

# **MISCONDUCT: UNAUTHORISED DISCLOSURE OF CONFIDENTIAL INFORMATION**

Sections 199 and 201 of the *Corruption, Crime and Misconduct Act 2003 (WA)*

30 November 2017

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## 1. EXECUTIVE SUMMARY

In October 2016 the Commission notified me under s 196(4) of the *Corruption, Crime and Misconduct Act 2003 (WA)* of an allegation made by one Commission officer against another Commission officer.<sup>1</sup>

The allegation made against X was that he retained a confidential document owned by his former employer, a public Agency,<sup>2</sup> without the Agency's authority, and once employed by the Commission, disclosed the document within the Commission on 4 October 2016 without authority from the Agency.

The document contained highly sensitive and confidential information about staff members at the Agency and other matters. It had been created by the Director of the Agency's Integrity Unit, the unit in which X had been employed before being employed by the Commission. It was a Briefing Note, dated 25 May 2016, compiled in relation to an internal investigation of alleged conflicts of interest in respect of obtaining employment at the Agency.

X applied for his position with the Commission whilst employed at the Agency, and the Director of the Agency's Integrity Unit offered to act as referee.

During my investigation of the allegation the Commission asserted that there was no evidence of criminality by X in any of his conduct, and as such he was not guilty of serious misconduct under s 4 of the Act.<sup>3</sup>

For reasons explained in my report I am critical of the Commission's assessment of the allegation, but, as a consequence of the way the assessment was conducted I have elected not to refer X's possession and disclosure of the confidential document to the Police for criminal investigation.

My determination of X's conduct on 4 October 2016 is that, not only was he to be found to have committed an act of serious misconduct under s 4(c) of the Act, but he committed an act of misconduct under s 4(d)(iii),(iv) and (vi) of the Act by disclosing, as an officer of the Commission, confidential and sensitive information which was the property of the Agency, without its authority.

X's possession and disclosure of the confidential document within the Commission was, in my view, manifestly a misuse of the information contained therein, and was in breach of his obligations to the Agency. His conduct in this respect and during the

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<sup>1</sup> The Commission officer against whom the allegation was made will be referred to as 'X' in my report. The Commission officer to whom he disclosed a confidential document will be referred to as the 'senior Commission manager'. The Commission officer who made the allegation against X was the unwitting recipient of the document from the senior Commission manager, and was senior to both other officers.

<sup>2</sup> The identity of the public Agency is not disclosed in my report, at its request, having regard to the reputational damage it fears might result from the publication of what it describes as X's baseless assertions made against it and some of its senior staff members as justification for retaining and disclosing the confidential document without authority.

<sup>3</sup> The Commission does not have jurisdiction under the Act, generally, to determine what is referred to as 'minor misconduct' by its officers or by any public officer other than a police officer.

Commission's assessment of the allegation fell short of the standards of transparency and accountability to be expected of an officer of the Commission.

My jurisdiction to investigate, assess and make recommendations about X's conduct extends to his unauthorised possession and disclosure of the confidential document within the Commission, but not to the circumstances of his unauthorised taking of the document from the Agency.<sup>4</sup>

## **2. X's DISCLOSURE OF THE CONFIDENTIAL DOCUMENT**

The Commission informed me that about a week prior to X's disclosure of the confidential document on 4 October 2016, he had a conversation with the senior Commission manager. She said to him that she had received certain correspondence from the Agency concerning its recruitment practices.<sup>5</sup>

During that conversation X offered information in his possession relevant to the subject-matter of the correspondence from the Agency. The senior Commission manager said she would love to have it, so he emailed the confidential document to her on 4 October 2016. X did not tell her that he had taken a copy of the document (by way of downloading it from the database of the Agency's Integrity Unit onto his personal thumb-drive and retaining it) without authorisation from its Director, or from anyone else in the Agency.<sup>6</sup>

The senior Commission manager subsequently forwarded the email containing the confidential document to another senior Commission officer. The senior Commission manager, it is said, did not realise the origin of the document until she subsequently had a meeting with the senior Commission officer on 5 October 2016, at which time the latter raised her concerns about X's disclosure.

X's disclosure of the confidential document was principally assessed by a senior Commission lawyer. On 10 October 2016 she interviewed him and the senior Commission manager. He explained that he was in the habit of retaining documents [from previous employers] just in case there was a need to refer to those documents later, for example, for preparation for court proceedings.<sup>7</sup> He said he initially saved a copy of the document on a group drive on the Agency's computer, and then later downloaded a copy of it to his personal thumb-drive.

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<sup>4</sup> I recommend in my report that X's copying and retention of the document be investigated by the Public Sector Commissioner as a matter of minor misconduct.

<sup>5</sup> Information contained in an Internal File Note dated 10 October 2016 recorded by the senior Commission lawyer who conducted an interview with X and the senior Commission manager. The letter from the Agency to the Commission is discussed in Chapter 3 of this report.

<sup>6</sup> X was employed by the Agency as a Prevention Consultant in its Integrity Unit on 15 May 2015, and commenced his duties on 22 June 2015.

<sup>7</sup> X during this explanation said that, as an example, he had been asked to provide 'information' for court proceedings concerning a previous employer. The nature of the information and its purpose was not elaborated upon. However, at a subsequent meeting with the senior Commission lawyer on 24 October 2016, X admitted that the previous employer knew and had authorised him to retain copies of certain witness statements.

X said to the senior Commission lawyer that some allegations of misconduct within the Agency, concerning inappropriate practices at all levels of recruitment processes, nepotism and the destruction of documents regarding conflicts of interest were not being reported by the Agency to the Commission. He said that the Director of the Agency's Integrity Unit wanted to report the allegations, but the Chief Executive Officer and other senior officers in the Agency did not want this to occur.

As part of the senior Commission lawyer's assessment of the allegation, X gave her copies of his *Staff Confidentiality & Compliance Agreement* and *Staff Exit Checklist* from his time at the Agency.<sup>8</sup> After his second meeting with her on 25 October 2016, X emailed her and said:

1. He was disappointed at his actions. Although he did not submit the confidential document formally through the Commission's portal, giving it to the senior Commission officer had put her in an awkward position, and the disclosure of the document to persons not involved with the matter was inappropriate; he apologised for doing so;
2. His disclosure of the confidential document was not motivated by a grievance or vexatious feelings towards the Agency, nor was there any attempt to obtain a personal gain or benefit by doing so. It was only during a discussion with the senior Commission manager that he realised he was privy to an account different from that possessed by her in relation to what was occurring at the Agency;
3. He believed the information he possessed was of vital importance to the Commission, and disclosed it in an email suggesting that he and the senior Commission officer should possibly discuss it further;
4. He subsequently liaised with the Director of the Agency's Integrity Unit and advised that he still possessed a thumb-drive with case documents upon which he had worked and/or had reviewed outside normal working hours. He was permitted by the Director to take material home to undertake such work. He informed the Director that the documents on his thumb drive were copies of those already stored on the unit's 'J' drive. He offered to deliver the thumb drive to the Agency for storage or destruction, and the Director replied that because the documents were already on the 'J' drive, he could just delete them, and
5. He did not presently have any documents from any previous employers, but he had had witness statements and a statement of material facts from a previous employer, only because the court proceedings were ongoing.

