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Services



Peoplefirst

# Duty of Care

Legal Services

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# **Duty of Care**

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# Introduction

## Disclaimer

This paper is intended to provide a broad understanding of the law governing the duty of care owed by the Department and, in some cases, by agencies engaged by the Department. It contains statements of broad principle and should not be understood as providing a comprehensive analysis of the law. Legal advice in relation to particular cases should be sought from the Legal Services Branch.

## Duty of Care

The law of negligence affects the way the Department and agencies who deliver services on behalf of the Department go about providing services to various parts of the community. It sets minimum standards for the Department and those agencies in the way that they deliver these services. The Department staff may know of this concept as 'duty of care'.

Most of the Department's clients are vulnerable in some way because of their age, state of health, social circumstances or other factors. This vulnerability affects the care the Department must take to avoid being found legally liable for negligence.

The Department contracts with many agencies and community organisations to deliver many of its services. When these services are contracted out by the Department, the Department remains responsible for the services to clients.

The Department is not able to delegate its responsibilities in relation to statutory clients. These responsibilities give the Department a non-delegable duty of care. This is dealt with later in these guidelines.

The law of negligence does not create 'no-win' situations for anyone. Contrary to popular misunderstandings, it does not impose impossible burdens upon staff or require anyone to be perfect. Nor does it expect anyone to be clairvoyant.

The only 'burden' imposed on the Department and its agents by the law of negligence is the requirement to act reasonably. If it does not act reasonably and people are injured, the Department will be held accountable. It is in the interests of its clients, as well as consistent with its legal obligations, that the Department behaves reasonably in delivery of its services to avoid injury to those clients.

## Who this policy applies to

This policy applies to all the Department employees and all agencies which provide services for the Department, whether or not they work in direct contact with clients. Employees must comply with the law of negligence in all aspects of their work.

# Negligence

## Definitions

There are three parts to the definition of negligence and all three elements must be present in any situation for the Department to be considered negligent by a court:

1. Duty of care. The Department must owe a duty of care to a particular person.
2. Breach of duty of care. The Department must have done something a reasonable person would not have done in a particular situation or omitted to do something which a reasonable person would have done.
3. Injury. Some harm must have been caused to the person because of the Department 's unreasonable action.

A detailed explanation of the definition follows.

## Duty of Care

A duty of care is a duty to take reasonable care of a person.

The Department owes a duty of care to anyone who is reasonably likely to be affected by the Department's activities. These may be:

- Clients.
- The families and carers of clients (for example, where they are injured as a result of a psychiatric crisis team failing to respond in a reasonable time).
- Certain groups of people in the community (for example, people living near a youth training centre who could be affected if a dangerous client escaped).

Department staff must take reasonable care to avoid causing injury to each of these categories of people in the delivery of its services.

Duties of care can be owed by different levels of Department employees in any particular situation. Program directors, regional directors, local managers, supervisors, direct care employees and health professionals will all owe duties of care to the three groups of people listed.

A child in the care of the Department may be injured because:

- The protective worker did not properly supervise a family group home placement of the child.
- The employee's supervisor did not provide sufficient direction and guidance to the employee in supervising the placement, and/or
- The placement and support manager had received reports that the family group home parents were not meeting some of their responsibilities in looking after children generally, but had not taken any action to ensure that those concerns were addressed and that the level of care improved.

Each employee will be expected to do different things to ensure that their duty of care is not breached.

## **Breach of Duty of Care**

A duty of care is breached if a person behaves unreasonably.

Failure to act can also be unreasonable in a particular situation.

A duty of care can be breached either by action or inaction.

The reasonableness of what a person has done, or not done, is assessed by considering how a hypothetical reasonable person would have behaved in the same situation. If the person's job requires special skills or training, the hypothetical person will be assumed to have the same skills or training.

This means that a manager's actions will be measured against the actions of a reasonable manager, the actions of a protective worker will be judged according to those of a reasonable protective worker, the actions of a health professional will be judged according to those of a reasonable health professional and so forth.

