

Compliance and Enforcement Publication Policy

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1 Definitions and abbreviations

Abbreviations

NSW Electoral Commission	New South Wales Electoral Commission
NSW Electoral Commissioner	New South Wales Electoral Commissioner
Electoral Act	<i>Electoral Act 2017 (NSW)</i>
Electoral Regulation	Electoral Regulation 2018 (NSW)
EF Act	<i>Electoral Funding Act 2018 (NSW)</i>
EF Regulation	Electoral Funding Regulation 2018 (NSW)
FDC&GC	Funding, Disclosure, Compliance and General Counsel Division of the NSW Electoral Commission
GIPA Act	<i>Government Information (Public Access) Act 2009</i> (NSW)
LG Act	<i>Local Government Act 1993 (NSW)</i>
LG Regulation	Local Government (General) Regulation 2021 (NSW)
Lobbying Act	Lobbying of Government Officials Act 2011 (NSW)
Lobbying Regulation	Lobbying of Government Officials (Lobbyists Code of Conduct) Regulation 2014 (NSW)

Definitions

1.1 **Media** - includes (but is not limited to):

- newspapers and magazines (paper and online)
- books, journals, bulletins, newsletters and noticeboards (paper and online)
- social media (e.g. Facebook, Twitter, comments on online articles, blogs)
- professional networks (e.g. LinkedIn)
- websites
- radio programs and advertisements

- television programs and advertisements or
- seminars, webinars and papers.

1.2 **Prosecution** - a method of enforcement for the most serious offences under the legislation or where a person has received a penalty notice and has elected to have the matter determined by a court.

1.3 **Publish** - to make information available to people.

1.4 **Stakeholder** - stakeholders include:

- political parties, their staff and volunteers
- members of political parties
- candidates and groups for NSW State and local government elections
- NSW Parliament elected members and government Ministers
- NSW local government councillors
- third-party campaigners
- associated entities
- political donors
- third-party lobbyists
- individuals who access enrolment information and
- individuals who engage in election campaigns.

2 Introduction

2.1 The NSW Electoral Commission is responsible for promoting compliance by political and election participants with the requirements of the legislation it regulates. FDC&GC staff carry out this regulatory function on behalf of the NSW Electoral Commission.

2.2 Where the NSW Electoral Commission is authorised or permitted by law, publishing information about compliance activities and enforcement actions exercised under the NSW Electoral Commission's responsibility is an important way to foster transparency, promote awareness, and encourage compliance with the law. The public is best served through easy access to information about compliance and enforcement, including provision of information online.

2.3 Uncontrolled publication of information can, however, put the NSW Electoral Commission in breach of the law, compromising its duties to the NSW public, and undermining its ability to

enforce offences. For instance, it is unlawful¹ in NSW and elsewhere in Australia to publish details of spent convictions without authority. Further, information in relation to the investigative or prosecuting functions of the NSW Electoral Commission is protected by law from public disclosure.² The public interest against disclosure of such information requires it to be treated with a very high level of confidentiality.

3 Purpose

Compliance and enforcement publication policy

- 3.1 This policy is intended to ensure consistency and accuracy in the information about compliance activities and enforcement actions released publicly, including through online publication.
- 3.2 This policy should be read along with other relevant policies and procedures of the NSW Electoral Commission, particularly the following that each provide general information about the exercise of the NSW Electoral Commission's compliance, investigation and enforcement functions:
- Compliance and Enforcement Policy
 - Compliance and Enforcement Procedures
 - Compliance Audit Policy
 - Prosecution Policy
 - Complaints Management Policy.
- 3.3 This document is not a guideline within the meaning of section 152 of the EF Act.