Further to X's email the senior Commission lawyer responded on 26 October 2016 with a clarifying question:

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<sup>8</sup> These documents and my assessment of the allegation are discussed later in my report.

‘Were you aware at the time of exiting [the Agency] that, in the absence of any written authority from [it], you were under an obligation to return any confidential information/documents?’

X replied shortly afterwards:

‘The answer to your question is that I honestly believed that by returning all of my physical files to the Records department, disclosing all intellectual property, and ensuring that all my emails and electronic case files were in order and accessible by my then Director, that I had satisfied the requirements of recordkeeping. It did not occur to me until after I left that my personal USB drive still had working drafts on it (when I was looking for personal documents on it and finding them there) that I did not think needed to be relinquished as that scenario was never raised during discussions with the Director upon my exit. There was nothing on my USB drive that was not already in [the Agency’s] possession as they were working documents that had been drafted/reviewed and sometimes sent to the Director after hours, with final copies stored on [the Agency’s] system.’

### **3. MY INVESTIGATION OF THE ALLEGATION**

#### *Initial correspondence with the Commission*

The notification to me of the allegation made against X on 20 October 2016 described the confidential document owned by the Agency as an ‘internal briefing note’, and said that the author of the document was the Director of the Agency’s Integrity Unit. The notification said that X commenced employment with the Commission on 19 September 2016, and that the Commission was in the process of obtaining further information about the allegation in order to assess it. I agreed that the Commission should do so, and requested its assessment before the Commission took any further action.

On 21 December 2016 the Commission informed me that its assessment of the allegation against X was ongoing, that he had been appointed to a senior managerial position within the Commission on 28 November 2016, and that despite his appointment it remained open to the Commission to take disciplinary action against him at any time in relation to the allegation.

On 8 February 2017 Commissioner McKechnie QC wrote to me and said that his assessment of the allegation was as follows:

1. X did not engage in serious misconduct or in any criminality by retaining and disclosing the confidential document within the Commission;
2. X was not under a duty not to disclose the confidential document within the meaning of s 81 of the *Criminal Code* because the Agency’s Code of Conduct and Confidentiality Agreement (to which X was subject when employed by the Agency) seemed to import a discretionary element. There was also some doubt as to whether he had signed the agreement;

3. X's stated reason for disclosing the confidential document within the Commission was that he thought the Agency may not have been complying with its misconduct notification obligations, and he believed that the document was of vital importance to the Commission;
4. In light of the reasons offered by X for disclosing the confidential document, s 220(2) of the Act may have application to his conduct,<sup>9</sup> and
5. He had instructed X to take immediate steps to rectify the situation with the Agency in respect of the information remaining in his possession which, he said, X had done.<sup>10</sup>

On 16 February 2017 I commenced an Inquiry under s 197(1) of the Act into the allegation made against X, and I issued a summons under s 9 of the *Royal Commissions Act 1968 (WA)* to the Director of the Agency's Integrity Unit for certain documents. The summons was executed on that day and documents and other information were obtained.<sup>11</sup>

#### *X's contract of employment with the Agency*

X was employed by the Agency in its Integrity Unit as a fraud prevention consultant on a full-time, continuing basis under a contract of employment dated 15 May 2015. He commenced his employment on 22 June 2015, and his line manager was the Director of the Unit. His employment conditions under his contract of employment included his obligation to comply with, *inter alia*:

1. The Agency's statutes, by-laws, policies and directions made under the legislation which created it;
2. The terms of any agreements, acts, statutes, by-laws, policies and directions which applied to the contract of employment from time to time that were not incorporated into that contract as terms or conditions;
3. The Agency's *Code of Conduct*;
4. The Agency's *Ownership of Intellectual Property* policy, and
5. Upon completion or termination of employment, the completion of the Agency's *Staff Exit Checklist*.

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<sup>9</sup> Section 220(2) of the Act states: 'If an allegation has been made to the Commission, the Public Sector Commissioner or the Parliamentary Inspector or any information has been given to the Commission, the Public Sector Commissioner or the Parliamentary Inspector no civil or criminal liability, other than liability under this Act, attaches to a person by reason that the allegation was made or the information was given.'

<sup>10</sup> The 'immediate steps' taken by X was apparently the email sent by him to the Director of the Agency's Integrity Unit on 25 October 2016. This email will be subject to further comment later in my report.

<sup>11</sup> The documents are discussed below.

### *Staff Confidentiality & Compliance Agreement*

Whilst employed by the Agency, X was subject to the provisions of its *Staff Confidentiality & Compliance Agreement* and, as were other prospective employees of the Agency, he was required to agree to those provisions before accepting his contract of employment. A number of provisions in the agreement were especially relevant to my investigation. They were:

1. You must during and after your employment with [the Agency] keep private all confidential information that is disclosed to you or obtained by you as a result of, or during the course of your employment with, it;
2. You agree not to use the confidential information for any purpose other than for the benefit of [the Agency] during or after your employment with it;
3. With the exception of duties related to your employment with [the Agency], **you must not:**<sup>12</sup>
  - disclose to any person the confidential information;
  - appropriate, make extracts from, copy, duplicate or in any manner reproduce the confidential information;
  - make adaptations of the confidential information, and
  - make use of or access the confidential information for private purposes (including accessing records of friends, relatives, colleagues or business associates), or in any manner which may, or is calculated to cause injury or loss to [the Agency], its customers, ... staff or associated entities;
4. You must return to [the Agency] any or all confidential information at the request of it;
5. These clauses shall continue to apply despite the termination or cessation of your employment with [the Agency] by either it or you;
6. For the purpose of this clause, “confidential information” means, but is not limited to, any document or information developed or relating to [the Agency], its staff and students including matters arising out of your employment with it, its business and activities including its intellectual property, financial information and other commercially valuable or sensitive information in whatever description and in whatever form (whether written or oral, visible or invisible) and all other information provided to you which is either labelled or expressed to be confidential, or given to you in circumstances where one would expect the information to be confidential to [the Agency], but excluding any matter that has become public knowledge or part of the public domain;

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<sup>12</sup> The bold emphasis appears in the agreement.



7. On cessation of your employment, you are required to deliver to the Agency all property including uniforms, keys, equipment, mobile telephones, books, documents, papers, materials and copies thereof that belong to [the Agency] that are in your possession or under your control, and
8. You are aware that any breach of these provisions or non-compliance with any of [the Agency's] policies or procedures, including those policies and procedures relating to privacy and confidentiality, may result in disciplinary action being taken against you with such action including dismissal.