Judging how reasonable a person's behaviour has been depends in part on the type of relationship between the two people. The closer the relationship between the Department and the person, or the more dependent the person is on the Department for their welfare, the more the Department will be required to do to ensure the person is not injured by its actions.

What is considered reasonable will depend on all the circumstances. What is reasonable in one situation will not necessarily be reasonable in another. There cannot be a complete set of ready-made answers to all the dilemmas and situations that could arise in any program area.

An important element in determining reasonable behaviour is the knowledge of the situation. The Department may have information about particular clients or premises. If that knowledge is authorised and available to the particular area of the Department it must be taken into account in considering what action to take. It is no defence to say the particular employee was unaware of Department information.

## **Injury**

The final part of the definition of negligence is that there must have been some harm caused.

The only kinds of harm recognised so far by the courts have been physical injury, nervous or emotional shock and financial loss. Unless a person suffers an injury of one of these kinds, there will not have been any negligence by the Department as far as the law is concerned.

The harm must be caused by the unreasonable actions of the Department for the Department to be liable for negligence.

# Reasonableness

## What Is Reasonable

While there are no predetermined answers to questions about whether or not an action is reasonable, there are a number of factors which must be considered each time an employee makes a decision. Staff must use their professional skills and experience to decide the weight to be given to each factor and to make a final decision about the most reasonable action in a particular situation.

The factors to consider are:

- The risks of harm and the likelihood of the risks occurring.
- The sorts of injuries that may occur, and how serious they are.
- Precautions which could be taken.
- The powers which Department employees have.
- The usefulness of the particular activity which involves risks.
- Any statutory requirements or specific directions from the Department.
- Current professional standards about the issue.
- Any other factors relevant to a particular situation must also be considered.

This list of factors must be used by Department staff to ensure reasonable decisions are made by the Department. No single factor can be relied upon by itself to justify acting in one way rather than another. All factors will need to be considered together to determine what is reasonable.

The fact that a client gives their consent or expresses a wish to do a particular thing does not justify the Department or an agency acting unreasonably to help the client perform that activity. The Department must act reasonably in the way it uses its powers and the consent of a client does not alter this.

## Risk of Harm

Staff are expected to take steps to avoid reasonably foreseeable risks of injury. No one will be found negligent for failing to prevent a completely far-fetched or improbable risk of harm to a client, but employees will need to assess the risks of particular activities sensibly.

If an appropriate health professional is considering whether to allow a psychiatric in-patient to have weekend leave, there is a risk that the person may suffer a deterioration in their condition over that time. The health professional will need to use his/her professional judgement to assess the likelihood of this happening.

However, there are other risks in the person having weekend leave. The person may be seriously injured while travelling on a bus which is involved in an accident. The health professional would not need to consider this risk in deciding whether it would be reasonable to grant leave, assuming the likelihood of such an accident is remote.

Before undertaking any activity with clients, staff must consider the risks of harm to clients and the likelihood of harm occurring. Staff will have to use their professional judgement in deciding these matters.

## Seriousness of Harm

The less serious the harm that could result from a particular activity, the more reasonable it may be to take the risk. Conversely, the more serious the harm (for example, serious injury or death), the less reasonable it may be to undertake the activity.

There is a risk of physical injury in playing netball. A player may be bumped, bruised or fall over during the game. These injuries are usually not serious and, after considering the other factors, it may be reasonable to allow clients to play. However, if the sport being considered was sky diving, the kinds of injury possible are much more serious and all the other factors would have to be considered to assess whether it was reasonable to take that risk.

The consequences of harm may also vary from person to person. For example, a client with asthma risks more serious harm than a non-asthmatic client by doing strenuous activities on 'smog-alert' days. A decision-maker will be taken to have constructive knowledge of any particular vulnerabilities known to the Department.

Staff must consider the seriousness of any potential harm to clients.

The more serious the harm which could result, the less likely it will be that the risk should be taken, depending on the other listed factors.

Staff must use their professional judgement in assessing the seriousness of injuries which could occur.

