercised to ensure the de-identification is thorough and irreversible and to assess whether there are any other barriers to disclosure of the information (such as confidentiality requirements arising under contract or personal information handling obligations under the Privacy Act).

4.3.1 Documentation of decision

Where a delegate decides to disclose protected information under one of the discretionary grounds in section 61 of the Commission Act, they must document the decision.

That is, there must be a document setting out:

- the delegate's decision
- the legislative basis for the decision
- material facts relevant to the decision
- the name and position of the decision maker.

While section 61 does not require a written determination to be made in all cases, the Commission's policy is that protected information disclosure decisions must be documented for evidentiary purposes and to reduce the risk of actual or apparent unauthorised disclosure of protected information.



4.4 Dealing with protected information requests

All external requests for protected information⁴ ('protected information requests') should be made in writing. The request should specify what information is required and explain the reason(s) why the information is being requested, including the legislative basis where relevant to the request.

If the Commission receives a request for protected information, the request must be referred to the section with business ownership of the information, for a delegate to consider.

The delegate must apply the protected information provisions, this policy and related procedures (including the SOP) to determine whether the Commission is permitted to release the protected information, on what basis and in what form.

The delegate must:

- consider if one of the exceptions in section 60(3) or (4) applies in the circumstances, in which case a disclosure under section 61 will not be required
- alternatively, identify the most applicable ground of disclosure under section 61 of the Commission Act (noting that section 111 of the Commission Rules also includes a ground of disclosure)
- correctly identify the precise requirements of the ground of disclosure
- establish the relevant facts and ask the requestor for more information if key facts require clarification
- based on the facts, assess whether all the requirements of the relevant ground of disclosure in section 61 are met.

In each case, the delegate must consider the circumstances, facts or evidence before them, and assess whether the applicable thresholds in section 61(1)(a) to (j) of the Commission Act are met before making a disclosure. The delegate should seek advice from Legal Services if in doubt about the application of the grounds for disclosure.

All protected information disclosures under section 61 of the Commission Act must be in accordance with the SOP, which specifies the requirements for preparing either a letter of disclosure and/or a detailed file note prior to any disclosure.

4.5 Referral of protected information

The Commissioner may also disclose protected information under section 61, on her own initiative, by making referrals to external organisations for their information and/or action. This may take place when it is appropriate for that organisation to deal with the matter at hand, and only when where there is a lawful basis to do so.

⁴ This includes requests from individuals and organisations, including government entities external to the Commission.



A referral that requires the Commissioner to disclose protected information to an external organisation must be made in accordance with the protected information provisions, this Policy, the SOPs and relevant operational policies and procedures.

Staff making a referral of protected information to an external organisation must carefully consider the role (including functions and powers) of the other organisation, and only disclose information that is specifically relevant to that role for a relevant and specified purpose. Consultation with relevant Commission business areas (such as Legal Services or the Clinical Unit) may be required. Disclosure of protected information beyond what is relevant to the organisation in the context of its role places the Commissioner at risk of breaching the protected information provisions.

4.6 Standing arrangements for protected information disclosure

The Commission has various information sharing arrangements in place, including [Memorandums of Understanding](#) (MoUs), with several government agencies and departments. They describe how the Commission and the other entity will work together, share information and understandings in a timely manner, improve two-way communication and assist both agencies to better fulfil their statutory mandates. An information sharing arrangement does not determine what information can be disclosed but sets out processes and protocols for the exchange of information.

The Commission may form a standing arrangement with another entity for protected information sharing. Such an arrangement must only be entered into where the sharing of de-identified data will not suffice. The protected information provisions must still be considered and applied prior to each disclosure under the arrangement, with the ground of disclosure relied upon clearly identified and the limitations on recording, use and disclosure clearly expressed to the person receiving the information.

Examples of government agencies the Commission has standing arrangements with includes; the National Disability Insurance Agency and Australian Health Practitioner Regulation Agency (AHPRA).

4.7 Limits on the recipient's handling of protected information

If a person receives protected information through a disclosure under section 61 of the Commission Act, section 62 places further limits on the way which the recipient can record, use or disclose the protected information. Section 62 of the Commission Act deems it an offence if:

- a person makes record of, or uses or discloses information; and
- the information was disclosed to the person under section 61; and
- the purpose for which the person makes the record of, or uses or discloses, the information is not the purpose for which the information was disclosed under that section.



4.8 Disclosure to a court

Section 63 of the Commission Act provides for limited circumstances in which a person or body can require the disclosure of protected information. This can occur under that section where the disclosure is required by a 'court, or any other body or person that has power to require the production of documents or the answering of questions,' only if one of the following applies:

- the disclosure is required for the purposes of the Commission Act or Commission Rules, or the Aged Care Act or Principles;
- the information was originally disclosed to the person or body under section 61 of the Commission Act and the disclosure is required for the purpose for which it was disclosed under that section; or
- the person or body to whom the information relates has consented, in writing, to the disclosure.

Such requests must be referred to Legal Services for consideration and response.

5 Consequences of unauthorised conduct

Breach of section 60(1) of the Commission Act is a criminal offence by the individual concerned. It carries a penalty of 2 years imprisonment and may also constitute a breach of the APS Code of Conduct (in section 13 of the *Public Service Act 1999*). Furthermore, it poses significant reputational risk for the Commission and may undermine its ability to achieve its purpose, could cause harm to individuals and can constitute a notifiable data breach under Part IIIC of the Privacy Act.

If it becomes apparent that the protected information provisions have been breached, the officer must immediately notify their supervisor and escalate the matter to a director. Consideration must be given to any harm that might result and whether any individuals or providers concerned should be notified of the breach.

The director must consider in what circumstances legal advice should be sought. For example, where disclosure is inadvertent and constitutes a one-off breach, the director may not consider legal advice is required.

If the breach involves personal information, the Commission's Data Breach Response Plan must be followed, and the Privacy Officers Network notified as soon as possible.

6 Classifying, accessing and storing protected information

Official documents and emails containing protected information should be clearly identified with the dissemination limitation marker 'OFFICIAL: Sensitive.'

All Commission staff are responsible for capturing official information in approved platforms. Approved platforms in the Commission include core business systems (BBP/NCCIMS), function-specific systems like TechOne, PDMS or LEX, and the broader Microsoft document and collaboration suite Office 365.



The need-to-know principle applies to all 'OFFICIAL: Sensitive' information. This means that staff must not access protected information unless they have a legitimate business reason in connection with the Commission's functions and activities.

See [Policy 8](#) of the Protective Security Policy Framework for more information about the application of dissemination limitation markers and the handling of OFFICIAL: Sensitive information.

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