#### *Staff Exit Checklist*

X signed a copy of a *Staff Exit Checklist* on 15 September 2016, the day before his employment with the Agency ceased. The checklist had a range of requirements for him to abide by in relation to the return of the Agency's property in his possession prior to leaving. In Part 3 of the checklist – completed by X and signed by him – he made two declarations:

- I have delivered to [the Agency] all course material prepared or used by me in the course of my employment with [the Agency], other than course material which I brought with me to [the Agency], and
- I have not kept in my possession any material of [the Agency], except to the extent of an explicit agreement and/or licence from [the Agency].

#### *The Agency's Code of Conduct*

While X was an employee of the Agency he was subject to its *Code of Conduct*.<sup>13</sup> Clause 5 of the Code, which was titled *Communication and Use of [the Agency's] Information*, said that an employee must:

Respect the confidentiality of sensitive and commercially significant information and not use it for their personal gain or the personal gain or benefit of others.

Clause 6 of the Code, which was titled *Dishonest and Criminal Behaviour*, said that an employee must:

Conduct themselves lawfully and properly, and not use their position within [the Agency] for personal advantage or for the personal advantage or disadvantage of others.

Clause 7 of the Code, which was titled *Use of [the Agency's] Resources*, said that an employee must:

Use [the Agency's] facilities, equipment and work time conscientiously, honestly and in a proper manner.

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<sup>13</sup> X, as with other employees at the Agency, was required by his contract of employment and by Clause 74.4.1 of the Agency's staff enterprise agreement (2012-2016) to abide by the Code.

Despite the clarity of the Agency's Code, its employees, including X, were assisted in their interpretation of the Code and the application of its obligations by reference to the Agency's *Valuing Integrity* handbook.

Clause 5 of the handbook, which is titled *Communication and Use of [the Agency's] Information*, said:

As a member of [the Agency] staff you may have access to confidential, sensitive, commercially significant and personal information that is not available to the public. You are required to respect the confidentiality of information and not use it for personal gain or benefit, or for the personal gain or benefit of others...

You can adhere to the 'communication and use of [the Agency's] information' requirement of the Code of Conduct by:

- maintaining the confidentiality, integrity and security of official [Agency's] information
- only disclosing confidential or restricted information when required to do so by law and where proper authority has been given
- respecting [the Agency's] intellectual property rights and acknowledging that anything we develop, invent or create as a consequence of being engaged or employed by [the Agency] remains the property of [the Agency]
- ensuring confidential/sensitive information is secure against loss, misuse or unauthorised access.

Clause 6 of the handbook, which is titled *Dishonest and Criminal Behaviour*, said:

You can adhere to the 'dishonest and criminal behaviour' provision of the Code of Conduct by:

- performing your duties to the highest standards of honesty and integrity
- conducting yourself lawfully and properly at all times, and not using your position within the [the Agency] for personal advantage or for the personal advantage or disadvantage of others.

*X's email to the Director*

During her investigation, on 24 October 2016, the senior Commission lawyer told X that I had been notified of the matter. He then sent an email from his Commission email address to the Director of the Agency's Integrity Unit on 25 October 2016 at 9.12am. After opening pleasantries, X wrote:

‘I was going through my USB drive, and I realised I still had some ISU documents on there, from when I took some home to work on. There is nothing that isn’t already saved on your G Drive, but given they still form a record under the State Records Act, would you like me to drop it out to your office this week, and you can store it or seek a disposal order for it. I could have just deleted it, but then if it was ever questioned that I saved some documents to a thumb drive, but never returned it, I could possibly be breaching the Act for improper disposal. I can buy you guys a coffee and you can regale me with talks of [the Agency’s] life in the past two months.’

X’s email to the investigating lawyer referring to the ‘inappropriate’ disclosure (p3 above) was sent at 11.14am on 25 October 2016. I note that the earlier email to the Director makes no reference to the briefing note or its disclosure.

When my summons was executed, the Director of the Agency’s Integrity Unit said:

1. Whilst the confidential document was on his unit’s database for all staff to see, it was not one that X had any business to download or use during his employment;
2. The confidential document was uniquely his document due to his position as Director, and was one which X had no reason to use;
3. The document was highly confidential and sensitive, and his staff members knew this;
4. If X had asked him for authority to download or use the confidential document after he left his employment with the Agency, he would have answered ‘no’, and
5. X got his position at the Commission whilst he was employed at the Agency, and the officer had asked him to be his referee.

Later during my investigation of the allegation, the Director reaffirmed that he initiated the investigation which resulted in the creation of the confidential document; he undertook and completed the investigation, and it was he who wrote the document. He said that he provided a hardcopy of a draft of it to both X and another employee of his unit for their information and comment, and X said something to the effect that it was a good report.<sup>14</sup>

#### *The Agency’s letter to the Commission*

On 2 August 2016 the Agency wrote to the Commission and said that it had come to its attention that there had been conflicts of interest in staff recruitment processes which the Agency had not disclosed.

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<sup>14</sup> Further information was obtained from the Director on this important aspect, and is discussed later in my report under the heading *Representations made pursuant to s 200 of the Act*.

The letter explained that the Agency's 'initial assessment determined that the cause of the problem stems mainly from some inadequacies in the Agency's policy framework, as well as a failure to properly comply with (or fully understand) relevant recruitment procedures and conflict of interest disclosure requirements. The lack of adequate management oversight has further contributed to the problem.'

The letter informed the Commission that the Agency was adopting measures to improve governance processes in this regard. It said it was happy to answer any questions the Commission might have, and invited 'any advice or guidance' about the measures the Agency was undertaking. The letter was allocated to the senior Commission manager, with whom X met on 4 October 2016. Before they met she had responded to the Agency's letter, on 4 October 2016, essentially seeking clarification of the issue the Agency had raised.<sup>15</sup>

During their meeting on 4 October 2016 the senior Commission manager mentioned the Agency's letter to X.<sup>16</sup> He then alerted her to his possession of information relevant to the letter. He subsequently, at 11.26am, emailed the confidential document to her. His email said simply:

'This will give you tingles ...'

To my mind the tone of the comment reveals that X was well aware of the significance of what he was doing and, of course, the confidential nature of the briefing note he knew he had before its disclosure, and its significance to the matter before the Commission.

#### *Further correspondence with the Commission*

On 21 March 2017 I wrote to Commissioner McKechnie QC and summarised the facts as ascertained thus far, adding:

1. I agreed that X's conduct does not constitute serious misconduct under s 4(a) or (b) of the Act. The matter did not involve corruption in any sense in which the term is used in the Act;
2. It was open to the Commission to form an opinion of serious misconduct by X under s 4(c) of the Act by way of the commission of an offence under s 81 of the *Criminal Code*,<sup>17</sup> and

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<sup>15</sup> The senior Commission manager described the subject-matter of the letter to the senior Commission lawyer in the lawyer's interview of the manager and X on 10 October 2016 as a 'notification about nothing'.