## Precautions

The availability of precautions must be considered. If the risks of harm from an activity can be reduced or eliminated by taking relatively simple precautions, then it will not be reasonable to proceed without taking those precautions.

If there are no feasible precautions that can be taken, then this must be considered, along with all the other factors, in deciding whether it is reasonable to go ahead. Employees must use their professional judgement to assess whether there are precautions which could be taken in any particular situation.

If an involuntary psychiatric in-patient who cannot swim wants to go to a swimming pool, there are a number of precautions that could be taken to ensure they do not drown. These include allowing the client to go in the water only if closely supervised at all times by at least one staff member, or requiring the client to wear a life jacket and also be supervised at all times.

The ultimate precaution, of course, is not to allow the client to go in the swimming pool.

Rather than deny the client this opportunity, it would be preferable to have staff closely supervise the client in the pool, or have the client wear a life jacket and be supervised by staff. However if neither of these less restrictive precautions is possible, the staff must take the next available precaution, that is, not allow the client to go in the water.

Staff must take all reasonable precautions which could avoid or reduce the risk of harm to clients.

Where there are a number of effective precautions which would reduce the risk of harm, staff must choose the option which is least restrictive to the client.

Again, staff will need to use their professional judgement to assess what precautions are available and which are the least restrictive.

The law of negligence does not require every and all precautions to be taken. If the cost of a precaution far outweighs the level of risk to be avoided, the law does not necessarily require the precaution to be taken. The law recognises that resources are scarce.

The cost of prevention of harm is an issue that a Court would take into account in considering whether or not there has been negligence.

Similarly if, for example, the Department was aware that a complaint had been lodged about some aspect of a residential support service which caused harm to a client and a second client was injured and the Department had taken no action on the initial complaint, the Department is likely to be found negligent.

## **Powers**

Precautions which can be taken may depend on the powers of the employee in any particular situation. The Department must do what is reasonable within its legal powers. The Department or its agents cannot be expected to do things it does not have the power to do. The law of negligence

does not give the Department (or anyone else) extra legal powers.

The Department's powers come from the Acts of Parliament it administers. Some of the major Acts are:

- *Adoption Act 1984*
- *Ambulance Services Act 1986*
- *Children and Young Persons Act 1989*
- *Community Services Act 1970*
- *Disability Services Act 1991*
- *Health Services Act 1988*
- *Health Act 1958*
- *Housing Act 1983*
- *Intellectually Disabled Persons' Services Act 1986*
- *Mental Health Act 1986*
- *Residential Tenancies Act 1997*
- *Sentencing Act 1991.*

Certain employees have very limited powers under these Acts to lock up or physically restrain clients to protect them from harm. More details about how these powers are used are contained in guidelines prepared by the relevant program areas.

All employees also have 'emergency' or 'rescue' powers enabling them to save a person from a dangerous situation. These powers allow an employee to prevent harm to someone by touching or even briefly physically restraining them without their consent. These 'rescue' powers are limited to emergencies.

Emergencies are sudden, unexpected and dangerous situations which do not happen often. If a particular, dangerous situation arises often, Department employees will be expected to take reasonable action to reduce the likelihood of the 'emergency' happening in future, as well as using their 'rescue' powers if it should happen again.

The limits on the Department's powers affect the precautions staff can take, or will be expected to take, to avoid injuries to clients and others. The law does not expect employees to do anything they do not have the power to do.

If an intellectually disabled woman lives at home and sleeps on the front lawn, the Department or an agency does not have the power to physically move her from the lawn. Of course, staff may discuss the issue with the woman and her parents or carers and encourage a change in behaviour to prevent harm to her. If that is not successful the Department or its agents have the power to notify the Office of the Public Advocate of any concern it has about the welfare of a person with an intellectual disability. The Department or its agency would need to act reasonably in deciding whether or not to do this.

Department staff must ensure they are aware of their powers and must act within those powers.

When exercising their powers the Department and its agents must act reasonably.