4 Scope and application

Breadth of compliance and enforcement activities

- 4.1 This policy is a guide for how the NSW Electoral Commission may deal with:
- publication, including online, of information regarding the NSW Electoral Commission's compliance, investigation and enforcement functions
 - the release of information about investigations, compliance and enforcement actions

¹ Criminal Records Act 1991, Crimes Act 1900 s579

² Government Information (Public Access) Act 2009 (the GIPA Act)

- the release of information about convictions, including spent convictions
- personal information related to the above
- publicly available information related to the above.

4.2 This policy relates to the compliance and enforcement activities of the NSW Electoral Commission with respect to the Electoral Act, the EF Act, the LG Act and the Lobbying Act.

5 Policy details

Application of policy

5.1 This policy and procedures instrument applies to:

- staff members of FDC&GC and
- staff members of other NSW Electoral Commission divisions whether they are permanent, temporary, casual, or contracted. It applies to staff on secondment from other organisations, and to staff and proprietors of other organisations working with the NSW Electoral Commission.

Definition of publish

5.2 In this document, publish is defined as ‘to make information available to a person or persons’, and includes but is not limited to any of the following:

- printed material that is made available to the those outside the NSW Electoral Commission
- material provided on the NSW Electoral Commission website or elsewhere online
- media releases and other advice to the media
- newspapers and magazines (paper and online)
- books, journals, bulletins, newsletters and noticeboards (paper and online)
- social media (e.g. Facebook, Twitter, comments on online articles, blogs)
- professional networks (e.g. LinkedIn)
- websites
- radio programs and advertisements
- television programs and advertisements
- seminars, webinars and papers.

Compliance, investigation and enforcement functions of the NSW Electoral Commission

5.3 The NSW Electoral Commission monitors and enforces compliance with relevant legislation by political stakeholders. In doing so, the interests of other stakeholders are also considered.

5.4 The relevant legislation is the following:

- the *Electoral Act 2017* ('Electoral Act')
- the *Electoral Funding Act 2018* ('EF Act')
- the *Local Government Act 1993* (NSW) ('LG Act')
- the *Lobbying of Government Officials Act 2011* (NSW) ('Lobbying Act')
- any regulations made under these Acts.

5.5 Political stakeholders include:

- political parties (including staff and volunteers)
- members of political parties
- candidates and groups for NSW State and local government elections
- NSW Parliament elected members
- NSW local government councillors
- third-party campaigners
- associated entities
- political donors
- third-party lobbyists
- individuals who access enrolment information
- individuals involved in election campaigning.

5.6 Other stakeholders include:

- the NSW public
- the Parliament of NSW and government ministers
- local Councils in New South Wales
- other electoral regulation bodies such as the Australian Electoral Commission
- other investigative or law enforcement agencies such as the Independent Commission Against Corruption and the NSW Police
- supporting agencies such as the Crown Solicitor's Office.

- 5.7 To regulate political stakeholders' compliance with relevant legislation, the NSW Electoral Commission can conduct compliance audits and undertake reviews and investigations. Depending on the outcome of an audit, review or investigation the NSW Electoral Commission can take enforcement action against a political stakeholder, including commencing a prosecution. For more information about the enforcement actions available to the NSW Electoral Commission refer to the Compliance and Enforcement Procedures.

Information that will not generally be published

- 5.8 Spent convictions will not be published by the NSW Electoral Commission and every attempt should be made to ensure that convictions are removed from the NSW Electoral Commission website when they become spent.
- 5.9 It is unlawful in New South Wales, and elsewhere in Australia, to publish details of spent convictions without authority. In New South Wales, spent convictions are covered by the Criminal Records Act 1991, Crimes Act 1900 s579, and specific provisions within some legislation.
- 5.10 There are multiple mechanisms by which a conviction may become spent. The process differs given the offence and legislation. There are also mechanisms by which a conviction might become spent regardless of the offence, for instance a court order of the dismissal of charges without recording a conviction under Section 10 Crimes (Sentencing Procedure) Act 1999.
- 5.11 In considering publishing statistical or de-identified details relating to spent convictions, the NSW Electoral Commission must take great care to ensure that:
- the information does not provide evidence that may lead to discovery of the identity of a person who has a spent conviction (e.g. a description of an offence or offences that, while not providing name/s, provides dates, location, current professional status of those involved) and
 - a totality of information provided in any given publication or combination of publications does not provide evidence that may lead to discovery of the identify of a person who has a spent conviction (e.g. details provided in different locations that contribute to an understanding about the general description of a person who has a spent conviction (when and where they were employed, and in what position when the offence occurred).
- 5.12 Unless permitted by law and in the public interest to do so (refer to paragraphs 5.23 to 5.31), detailed information about past or ongoing audits, reviews, investigations and enforcement actions will not be published by the NSW Electoral Commission.