<sup>16</sup> The Agency replied in writing on 2 November 2016 to the Commission's letter dated 4 October 2016 detailing the background of the subject-matter, but the Commission never replied to that letter, an issue raised with me by the Agency during my investigation. No misconduct investigation was ever commenced by the Commission into the subject-matter of the Agency's letter because the Commission was satisfied with the Agency's explanation.

<sup>17</sup> Section 81(2) of the *Criminal Code* states: 'A person who, without lawful authority, makes an unauthorised disclosure is guilty of a crime and is liable to imprisonment for 3 years.' Section 81(1) defines an 'unauthorised disclosure' as: '(a) the disclosure by a person who is a public servant or government contractor of official information in circumstances where the person is under a duty not to make the disclosure; or (b) the disclosure by a person who has been a public servant or government

3. X was under an absolute duty of confidentiality with respect to the confidential document, both during his employment and upon its cessation, except in circumstances where the Agency gave him explicit authority to disclose it – authority which he never sought, nor was ever given.

On 15 May 2017 Commissioner McKechnie QC replied, saying:

1. This matter amounts to the proposition that a public officer who, in good faith, gave information to the Commission to assist the Commission's assessment of an allegation of serious misconduct, now faces potential prosecution due to a possible breach of contract. This only has to be stated for the unreality of the situation to become apparent;
2. The basis of any suggested non-disclosure duty is an ambiguous paragraph in the Code of Conduct or an interpretation of an unsigned compliance agreement that ignores [X's] actual role with [the Agency]. He was engaged to do exactly what he did;
3. Moreover, the purpose of the Act s 220 is to allow public officers and others to report misconduct whatever legal obstacles an employer might put in the way to prevent them from so doing;
4. He did not agree that there was a duty not to disclose imposed on [X] by the Agency. Of more importance, he considered that the Act s 220(2) is designed to protect a person who makes an allegation to the Commission in breach of an obligation of confidentiality, from civil or criminal liability;
5. He would assume, for present purposes, without conceding the point, that the employment contract does incorporate and apply the Agency's Code of Conduct so as to render [X] at least contractually bound by its conditions;<sup>18</sup>
6. Clause 5 does not equate to an absolute duty not to disclose [the confidential document] because it must be read as a whole paragraph and that paragraph must be construed in the context of the Agency's Code.

If a duty not to disclose somehow arises, notwithstanding the use of an ambiguous word 'respect', the duty is limited to sensitive and commercially significant information. The information disclosed by [X] is not commercially significant information. It may or may not be sensitive information, whatever that may be, but the use of the conjunctive 'and' requires that in order for the duty to be breached, the information must be both sensitive and commercially

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contractor of official information in circumstances where, were the person still a public servant or government contractor, the person would be under a duty not to make the disclosure.' Section 81(1) defines 'official information' as: 'information, whether in a record or not, that comes to the knowledge of, or into the possession of, a person because the person is a public servant or government contractor'; and defines 'disclosure' as including: '(a) any publication or communication; and (b) in relation to information in a record, parting with possession of the record.' X was a 'government contractor' when employed by the Agency.

<sup>18</sup> The Commission had not obtained a copy of officer A's contract of employment with the Agency.

significant. The duty to keep confidential is not 'at large'. It is limited to use for personal gain or personal gain or benefit of others;

7. [X] disclosed the confidential document within the Commission for the purpose of reporting misconduct;
8. [X's] Confidentiality and Compliance Agreement with the Agency does not make it absolutely clear that confidential information must not be disclosed. The obligation on him was to keep confidential information confidential except when he was undertaking his duties with the Agency;
9. Neither Clause 5 of the Agency's Code nor the Confidentiality and Compliance Agreement imposed an absolute duty not to disclose, in the sense of prohibiting [X's] disclosure of the confidential document within the Commission, and therefore his actions cannot amount to an offence for the purposes of s 4(c) of the Act;
10. The protection given to 'whistleblowers' and others by s 220(2) of the Act is critical to the Commission's work because without it, suspicion of serious misconduct could never be brought to the Commission's attention by any person subject to a non-disclosure duty;
11. [X] suspected wrongdoing on the part of the Agency in their failure to notify the Commission of potential criminal conduct, a view that was supported by the information in the confidential document [that which was disclosed by him without authority] and at odds with the Agency's letter to the Commission dated 2 August 2016;
12. The meaning of s 220(2) of the Act is that a person who makes an allegation or who gives information to the Commission will incur no civil or criminal liability for doing so, and
13. He agreed that [X's] disclosure of the confidential document was deliberate and knowingly done, but in his view the disclosure was not unlawful because the officer was not under a duty not to disclose it.

Attached to Commissioner McKechnie QC's letter was an unsigned and undated, typed document which the Commissioner said was a response by X to my letter dated 21 March 2017. The document is a page and a half long. It says, concerning his employment in the Agency's Integrity Unit:

1. He had backed-up on his thumb drive copies of a range of documents that he had either developed, or had been asked to review and provide further material;
2. On many occasions he had worked on documents after hours and on weekends to meet deadlines or progress matters ahead of time;

3. On many occasions he travelled to different areas within the Agency to liaise with department heads and so he would need to have working copies of documents with him;
4. He assisted the Director of the Integrity Unit extensively in gathering information due to the matter's complexity [the creation of the confidential document] and as with most pieces of work developed in the Unit they proof-read and provided feedback to each other on final drafts;
5. He never knew of the Agency's course of action following the submission of the confidential document by the Director until after he commenced his employment at the Commission and was told of the Agency's letter to the Commission dated 2 August 2016;
6. He commenced employment with the Commission on 19 September 2016 and during the following two weeks he was involved in an induction training course. His disclosure of the confidential document was done at the start of his third week when he was still becoming familiar with the legislation and processes of the Commission;
7. On his first day after his induction training he talked generally about nepotism in the Agency's recruiting, and the senior Commission manager said that she had received correspondence from the Agency which advised the Commission that it was reviewing current recruitment situations. He then raised with her his awareness of the confidential document and that perchance he may have a copy of it;
8. His comment in his email to the senior Commission manager when he disclosed the confidential document 'This will give you tingles ...' was not intended to be with any malevolence, but was merely to highlight that the confidential document was contrary to what had been notified to the Commission by the Agency, which inevitably would bring a sense of curiosity to anyone who received information that told a different version of events;
9. The senior Commission manager then showed him the letter from the Agency dated 2 August 2016 and she said that she had already drafted a response to it. He believed s 220 of the Act applied to him on this occasion, in that his disclosure of the confidential document was done in good faith and with the belief that the Commission should be made aware of it. He further believed that legislative Acts will always override a civil agreement;
10. He wrote his email dated 25 October 2016 to the Director of the Agency's Integrity Unit in response to the allegation made against him being referred to the Parliamentary Inspector. He was informed it would be appropriate to notify the Agency that he still had some electronic documents and to ask what action it would require from him in disposing of them. He put a positive face on the content of his email by not making any reference to the confidential document or its disclosure to the Commission because he did not feel it was appropriate for him to do so. He added he did not want to compromise any on-

going inquiry being conducted by the Parliamentary Inspector or by the Commission;