### **Purpose of the Activity**

If there is little benefit for a client from a particular activity and it involves real risks of serious harm to the client, then it would not be reasonable to proceed with the activity.

However, if there is a real benefit to be gained from doing something and the risks of serious harm are relatively small, then it

may be reasonable to take those risks with proper precautions.

There are minor risks of cuts or burns involved in learning to prepare meals, but with proper training and supervision, the risks may be worth taking. There are risks in some clients living in community housing rather than in institutions, but as long as appropriate precautions are taken, the risks may be worth taking.

Staff must consider the purpose of any activity which may cause harm to a client.

The fact that an activity is useful will not by itself justify putting a client at risk of harm. If an activity carries a high risk of serious harm and there are no effective precautions available, then the activity must not be undertaken.

However, where the risks of an activity are not high, the types of possible injury not serious, or there are effective precautions which could be taken, the purpose of the activity may be relevant in deciding that the activity is reasonable.

Staff must use their professional judgement to assess the purpose or usefulness of an activity.

### **Statutory Requirements**

If there are statutory requirements or specific directions from the Department about any particular matter, employees must comply with them. For example, section 44(5) of the Intellectually Disabled Persons' Services Act requires the supply of bedding

and clothing, food and drink, and provision of toilet facilities when a client is kept in seclusion. If these requirements are not met and a client suffers injuries because of this, it would be very hard to argue that the Department or its agent has behaved reasonably.

However, compliance with any statutory requirements or directions will not necessarily be the end of the matter. It may be reasonable to do more. A person may do all that is set out in an Act or Regulation or direction from the Department and still not have done as much as the reasonable person would have done.

It may be reasonable to provide a client being kept in seclusion under section 44(5) of the Act with more than the goods listed in the Act. The client may be known by staff to need regular medication. In that case, a reasonable employee would ensure that the client was able to take medication at the relevant times, even though section 44(5) of the Act does not require this.

Statutory requirements and directions from the Department must be followed by staff. If additional action in a particular situation would be reasonable, such action must also be taken.

It is up to Department employees to decide whether it is reasonable to do more than is required in guidelines or by statute. This decision must be made on the basis of employees' professional training and skills.

## **Professional Standards**

The prevailing standards of the relevant profession will also be taken into account in deciding whether a person has behaved in a reasonable manner, as long as those standards are themselves reasonable.

However, compliance with reasonable professional standards will not necessarily be all that is required in an individual case. The facts should be examined to determine whether, in that particular situation, it would have been reasonable for a person to do more than, or other than, comply with the standards.

Staff must comply with current professional standards and practices, where those standards and practices are themselves reasonable.

Staff must also consider whether, in a particular situation, it would be reasonable to do more than the standards or practices require.

This decision must be made by the employee and supervisor on the basis of their professional skills and experience.

It is Department policy that professional standards or practices will not be considered to be reasonable if they expose a client to a real risk of serious harm and there are no effective precautions which can be taken to reduce the risk of injury.

This means that if there is a real risk that a client will suffer serious harm, and there are no reasonable and effective precautions possible, then the activity must not be undertaken.

# Summary of Negligence

## Guidelines

There is no neat, convenient solution to all the issues raised by the Department's duty of care to its clients and others. The simplest guide is that as long as employees behave reasonably, the Department will not be found to have acted negligently. Similarly, as long as the Department has appropriate systems in place to assure itself that agencies also act reasonably in work with clients, the Department will not be found to have acted negligently.

One of the best ways to ensure that reason guides the Department's actions is to develop guidelines and case practice standards for services. The more thought, preparation and planning that has gone into something, the easier it will be to show that what was done was reasonable. This applies to planning for one-off foreseeable risks, such as taking clients on an unusual outing, as well as for the normal running of programs and services.

An increased awareness and greater discussion of the issues will also better equip staff to deal with incidents as they arise and make reasonable on-the-spot decisions about what to do in individual situations.