- 5.13 The NSW Electoral Commission conducts audits, reviews and investigations to ascertain if there has been a breach of the legislation. As an audit, review or investigation progresses, much information such as personal details, communications between the subject of the investigation and the NSW Electoral Commission, witness communications, financial information and other evidence are collected. Unless permitted by law and in the public interest to do so the NSW Electoral Commission will not publicly disclose information or evidence about a current or ongoing audit, review or investigation.
- 5.14 Audits, reviews and investigations can result in enforcement action against a political stakeholder or other person. Enforcement action can include issuing a warning, caution or penalty notice, recovering the value of an unlawful donation, suspension or cancellation of a third-party lobbyist registration and prosecution. The NSW Electoral Commission keeps a record of enforcement actions in regard to stakeholders, and the reasons for a particular enforcement action.
- 5.15 Information in relation to the NSW Electoral Commission's investigative and prosecuting functions is 'excluded information' under the GIPA Act.³ The GIPA Act states that there is a conclusive presumption of an overriding public interest against disclosure of excluded information (unless the NSW Electoral Commission consents to its disclosure).⁴ The GIPA Act also prevents an access application being made to the NSW Electoral Commission for excluded information.⁵
- 5.16 As a result, information about the NSW Electoral Commission's investigative and prosecuting functions cannot be obtained through a GIPA access application (unless the NSW Electoral Commission consents to its disclosure). This includes information such as whether a particular stakeholder is being investigated for an alleged offence. Accordingly, the NSW Electoral Commission will not voluntarily provide excluded information unless it has already been made publicly available (see below), or the NSW Electoral Commission has consented to its disclosure.
- 5.17 Personal information will not generally be published by the NSW Electoral Commission.

³ Government Information (Public Access) Act 2009 (NSW) – Schedule 2, clause 4.

⁴ Government Information (Public Access) Act 2009 (NSW) – Schedule 1, clause 6.

⁵ Government Information (Public Access) Act 2009 (NSW) – Schedule 1, section 43.

5.18 Unless required or authorised or permitted by law to do so, the NSW Electoral Commission will not publish personal information, or an opinion about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion, including:

- electoral roll or enrolment information
- election voting information (including in statutory ballots)
- personal information of political stakeholders such as candidates and elected members
- funding and disclosure information that is not publicly available
- human resources information
- feedback and complaints information
- information or an opinion about the physical or mental health or disability of an individual.

5.19 Refer to the following documents which explain access to information, privacy, and exceptions to the above rules in more detail:

- the NSW Electoral Commission webpage, Access to Information
- the NSW Electoral Commission's Privacy Policy Statement and Management Plan
- the NSW Electoral Commission's Government Information (Public Access) Policy and Procedures.

Information that will generally be published

5.20 The NSW Electoral Commission publishes information that may identify individuals and entities where authorised or permitted by law and where there is no public interest against disclosure, such as:

- details of, and reasons for, a decision to suspend or cancel the registration of a third-party lobbyist (or an individual engaged to undertake lobbying for a third-party lobbyist)
- details of, and reasons for, a decision to place the name of a third-party or other lobbyist on the Lobbyists Watch List
- details of, and reasons for, a decision to refuse to register a third-party lobbyist (or an individual engaged to undertake lobbying for a third-party lobbyist)
- details of, and reasons for, a determination that a third-party lobbyist who has carried on the business of lobbying while not registered is ineligible to be registered for the period specified by the NSW Electoral Commission.