11. His email to the senior Commission lawyer on 25 October 2016 in which he confessed that his unauthorised disclosure of the confidential document was 'inappropriate' was a reference to the fact that he provided the confidential document directly to the senior Commission manager, rather than lodging it with the Commission under s 25 of the Act, and
12. He completed all the items on his Staff Exit Checklist during his final two weeks of employment with the Agency, and submitted the form to its human resources department before his final day of employment. There was no verification process with his Director on the last day of his employment as to the accuracy of his completion of the checklist.

He did not at that time think about his thumb-drive because it not only contained the confidential document but private documents as well, and he carried the thumb-drive with him on a daily basis.

#### **4. THE COMMISSION'S INTERNAL LEGAL ADVICE**

On 18 January 2017 the senior Commission lawyer, having provided various opinions upon the legal issues raised by the case, emailed X asking him to provide her with a copy of his contract of employment with the Agency and a signed copy of his *Staff Confidentiality & Compliance Agreement*. He replied on 23 January 2017 with a copy of his contract of employment, but stated that he did not have the signed version of the confidentiality agreement.

On 2 February 2017, during an email exchange with the senior Commission lawyer who was advising upon what were considered to be the issues upon which the Commission's assessment would depend, it seems that there was some uncertainty as to whether, when entering into his contract of employment with the Agency, X had actually signed a copy of the confidentiality agreement. X said that he thought he had done so, and:

'I am prepared to make a written admission that I did sign such an agreement during my orientation week at [the Agency].'

On the following day X contacted the Agency by email<sup>19</sup> and received a response from it which attached a copy of the contract of employment, but said there was not a separate copy of the confidentiality agreement.

On the same day the senior Commission lawyer forwarded the email above to her Director, Legal Services and said:

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<sup>19</sup> A copy of which, if it exists, was not on the Commission's file when it was provided to me during my investigation.



‘I left my advice re this matter in your in-tray this morning. I finalised it on the premise that we would receive confirmation that [X’s first name] signed the confidentiality agreement during his induction (not exist).

[The senior Commission manager to whom X disclosed the confidential document] recalls that she signed a CA at the start and end of her employment [at the Agency].<sup>20</sup>

If we take the information below as the most accurate version of events, then parts of my advice (both memos) will become slightly redundant. The only source of the non-disclosure obligation then is the Code of Conduct.’

A fourth and final version of the senior Commission lawyer’s legal advice was created, and upon its completion by her was dated 6 February 2017. It was addressed to the Commissioner and copied to the Director, Legal Services. The purpose of the advice was to update the Commissioner on gaining a copy of X’s contract of employment and a copy of the (unsigned) *Staff Confidentiality & Compliance Agreement* to which the officer was bound.

The advice of the senior Commission lawyer settled upon the view that the *Staff Confidentiality & Compliance Agreement* did not impose a duty on X not to make a disclosure of the confidential document within the meaning of s 81 of the *Criminal Code*, and consequently it did not appear that he disclosed official information. The advice that X’s unauthorised retention and disclosure of the document did not amount to criminal conduct or serious misconduct, but that the disclosure could constitute minor misconduct pursuant to s 4(d)(iv) and (vi) of the Act, did not change.

Commissioner McKechnie QC considered the final version of the legal advice on 8 February 2017 and agreed with the senior Commission lawyer’s final position, adding that ‘real questions as to the binding nature of the Code and any document signed by [X] (if signed) remain.’

The opinion to which he came is, of course, reflected in his final letter to me dated 15 May 2017, discussed above, and it is sufficient at this stage for me to say that in my view, in the circumstances described, there is no doubt as to the confidential nature of the document disclosed by X or his duty not to retain or disclose it in the circumstances I have described.

## **5. MY ASSESSMENT**

### *The Commission’s procedure in assessing the allegation*

It is evident that the Commission’s assessment of the allegation made against X was not commenced or subsequently conducted in an investigatory way that left open the question whether his conduct, as ultimately found, might amount to the commission of a criminal offence. However, the nature of the allegation plainly demanded such treatment.

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<sup>20</sup> The senior Commission manager had also previously been employed at the Agency.

From the outset the allegation raised the possibility that X may have corruptly copied and retained the confidential document before leaving the Agency, and may have committed an offence under s 81 of the *Criminal Code* by disclosing the document without authorisation from it. In other words, the copying, retention and subsequent disclosure of the document should have been considered as steps taken in a single course of conduct until the facts were finally known and the officer's motivation was objectively and critically ascertained. X was never questioned by a Commission investigator, least of all questioned under caution whilst being recorded, in accordance with the *Criminal Investigation Act 2006 (WA)*.

In contrast, X was interviewed by a senior Commission lawyer about his possession and disclosure of the confidential document, and during the Commission's ensuing four-month assessment, even liaised with her to provide documents and information which contributed to the Commission's eventual determination that his conduct did not constitute a crime, or serious misconduct in any form under s 4 of the Act.

At no time after the allegation was made against X did the Commission interview the Director of the Agency's Integrity Unit to ascertain his evidence about X's unauthorised copying, retention and subsequent disclosure of the confidential document. What is known about those matters was ascertained later upon my Inquiry under s 197 of the Act.

Obtaining the Director's evidence to objectively test the truthfulness and accuracy of the explanations given by X for his conduct should have occurred quickly. This was the most elementary of investigative steps which should have been taken by the Commission in the early stages of its assessment, as were the efforts to obtain X's contract of employment and other documents at the centre of his obligations to the Agency.

Instead, the Commission accepted as truthful and accurate X's explanation for his conduct, and with this one-sided view, the direction of its assessment process was set on the course detailed above. It was not an effective or appropriate assessment process, given the serious nature of the allegation.

In my view the proposition is a simple one. X's conduct was the subject of an investigation which potentially involved criminal or serious misconduct, and at the least, misconduct. His participation in the manner I have described robbed the process of its legitimacy.

By the time Commissioner McKechnie QC wrote to me on 8 February 2017 conveying what proved to be the Commission's final assessment of the allegation, all reasonable opportunity to have the allegation properly investigated by any agency for possible criminality was lost, if for no other reason than the provision of factual material by X which was untested by questioning and not under caution and recorded.