Guidelines and procedures should be developed for all relevant aspects of Department services. These guidelines should be prepared whether or not incidents have already occurred. The documents should cover the factors listed in this policy (where they can be anticipated), particularly the risk of harm to clients and others, precautions that can be taken, the purpose and benefits of the activities and relevant legislation or directions from the Department.

The guidelines should require that written records are kept of any decisions made which could lead to injuries to clients or others, together with the factors taken into account in making those decisions. It is not necessary to write down every decision made by every staff member. Common sense should dictate those that should be recorded for possible discussion or review at a later stage.

## Conclusion

Department staff must take reasonable care to avoid causing injury to:

- Clients
- Families and carers of clients
- Any other person who is likely to be affected by the Department's actions.

When making decisions about the reasonableness of any action, the following factors must be taken into account:

- The risks of harm and the likelihood of the risks occurring.
- The sorts of injuries that may occur, and how serious they are.
- Precautions which could be taken.
- The powers which Department employees have.
- The usefulness of the particular activity which involves risks.
- Any statutory requirements or specific directions from the Department.
- Current professional standards about the issue.

Any other factor which is relevant in a particular situation must also be taken into account.

The factors all need to be considered together to determine what is reasonable. No single factor can be relied upon by

itself to justify acting in one way rather than another.

Department staff must use their professional skills and experience to make decisions about the weight to be given to each of the factors listed above. This professional judgement must also be used to make a final decision about the most reasonable action in a particular situation.

The fact that a client gives their consent or expresses a wish to do a particular thing does not justify the Department acting unreasonably to help the client perform that activity. The Department must act reasonably in the way it uses its powers and the consent of a client does not alter this.

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The guidelines should require that written records are kept of any decisions made which could lead to injuries to clients or others, together with the factors taken into account in making those decisions.

# Non-Delegable Duty

## Introduction

We have considered the Department's direct duty of care a breach of which causes negligence. The Department also has what can be understood as an indirect duty of care. That indirect duty of care is known as a non-delegable duty.

## Delegating activities or duties

There is an old saying that "you cannot give away what you don't have," and this is true. But it could also be said quite correctly that just because you have something doesn't mean you can give it away. It may be considered so personal, for whatever reason, that it ought properly remain with you.

This is what the concept of non-delegable duty is all about. Sometimes the law says a duty cannot be delegated. As such it will stay with the original person or body. This is true even though the original person tries to delegate it to someone else.

This will not prevent the original person getting someone else to perform the duty (for example, by contracting out the work), but if something goes wrong the responsibility will stay with the original person or body.

The court has explained it in these terms:

*"Where one person becomes liable to perform, or undertakes the performance of a duty to another, it is quite immaterial (as between himself and that other) whether he performs the duty himself or employs an agent, or an independent contractor to perform it. The liability (whatever it may be) for the proper performance of the duty adheres to the person who undertook it; he cannot get rid of it."*

The original person is not vicariously liable for the contractor's negligence. Rather, the

original person is responsible for not fulfilling his own duty. The obligation is only fulfilled by exercising the duty properly (for example, using due care and skill). It is not fulfilled by entrusting its fulfilment to someone else.

## Special Relationships

This concept has been applied to specific relationships. It applies, for example, to the relationship between employer and employee, school authority and pupil, hospital and patient, and welfare authority and ward. The essential features to look out for are control and responsibility on the one side and, from the perspective of the person to whom the duty is owed, special dependence or vulnerability on the other.

Employers and government agencies (acting as employer, provider and /or purchaser of services) need to ensure that people are not put at risk from the conduct of their undertaking. This means that the Department must ensure so far as practicable that the way in which it conducts its operations does not put any person (sub-contractors and members of the public included) to a risk to their health and safety.

An example of this general duty of care was the prosecution of a local council following an incident involving injuries to students from the collapse of a wall at an indoor swimming centre. The failure of the council to ensure the proper conduct of work by a series of contractors, and to ensure the safety of the outcome of those works, represented a breach of the duty of care owed by it to the members of the public attending the centre.