5.21 The NSW Electoral Commission publishes de-identified information such as:

- statistical information* about Supreme Court orders, prosecutions, convictions, penalty notices, cautions and other enforcement decisions that may include details of offences by stakeholder category, election, and the period to which the information relates
 - statistical information* about warnings that may include details of offences by stakeholder category, election, and the period to which the information relates
 - statistical information* about the level of compliance or non-compliance that may include details of offences by stakeholder category, election, and the period to which the information relates
 - information about compliance operations for election events and
 - information about audit and compliance findings may be published on a case by case basis.
- * statistical or de-identified information here should not provide evidence that may lead to discovery of the identity of person.

5.22 For an explanation of the NSW Electoral Commission's policies and procedures in the exercise of its investigative and enforcement powers, refer to the Compliance and Enforcement Policy and Compliance and Enforcement Procedures.

Disclosure of information if in the public interest

5.23 Generally, the NSW Electoral Commission will neither confirm nor deny that a particular allegation has been received and will not comment on any matter that is the subject of ongoing investigation or consideration. However, under section 268(2) of the Electoral Act, the NSW Electoral Commission or Commissioner may disclose information if:

- the information is disclosed to a person who has given information about possible contraventions of the Electoral Act and the EF Act or a regulation under either of these Acts, and
- the disclosure is reasonably necessary for the purpose of:
 - reporting the progress of an investigation into the possible contravention, or
 - providing the person who gave the information with advice as to the outcome of the investigation or any action taken as a result of the investigation, and
- the NSW Electoral Commission or Commissioner is satisfied the disclosure is in the public interest.

5.24 Under section 268(3) of the Electoral Act, the NSW Electoral Commission or Commissioner may also disclose information if:

- the information concerns a possible contravention of the Electoral Act or the EF Act or a regulation under either of these Acts, and
- the disclosure is for the purpose of reporting to the public about the progress or outcome of an investigation into the possible contravention, and
- the NSW Electoral Commission or Commissioner is satisfied the disclosure is in the public interest.

5.25 The NSW Electoral Commission and Commissioner have qualified privilege in proceedings for defamation arising out of a disclosure made under these provisions.

5.26 Disclosures of information under section 268(2) or (3) may only be made in relation to possible contraventions of the Electoral Act and the EF Act or a regulation under either of these Acts. They cannot be made in relation to contraventions of other legislation the NSW Electoral Commission has the function to enforce such as contraventions under the following Acts or regulations made under these Acts:

- the now repealed *Election Funding, Expenditure and Disclosures Act 1981*,
- the now repealed *Parliamentary Electorates and Elections Act 1912*,
- election provision under the LG Act, and
- the Lobbying Act

5.27 The NSW Electoral Commission often receives information in relation to possible contraventions from political stakeholders such as political parties and candidates. Any disclosure of information that is made to a person who has given information to the NSW Electoral Commission about a possible contravention of the Electoral Act or the EF Act MUST be in the interest of the public and not merely the individual or private interest of the informant. Disclosing information about an investigation only to a specific political stakeholder may be, or be perceived to be, in favour of this stakeholder. To comply with its duty to exercise its functions in a manner that is not unfairly biased, where it determines there is a public interest in favour of disclosure the NSW Electoral Commission may make a disclosure to the public under section 268(3) instead of to a particular informant under section 268(2). Such disclosure may be made in the form of a statement from the Chairperson published on the Electoral Commission's website or any other way determined by the NSW Electoral Commission. A disclosure will contain a statement to the effect the NSW Electoral Commission considers it is in the public interest to do so and may include the reasons. A record of the reasons will be kept internally.