On previous occasions I have been critical of the Commission's failure to take effective and objective investigatory steps in accordance with the *Criminal Investigation Act* and best-practices in criminal investigations when faced with

allegations against its officers that clearly involve possible criminality.<sup>21</sup> This report shows that either the Commission's procedures to respond to such allegations continue to be ineffective and inappropriate, or there is an issue with their proper implementation.

#### *X's Accounts versus Some Objective Facts*

There are reasons to call into serious question X's credibility in relation to his explanations for his conduct. He said he had contributed 'extensively' to the content of the confidential document whilst he was employed at the Agency. In contrast, the Director of the Agency's Integrity Unit said:

- It was he who initiated the investigation which resulted in the creation of the confidential document, and it was he who wrote it;
- X had no business in downloading or using the document during his employment;
- The document was uniquely his as Director and X had no reason to use it;
- X and other staff knew the document was highly confidential and sensitive, and
- Had X requested authority to download the document, or to use it after his employment at the Agency, he would have said no.

X exaggerated, if not misrepresented, his alleged contribution to the creation of the confidential document. He attempted to bolster his claim in this regard by adding that it was legitimate for him to have accessed and downloaded the document to his personal thumb-drive, inferring that it was an approved practice to enable him to work on documents after hours and on weekends in order to meet deadlines or to progress matters ahead of time, and to enable him to travel to different areas of the Agency to liaise with departmental heads. He was never authorised, nor asked, by the Director to do any such thing in respect of the document.

X did not ask the Director if he could download a copy of the confidential document, and his reference to his practice of doing so when in previous employment of a like kind referred to circumstances totally unlike the circumstances surrounding his creation of the document and its retention upon the cessation of his employment with the Agency and taking up similar employment with the Commission.

I do not accept as truthful X's claim to have had a legitimate purpose in downloading the confidential document to his personal thumb-drive in light of the confidential and sensitive nature of the information in the document, and in light of the information

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<sup>21</sup> See the Joint Standing Committee's Report titled *The Parliamentary Inspector's Report on Allegations of Misconduct made against Officers in the Commission's Electronic Collection Unit*, November 2015, 37-42; The Joint Standing Committee's Report titled *The Parliamentary Inspector's Report on Misconduct and Related Issues in the Corruption and Crime Commission*, June 2015, 30-45, and my Report titled *Misconduct by a Corruption and Crime Commission Officer: Matthew John Lynch*, 8 February 2017, 12.

given by the Director of the Agency's Integrity Unit. Such information being carried around on X's person and during his non-work hours is clearly not a scenario the Director would have countenanced.

Having had no legitimate basis for downloading and retaining the confidential document, the question why X did both these things remains unanswered. But it is a fair inference that the confidential document had been created by his Director before the Agency's letter dated 2 August 2016 and X was aware of different views as to the terms in which the Agency was to notify the Commission.

X ceased employment at the Agency on 16 September 2016, the day after he filled out the *Staff Exit Checklist* which directed his attention to the obligation not to retain material owned by it without an explicit agreement authorising him to do so. Further, X started work at the Commission on 19 September 2016 and disclosed the document on 4 October, having told the senior Commission manager he had information relevant to the subject matter of the Agency's letter.

I was notified of the allegation on 20 October 2016. Officer X was told this had been done and he was interviewed by the senior Commission lawyer on 24 and 25 October. His email to his former Director at the Agency preceded that second interview. In it he refers to his alleged unwitting retention of 'some ISU documents' on his personal thumb-drive. He said to the Director that the documents he had were all on the Integrity Unit's database, but conspicuously did not identify any of the documents he possessed.<sup>22</sup>

This was another opportunity for X to be open, honest and transparent with his former Director about his conduct, but he was not. I do not accept his subsequent explanation that he felt he was unable to tell the Director what he had done because it would not be 'appropriate' to do so, or that he did not want to compromise my investigation or the assessment being made by the Commission of the allegation. There was no possibility of such compromise. If his apprehension in respect of my investigation was genuine, he or the Commission could easily have contacted me to ask. Both could reasonably have assumed that I would be in contact with the Director.

X's statement to the Director in his email that he had placed a 'range' of documents from the Agency on his personal thumb-drive not only conceals his dealing with the confidential document, but gives the impression there was nothing remarkable about the document itself. Yet his possession of the document was clearly in his mind because when the senior Commission manager mentioned that she had received a letter from the Agency concerning its recruitment processes, he 'remembered' that he had the document, and promptly gave it to her.

X gave no explanation to the senior Commission manager as to how or why he possessed the document, or that he had downloaded and retained it without the Agency's authority. He certainly did not say that he was disclosing it to her for the purpose of making a complaint of misconduct or serious misconduct against his

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<sup>22</sup> X has since implied that the nature or identity of the documents, other than the confidential document that was disclosed, substantially were purely personal documents.

former employer under s 25 of the Act, as he would later do during the progress of the Commission's assessment. All he said to her was:

'This will give you tingles...'

X, in company with the senior Commission manager, suggested to the senior Commission lawyer on 10 October 2016 that he disclosed the confidential information to the manager after she mentioned a matter she was working on because he realised he was 'privy to a differing account' of what was occurring at the Agency. However, the general subject-matter of its letter to the Commission dated 2 August 2016 was the same as the more detailed subject-matter of the confidential document. To my mind, his explanation does not ring true.

In addition, in his submission attached to Commissioner McKechnie QC's letter to me dated 15 May 2017, X said that on his first day after his induction training in the Commission *he* talked generally about nepotism in the Agency's recruitment, and his manager *then* said she had received the letter from the Agency. He then raised his awareness of the confidential document, and that 'perchance' he *may* have a copy of it. This is the opposite of the explanation given to the senior Commission lawyer on 10 October 2016.

In contrast to his eventual claim that he disclosed the confidential document under s 25 of the Act, X emailed the senior Commission lawyer on 25 October 2016 expressing disappointment about what he had done, and apologising for having put the senior Commission officer to whom the senior Commission manager had disclosed the confidential document in an awkward position.

Yet even in this email X simultaneously kept important information from the lawyer. By saying he had 'liaised' with the Director about having retained case documents on his personal thumb-drive, he inferred continuing cooperative relations between him and the Director (which was the case, but only because he had not been frank with the Director), but failed to alert the lawyer to the fact that he told the Director nothing about the nature of any of the documents he had retained – most notably, the confidential document.

X also inferred to the senior Commission lawyer in his email that the confidential document was one he had authorisation from the Director to possess in the first place by alleging that the Director had given him general permission to take material home to work on. This was certainly not the case in respect of the confidential document.

When, on 26 October 2016, the senior Commission lawyer replied to X's email with a request for a simple clarification (albeit in a challenging tone) as to whether he knew he was obliged to return confidential documents and information before leaving the Agency, his response was self-serving, defensive and failed to answer her question.