Another example of this duty is the fire at Kew Residential Services. Such was the relationship between the State and the residents, hence the duty owed by the State, that the duty was found to be non-delegable. It was one of those categories of cases in which a duty to take all reasonable care could not be discharged merely by engaging qualified and ostensibly competent independent contractors. There was a relationship of proximity which gave rise to a duty of a special and more “stringent” kind, namely a “duty to ensure that reasonable care is taken”.

Arguably, the same duty of care would apply to a myriad of situations where a council, or agency, contracted out some service or task which impacted on members of the public, either directly or indirectly, and the performance of which was negligent. It may be services to the disabled, the elderly, or the young, for example.

### **Funded agencies**

Such a relationship does not necessarily shift full responsibility to the external agency paid to deliver those services.

The Department’s reliance on funded external agencies to provide services to clients and others means the concept of non-delegable duty is of particular importance.

It becomes necessary here to work out who has the personal relationship with whom, the original provider or the person contracted to provide the service to whom effective control seems to have passed.

Relationship is important. Relationship determines what is and is not “personal”, and what can and cannot be delegated.

If there is no special relationship then a duty can be discharged by a competent contractor engaged in the non-negligent performance of a task. If there is a special relationship then the duty cannot be discharged by getting a contractor, however competent, to do it.

The basic question is whether a personal (a non-delegable) duty is imposed because of a certain relationship. Apart from the well established relationships already mentioned, it is not easy to determine whether a personal duty exists or not.

The legal principle is that:

*“a special duty arises because the person on whom it is imposed has undertaken the care, supervision or control of the person or property of another or is so placed in relation to that person or his property as to assume a particular responsibility for his or its safety, in circumstances where the person affected might reasonably expect that due care will be exercised”*

A rented house had faulty wiring. The landlord engaged a qualified electrician to fix it. He did not do the job properly and the tenants' child suffered serious brain damage from electrocution. Was the landlord liable for the injury to the child? Was there a non-delegable duty?

The difficulty of applying the legal principle to particular facts was illustrated by the 1997 High Court decision in *Northern Sandblasting v Harris*. In the case two judges said a non-delegable duty applied and was breached. Two others said there was direct negligence. Three others found the landlord not to be liable for the injury.

# Liability of Department Staff

## Department acts through employees

The Department acts through its employees. When we speak of the Department's negligence we are in fact speaking of the negligence of an employee or an agency for whose actions the Department is responsible.

In most cases it is the Department, the Secretary or the State that is sued. But what if an employee is also named in the action?

What then is the situation of the individual employee whose actions/inactions are said to be negligent?

## Vicarious liability

An employer is vicariously liable for its employees' acts "in the course of employment". Precisely where the limits of "the course of employment" lie is difficult to determine.

A CRU worker is driving a Department vehicle and runs over a child. Consider the following three scenarios.

- It was customary for such employees to drive vehicles to transport clients.
- The employee was going home for lunch.
- The employee had given a hitch-hiker a lift, in breach of clear policy, and not been concentrating.

Was there negligence and if so was the Department liable?

Generally speaking where an employee is negligent "in the course of employment" the interests of the employee and the Department will coincide and the Department will defend the action in terms of its vicarious liability. In such a case one would not expect the employee to need to be separately legally represented.

Where an employee is negligent but has stepped outside of "the course of employment" the employee may bear sole responsibility for the negligent action. In such a case, the employee would be well advised to arrange separate legal representation.

A child is removed from its natural parents by the Department and placed in foster care. The natural parents are known to be violent and unstable. The natural parents apply under FOI for the child's file. Documents are wrongly released which disclose the name and address of the foster parents. The natural parents start harassing the foster parents causing them to have to move house and causing psychological harm.