5.28 Whether a disclosure is in the public interest will be assessed in relation to the specific circumstances of the matter for which information may be disclosed. Considerations for and

against disclosure will need to be balanced. The timing of a matter may also impact the nature of the information that may be released. There is no general obligation to disclose information under s. 268(2)-(3), even if on balance disclosure is in the public interest. It is anticipated that disclosure under s. 268(2)-(3) will only be made in limited circumstances.

5.29 The disclosure of information pursuant to s 268(2)-(3) requires the positive identification of a public interest to necessitate the disclosure. The following factors, amongst others, will be considerations in favour of disclosure:

- information publicly reported (eg media, public statements) about the alleged contravention or investigation is inaccurate and misleading about a political stakeholder,
- misinformation or disinformation about certain matters is widely circulating on social media platforms,
- the alleged contravention or investigation has generated significant public interest and the Electoral Commission does not intend to take any further action in the matter,
- there is a potential misunderstanding in the public about the relevant legislative requirements or the functions of the NSW Electoral Commission or Commissioner,
- the integrity of electoral processes including the funding and disclosure scheme in New South Wales will be supported,
- the administration of justice and the integrity of the criminal justice system will be supported, or
- the disclosure of information may serve as an opportunity to educate the public or political stakeholders and prevent future contraventions.

5.30 It is also necessary to consider whether any public interest(s) that mitigate against disclosure exist and, if so, it must be determined where the balance of interests for and against disclosure lie. The following factors, amongst others, will be considerations against disclosure:

- the alleged contravention or investigation is not already in the public domain,
- an audit, review or investigation into the alleged contravention is ongoing or is likely to result in court proceedings,
- the outcomes of other similar matters have not been the subject of disclosure,
- the disclosure is prohibited by law, such as privacy and sentencing legislation,
- complaints that have arisen as a public interest disclosure,
- the information is the subject of a non-publication or suppression order,
- the information is the subject of legal privilege or public interest immunity,

- disclosure would prejudice the effective exercise of the NSW Electoral Commission's functions,
- disclosure would prejudice the prevention, detection or investigation of a contravention or possible contravention of the law or prejudice the enforcement of the law,
- disclosure would prejudice any court processes,
- disclosure would expose a person to a risk of harm or serious harassment or serious intimidation,
- objection to disclosure has been made by ICAC, NSW Police or any other investigative agency involved in a particular matter,
- objection to disclosure has been made by the Office of the Director of Public Prosecutions (ODPP) with respect to a particular matter, or
- the disclosure of information may affect the integrity and fair conduct of elections, particularly during a period of 6 months preceding a general election, or from when it is known that a by-election will be held.

5.31 Where an identified public interest would be served by a disclosure, and there are competing factors of the public interest on the side of confidentiality, information may or may not be disclosed, according to the balance of competing considerations. The exercise of determining where the public interest lies can sometimes involve weighing competing considerations that are finely balanced. In some circumstances, the Commission may decide to consult any person who might be adversely impacted by disclosure.

5.32 The NSW Electoral Commission may, in certain circumstances, delegate the function of disclosing information including the assessment of the public interest considerations to a member of staff of the NSW Electoral Commission.

5.33 The NSW Electoral Commission will not accept broadly framed requests for information concerning allegations or investigations about a particular party or individual that appear to be without foundation or requests for information the disclosure of which would be unlikely to be in the public interest.