Further, X may have sought to deceive the senior Commission lawyer again by saying that he did not think he had to surrender his possession of the Agency's documents on his personal thumb-drive because 'that scenario was never raised during discussions with the Director upon my exit.'

But in his submission attached to Commissioner McKechnie QC's letter to me dated 15 May 2017, X said that no such discussion occurred with the Director upon his exit. He added that he did not even turn his mind to his thumb-drive at that time, despite having said that he was aware it contained both private documents and documents from the Agency and despite always carrying it on his person.

As a consequence I do not accept X's explanations about his unauthorised copying and retention of the confidential document at the Agency, or his unauthorised disclosure of it within the Commission, as truthful.

### *X's Obligations of Confidentiality*

I am satisfied that the combined effect of X's contract of employment with the Agency, the Agency's *Staff Confidentiality & Compliance Agreement*, *Staff Code of Conduct* and *Ownership of Intellectual Property Policy* placed upon him, at the time of signing his contract of employment, an obligation not to retain possession of confidential information owned by it upon his cessation of employment, and an ongoing obligation after such cessation not to disclose confidential Agency information which remained in his possession.

I am satisfied that the confidential document X copied and retained without authorisation contained confidential information which was the property of the Agency. It was confidential because it was sensitive information which named persons suspected of misconduct in a document created for the purposes of the Agency which was not in the public domain.

I am satisfied that X had no legitimate reason whilst employed by the Agency to copy the confidential document onto his personal thumb-drive, but in any event, as required by the *Code of Conduct*, its confidentiality was to be given 'respect', both during and after his employment unless its disclosure was properly authorised by the Agency.

I am satisfied that X signed his *Staff Exit Checklist* on 15 September 2016, the day before his employment ceased with the Agency, thereby representing that he had not kept in his possession any of its materials except in accordance with an explicit agreement with, or licence from, it. I am satisfied that this representation was materially false.

The Commission contends that the documents quoted above did not impose an obligation on X to keep confidential any such information which came into his possession at the Agency. If this interpretation is accepted, then so must the proposition that the officer was free to release to any person inside or outside the Agency, for any reason and at any time, any confidential information owned by it and be immune from any disciplinary action. I do not accept the Commission's interpretation. The Agency's words creating this obligation are plain and clear in meaning.

### *The letters between the Commission and the Agency*

The Commission, in its correspondence with me, placed importance on the Agency's letter to it dated 2 August 2016, in which the Agency informed the Commission of its

awareness that there had been conflicts of interests in staff recruitment processes which the Agency had not yet disclosed. The Commission said that X's disclosure was made for the purpose of reporting misconduct under s 25 of the Act on the part of public officers in the Agency – that is, the conduct of which the Agency had already notified the Commission in its letter.

It will be recalled that the letter explained that the Agency's initial assessment of the information was that managerial oversight over its recruitment process may have been lacking. The Agency was taking measures to address the situation, and welcomed any input or guidance from the Commission.

The senior Commission manager responded to the Agency, seeking clarification of the situation. The manager told the senior Commission lawyer on 10 October 2016 that she regarded the Agency's letter as a 'notification about nothing.' The matter to that point was therefore being addressed.

X asserted to the senior Commission lawyer who interviewed him on 10 October 2016 that the Director had wanted the Agency to report alleged misconduct to the Commission, but that the Agency's Chief Executive and other senior officers did not want this to occur – an assertion strongly denied by the Agency during my investigation. There is no indication that, before the Commission's final assessment of the allegation against X, it investigated the truthfulness of his assertion and, as will be seen below, his assertion was false.

In any event, the disclosure by X of the confidential information within the Commission did not occur while he was employed by the Agency, or at the moment he commenced his employment with the Commission, but afterwards, in circumstances which he might have regarded as being beneficial to him in his new employment. As has been seen, when confronted by the allegation that his disclosure was improper, he did not assert that he was acting under s 25 of the Act, but instead (and 15 days later) expressed regret for what he had done.

#### *Representations made pursuant to s 200 of the Act*

In its representations to me under s 200 of the Act, the Agency provided the following relevant information and supporting materials:

1. It denied claims made that it had failed to abide by its obligations under the Act to report suspected misconduct to the Commission. It responded to the Commission's letter dated 4 October 2016 with a detailed letter dated 2 November 2016, but the Commission never formally replied to that letter.<sup>23</sup> As a consequence, the Agency does not know if the Commission's consideration of it is completed, or not;

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<sup>23</sup> On this point the Agency provided me with a copy of its letter dated 2 November 2016, a copy of which was not on the Commission's file provided to me during my investigation. The Commission subsequently explained to me that the letter was on a different Commission file relating to the matter, but in any event decided that it had no cause to investigate any of the matters detailed in the Agency's letter. The Commission never responded to the Agency's letter telling it of this decision.

2. It detailed the Agency's meetings between the Director of its Integrity Unit with the Chief Executive and other senior officers that dealt with the issues in the confidential document, and said that X was never present at any of these meetings, nor was he consulted about them. X therefore had no knowledge of the action the Agency intended to take to deal with those issues;
3. As a consequence of the above-mentioned points, the assertions made by X to the Commission about the Director wanting to disclose the information in the confidential document to the Commission, but that the Agency's Chief Executive and other senior officers did not want this to happen, was completely baseless and untrue;
4. The Agency's misconduct reporting procedures were reviewed by the Public Sector Commissioner in late 2016 and they were found to be in the top 12 agencies for best practice;
5. X never assisted the Director in his creation of the confidential document as X asserted, due to the high sensitivity and confidentiality of the document. Electronic proof of this fact can be provided, if necessary, and
6. X did not submit his Staff Exit Checklist to the Agency's human resources department. It was the Director who did so.

In its representations to me under s 200 of the Act the Commission agreed that X had committed an act of minor misconduct, but said that it would not discipline him for his conduct. It disagreed with my opinion that his conduct 'fell well short of the standards of openness, transparency and accountability expected of an officer of the Commission', and the Commission believes he remains a fit and proper person to be an officer of the Commission.

The Commission disagrees that its procedures used to assess the allegation against X undermined the effectiveness of a criminal investigation into his conduct. In support of its view it said that I am able to refer the allegation to the W.A. Police or the Director of Public Prosecutions for such an investigation to be conducted.

However, as I have said, the Commission made X privy to its assessment along the way, including the sharing of relevant information, and this contaminated any truly objective account from him of his motivations for his conduct. The Commission did not first obtain critical information from the Agency prior to putting the allegation to him in accordance with the *Criminal Investigation Act*, or before forming its conclusion that his conduct could not involve criminality.