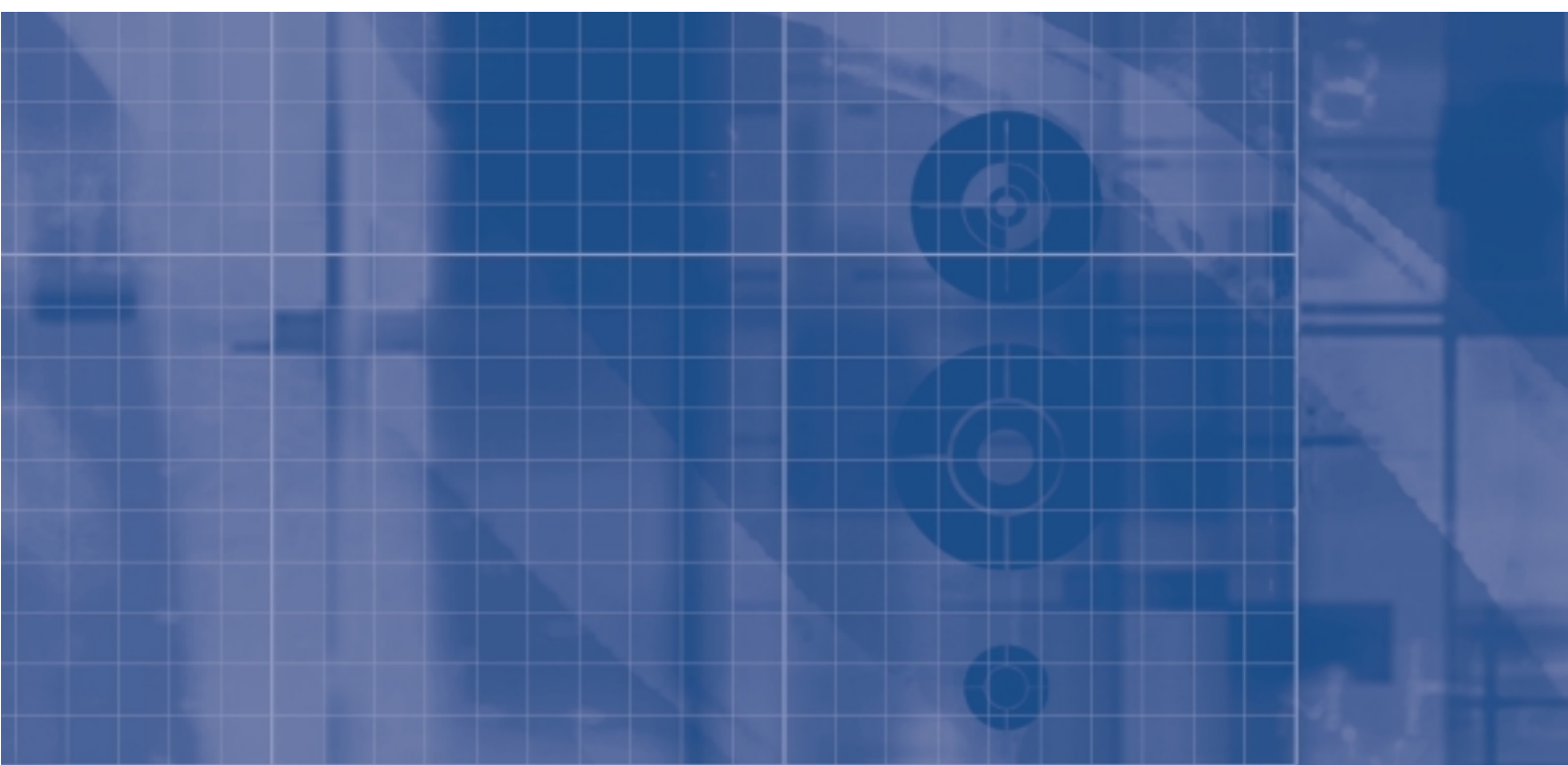
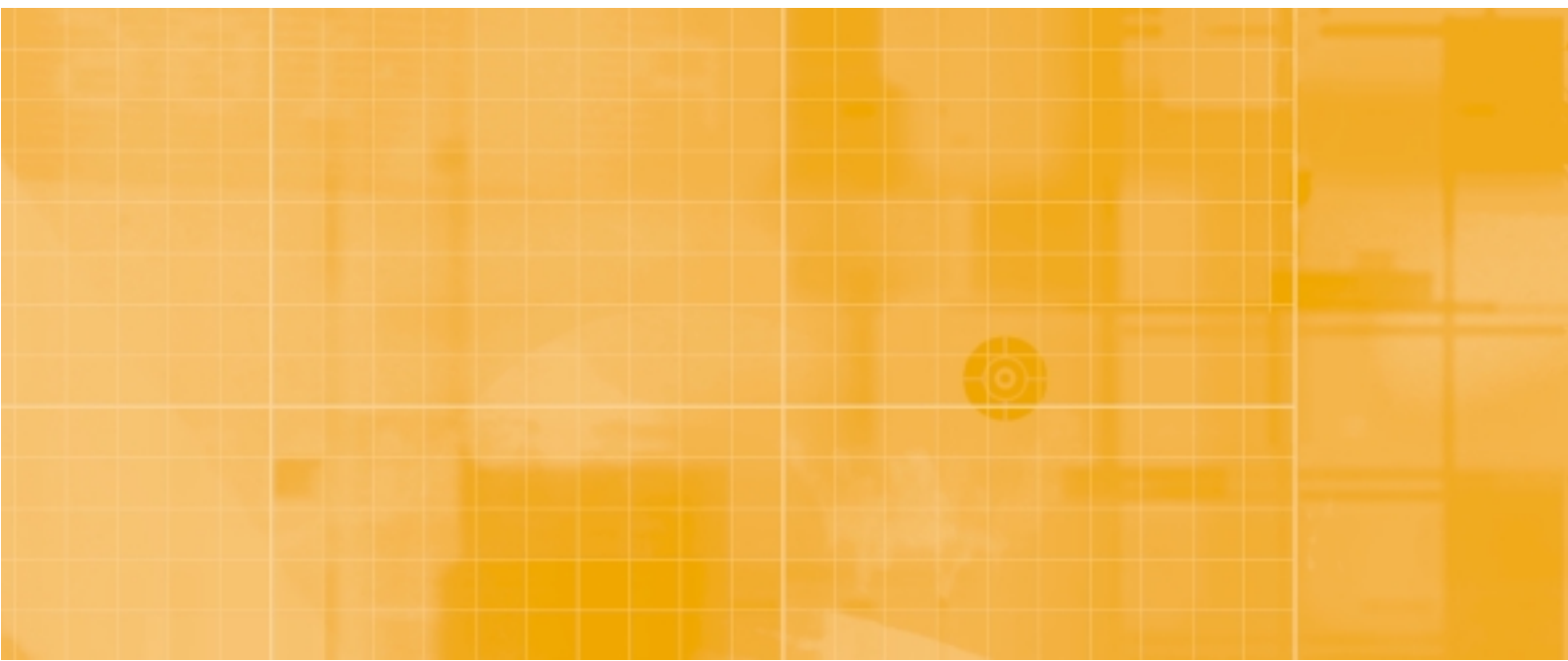
Although the FOI officer was negligent, breaching the FOI restriction on disclosure of personal information, the action was still within "the course of employment". It was the very thing the FOI officer was employed to do, an error of judgment did not change that.

In such a case as the one above while the Department is liable in negligence for the officer's actions, rather than the officer personally, the officer may be subject to discipline proceedings on grounds of incompetence.

### **Parties and Witnesses**

In terms of the liability of Department staff it is important to understand the difference between a party to a claim of negligence and a witness. The parties are the persons making the claim (the plaintiff/applicant) and the person against whom the claim is made (the defendant/respondent). A witness is incidental to the claim itself. A witness cannot be liable to pay damages if the claim is proved.

Where a claim is made against the Department, a staff member may be required to give evidence. As the staff member is generally not at risk in such situations, legal representation is not generally required. A witness is required to give evidence to the court or tribunal and, as a general rule, must answer questions and answer truthfully. A lawyer for a witness cannot interfere with this process unless there are grounds for objecting to answers on the ground of privilege, such as the privilege against self-incrimination.



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