6 Roles and responsibilities

Who	How
NSW Electoral Commission	<ul style="list-style-type: none"> • approves this policy and associated documents
Executive Director and Directors FDC & GC	<ul style="list-style-type: none"> • participates in the consultation process • determines policy instrument content and compliance with electoral funding laws • communicates policy development and revision with the Legal Unit and the Policy Coordinator
Policy Coordinator	<ul style="list-style-type: none"> • coordinates administration of the policy development and review process • manages the publication, amendment or archiving of approved policy instruments in the Policy Library
Manager, Regulatory Education and Policy	<ul style="list-style-type: none"> • develops or amends policy instruments as required • forwards approved policy instruments to the Policy Coordinator for registration and publication • forwards approved policy instruments to the Policy Implementer (if not also the Policy Author) for implementation

7 Monitoring, evaluation and review of this policy

- 7.1 This policy will be reviewed every three years, or whenever it becomes apparent that a revision is needed.

8 Associated documents

- 8.1 Access of Information

- 8.2 Compliance and Enforcement Policy
 - 8.3 Compliance and Enforcement Procedures
 - 8.4 Compliance Management Policy
 - 8.5 Governance Information (Public Access) Policy and Procedures
 - 8.6 Media Protocol
 - 8.7 NSW Electoral Commission Code of Conduct
 - 8.8 Privacy Management Plan
 - 8.9 Prosecution Policy
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9 Relevant legislation

- 9.1 The NSW Electoral Commission monitors and enforces compliance with relevant legislation by political stakeholders. In doing so, the interests of other stakeholders are also considered.

The relevant legislation is the following:

- *The Electoral Act 2017* (NSW) ('Electoral Act')
 - *the Electoral Funding Act 2018* ('EF Act')
 - *the Lobbying of Government Officials Act 2011* (NSW) ('the Lobbying Act')
 - *the Local Government Act 1993* (NSW) ('the LG Act');
 - any Regulations made under the above four Acts;
 - *Criminal Records Act 1991*, *Crimes Act 1900*; and
 - *Government Information (Public Access) Act 2009* (the GIPA Act).
-

10 Stakeholders

- 10.1 Political stakeholders are:
 - political parties
 - candidates and groups for NSW State and local government elections
 - NSW Parliament elected members and government Ministers

- NSW local government councillors
- third-party campaigners
- associated entities
- political donors
- third-party lobbyists
- individuals who access enrolment information and
- individuals who engage in election campaigns.

10.2 Other stakeholders include:

- the NSW public
- other electoral regulation bodies such as the Australian Electoral Commission
- other investigative or law enforcement agencies such as the Independent Commission Against Corruption and the NSW Police and
- supporting agencies such as the Crown Solicitor's Office.

11 Document control

Document management

Approved by:	Signature:
The NSW Electoral Commission	<div style="border: 1px solid black; background-color: #f4a460; padding: 5px; text-align: center;">Signature Redacted</div> <p>Date approved: 3 March 2023</p>
Executive Director Review:	Signature:
Rachel McCallum Director Funding, Disclosure & Compliance and General Counsel	<div style="border: 1px solid black; background-color: #f4a460; padding: 5px; text-align: center;">Signature Redacted</div>
Director Review:	Signature:
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Publication details

Document Type:	<input checked="" type="checkbox"/> Policy <input type="checkbox"/> Standard <input type="checkbox"/> Procedure <input type="checkbox"/> Guidelines		
Responsible Business Unit: Funding, Disclosure & Compliance and General Counsel	Author: Manager, Regulatory Education and Policy	Publication: <input type="checkbox"/> Not for publication <input type="checkbox"/> Internal catalogue <input type="checkbox"/> Intranet only <input checked="" type="checkbox"/> Intranet and website	

Review Record

Date	Version	Revision description
01 July 2017	V 1.0	New Policy and Procedures
11 October 2017	V 1.1	Legislative change – <i>Environmental Planning and Assessment and Electoral Legislation Amendment (Planning Panels and Enforcement) Act 2017</i>
10 October 2018	V 1.2	Periodic review and update in response to post-implementation feedback. Legislative changes – <i>Electoral Act 2017</i> and <i>Electoral Funding Act 2018</i>
14 August 2019	V 1.3	Periodic review
21 February 2023	V 1.4	Legislative changes – <i>Electoral Act 2017</i>