The relevant aspects of X's representations to me under s 200 of the Act were:

1. The Agency's Integrity Unit did not provide him with a thumb drive for his work purposes, so he had to use his own privately-owned device to remove the confidential document from its electronic records;
2. He acknowledged that the Director of the Agency's Integrity Unit was the author of the confidential document, and that the document remains the



property of the Agency, but maintained that he was involved in some associated processes which contributed to its creation;

3. His email to the Director of the Agency's Integrity Unit on 25 October 2016, which Commissioner McKechnie QC had told him to write, did not refer to his taking of the confidential document without authorisation because the senior Commission lawyer told him not to make mention of it;
4. At the time of disclosing the confidential document to the senior Commission manager he was not aware of s 25 of the Act or the procedures to be used when reporting suspected misconduct in accordance with that section, but nevertheless believed that he was making a 'notification to the Commission' when he did so;
5. It is illogical to suggest that he should have spoken to the Director of the Agency's Integrity Unit to seek his authority to disclose the confidential document when he believed the Agency was attempting to conceal the information;
6. Despite being unfamiliar with the provisions of the Act at the time he disclosed the confidential information, he was familiar with the legal intricacies of s 220 of the Act and believed that the section offered him criminal and civil protection which might otherwise apply to his conduct;
7. He is astonished that my investigation has resulted in a determination of misconduct by him, and
8. The detail in my report is unfair to him because it may lead some people to identify him as the person who disclosed the confidential document without authorisation.

### *Conclusion*

The facts surrounding this allegation establish that X, while still an employee at the Integrity Unit of the Agency, downloaded a highly confidential and sensitive document written by its Director, onto his personal thumb-drive, without the Director's authority. It was not X's document to download.

X retained the document – and other documents whose number and nature are not known – without authority, and signed a declaration that falsely said he had surrendered all such documentation.

It was these acts which placed X in a position to use the information in the confidential document after his employment ceased, contrary to his on-going duty of confidentiality.

X's contract of employment and the Agency's policies prohibited him from taking a copy of the confidential document away with him, not that such policies should have been necessary to guide a sense of honesty and accountability that one would expect of someone in X's position.

It is disappointingly necessary to point this out, given the Commission's focus on the proposition that the effect of the contract and the policies did not protect the confidential document from the officer's use for unauthorised purposes.

The facts also establish that, shortly after X commenced his employment with the Commission, he disclosed the confidential document to the senior Commission manager. Nothing prevented him, before he did so, from contacting the Director to tell him that he had taken a copy of it, and that he intended to disclose it to the Commission – and why. He could then have sought formal authorisation to make the intended disclosure, but he did not do so. As I have said, I do not accept X's explanations of his conduct or his motivations for it.

The Commission did not react properly to the obvious potentiality of criminality evident on the face of the allegation. It should have treated the allegation as a criminal investigation from the outset. The matter was never complicated, and a statement from the Director of the Agency's Integrity Unit to test X's explanations would have made it even clearer. As time progressed, and the more X was co-operatively included in the Commission's assessment of the allegation, the opportunity for a proper criminal investigation of his conduct was lost.

The allegation from within the Commission came to me pursuant to s 196(4) of the Act. As I have said, there is no question of serious misconduct arising under s 4(a) or (b). The live question for the Commission was whether it should form an opinion upon its assessment that the disclosure of the information in question constituted the commission of the offence defined in s 81(2) of the *Criminal Code*. That would be an opinion that X's conduct in making the disclosure was serious misconduct within the meaning of s 4(c) of the Act.

To express that opinion would be to exercise the power contained in s 22(1) of the Act. As has often been observed, that is by no means the same as a finding of guilt of a criminal offence – a finding of criminal liability, from which punishment may follow. That remains the province of the courts if prosecution follows upon a referral of the matter to the Police or other appropriate authority which pursues the process of prosecution to secure a conviction. No criminal liability flows from the expression of an opinion by the Commission.

In my view, on the known facts, the opinion that the conduct contravened s 81(2) of the *Criminal Code* was a compelling conclusion upon the Commission's assessment.

There is no doubt that the information contained in the confidential document was 'official information' as defined in s 81(1) of the *Criminal Code*. The offence is committed when there is an unauthorised disclosure of such information without lawful authority.

There was 'disclosure' within the meaning of the definition in s 81(1) on 4 October 2016, by which time X was an officer of the Commission. But the disclosure was 'unauthorised' under s 81(1) because X was under a duty not to make the disclosure, and, also, he had been under such a duty during the period when he was a 'government contractor' in the employ of the Agency.

Finally, there is no doubt that, on the known facts, the unauthorised disclosure was made without lawful authority.

It is important, I think, that I make the point clear that s 220(2) of the Act, in my opinion, provides only limited assistance to X when it provides that, when *any* information 'has been given to the Commission, ... no civil or criminal liability, *other than liability under this Act*, (my emphasis) attaches to a person by reason that the ... information was given.'

The sub-section, apart from the deficiencies, as I see them, in the manner in which the Commission investigated the matter, may provide another reason why it would be inappropriate for the Commission to refer the case to an appropriate authority for further investigation and prosecution. Nothing could come of it by way of criminal liability, but the section preserves the liability under the Act to disciplinary action following upon the conclusion of serious misconduct flowing from the formation of an opinion in that regard by the Commission.

In respect of X's conduct as an officer of the Commission, to which my misconduct function under s 195(1)(b) of the Act extends, I am satisfied that on 4 October 2016 he committed an act of minor misconduct under s 4(d)(iii),(iv) and (vi) of the Act by disclosing confidential and sensitive information which was the property of the Agency without its authority.

I find that X's conduct was a breach of the trust placed in him to keep confidential that which he had no authority to possess or disclose, an act which involved the misuse of the information in question of such seriousness as to constitute a disciplinary offence providing reasonable grounds for the termination of his employment.

I am also satisfied that grounds exist for the Public Sector Commissioner to investigate X's unauthorised copying and taking of the confidential document, and other documents, which were the property of the Agency, from it without authorisation.

In making my determination I have considered the various representations made to me by the Agency, the Commission and X.

## **6. MY RECOMMENDATIONS**

I make the following recommendations to the Commission:

1. Determine if X should remain an officer of the Commission.
2. If X remains an officer of the Commission, ensure that he is appropriately disciplined for his conduct as an officer of the Commission described in my report, and such disciplinary action is, on implementation, to be reported to me.

3. Review its process for assessing an allegation made against an officer of the Commission whose alleged conduct may involve criminality to ensure that the allegation is immediately investigated pursuant to the *Criminal Investigation Act*.

I make the following recommendation to the Public Sector Commissioner:

1. Upon referral by me investigate the conduct of X at the Agency as described in my report to determine if such conduct constitutes misconduct under the Act and to deal with it accordingly as may then be appropriate.

  
**HON MICHAEL MURRAY AM QC**  
**PARLIAMENTARY INSPECTOR**