

AUSTRALIAN COMMISSION FOR LAW ENFORCEMENT INTEGRITY

INFORMATION GUIDELINES

SUMMARY

1. ACLEI obtains information for corruption investigations from a wide range of sources, including coercive hearings and notices to produce and a range of warrants.
2. This information (ACLEI information) is protected against disclosure by a general confidentiality obligation under section 207 of the *Law Enforcement Integrity Commissioner Act 2006* (the LEIC Act).
3. Disclosure of ACLEI information may be additionally restricted by a non-publication direction made by the Integrity Commissioner under section 90 of the LEIC Act, a certificate issued by the Attorney-General under section 149 of the LEIC Act or by the secrecy requirements of another Act under which the Integrity Commissioner obtained the information.
4. As an exception to the general confidentiality obligation, disclosure of ACLEI information is permitted in a communication made for the purposes of a corruption investigation or otherwise for the purposes of the LEIC Act, eg sharing information with other investigating agencies, reporting the progress and outcome of the investigation to interested parties, giving evidence to courts or prosecuting authorities.
5. The Integrity Commissioner also has a discretion to disclose ACLEI information to a government agency to whose functions it is relevant, to a person to protect life or safety, or to the public where it is in the public interest to do so.
6. The LEIC Act requires the Integrity Commissioner to consider natural justice and the sensitivity of the information before making a public interest disclosure. The Integrity Commissioner will consider applications for public interest disclosure by individuals who wish to use the information in criminal appeals or to seek review of a conviction. Applicants should clearly indicate what information they seek and its significance for their case, but the Integrity Commissioner will need to take other relevant considerations into account.
7. Disclosure of ACLEI information may be required by another law, such as the *Freedom of Information Act 1982*, although much of the material or information that ACLEI holds would be exempt under that Act.
8. ACLEI staff members are only compellable to give ACLEI information in evidence in court proceedings that have an ACLEI link. If the Integrity Commissioner has issued a non-publication direction for evidence given in a hearing before him or her, a court may require the Integrity Commissioner to disclose the evidence to the court, so that it can consider whether it should be disclosed to an accused or their legal representatives in the interests of justice.

1. Sources of ACLEI information

1.1 ACLEI obtains information for the purposes of corruption investigations in a variety of ways, including:

- voluntary statements;
- provision of information by an agency under sections 20, 21, 32, 46 of the LEIC Act;
- submissions made to the Integrity Commissioner under section 51 of the LEIC Act;
- information, documents and things provided in response to a request (notice to produce) issued under section 75 or 76 of the LEIC Act; and
- evidence given at a hearing under Part 9 Division 2 of the LEIC Act;
- copying or taking extracts from documents, or seizing things, found at law enforcement premises under section 105;
- seizing things under a search warrant under Part 9 Division 4 of the LEIC Act or under any other applicable law;
- intercepting telecommunications or accessing stored data under warrants issued under the *Telecommunications (Interception and Access) Act 1979* (the TIA Act);
- using surveillance devices in accordance with the *Surveillance Devices Act 2004* (the SD Act);
- accessing AUSTRAC information under the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (the AML/CTF Act); and
- receiving information disclosed by the Commissioner of Taxation under section 3E of the *Taxation Administration Act 1953* (the TA Act).

2. The general obligation of confidentiality

2.1 Part 13 Division 5 of the LEIC Act strictly controls the disclosure of information acquired by ACLEI under the provisions, or for the purposes, of the Act. Under section 207 of the LEIC Act it is an offence for a current or former staff member of ACLEI to record, divulge or communicate any such information that the person acquired because of being, or in the course of carrying out duties as, a staff member of ACLEI, unless the act falls within a specified exception. This obligation applies irrespective of whether the information is or would be confidential in any other circumstance.

3. Specific directions restricting or prohibiting disclosure

Non-publication directions by the Integrity Commissioner

3.1 Under section 90 of the LEIC Act, the Integrity Commissioner may direct that evidence given at a hearing, information about a document or thing produced at a hearing, or information about the identity of a witness, must not be published, or may only be published in a specified way or to specified persons. The direction binds the

witness, the witness's legal representative, ACLEI staff members and anyone else present at the hearing or to whom the evidence is lawfully disclosed according to its terms. The penalty for a breach of the direction is up to 12 months imprisonment.

3.2 The Integrity Commissioner has a discretion to give such a direction in any case where it appears appropriate, but must give a direction in relation to a closed hearing if failure to do so might prejudice the safety or reputation of a person, or the fair trial of a person who has been, or may be, charged with an offence, or might lead to the publication of information for which the Attorney-General has issued a certificate under section 149. The Integrity Commissioner must not vary or revoke a direction if to do so would have any of these consequences.

Section 149 certificates issued by the Attorney-General

3.3 Under section 149 of the LEIC Act, the Attorney-General may issue a certificate in relation to information about a specified matter or the contents of a document on the grounds that disclosure of the information would be contrary to the public interest for any of a range of reasons listed in subsection 149(2). The certificate is directed to the Integrity Commissioner and the agency or person that has possession of the information or document. The certificate must specify the type of disclosure that would be contrary to the public interest: disclosure to the Integrity Commissioner, or to any other officer or agency, may or may not be permitted. Disclosure to the public will invariably be prohibited.

3.4 Any obligation that the Integrity Commissioner or any other person has to disclose information or a document to another person may be overridden by a section 149 certificate that prohibits such a disclosure. However, the certificate does not of itself provide grounds for refusal to disclose information or a document to a court. A person required to give such evidence by subpoena or in court would need to seek relief from the requirement on the basis of public interest immunity.

4. Permitted disclosures

Communications for the purposes of the LEIC Act

4.1 The main exception to the general obligation of confidentiality is acts done for the purposes of a corruption investigation or for purposes otherwise connected with the exercise of the powers, or the performance of the functions, of the Integrity Commissioner under the LEIC Act¹.

4.2 This exception expressly includes communications by the Integrity Commissioner that are required or permitted by a provision of the LEIC Act.² Examples would include:

- advising interested parties (the Minister, the person who referred the corruption issue to the Integrity Commissioner, the head of the law

¹ Subsections 208(1) and (2), LEIC Act.

² Subsection 208(2), LEIC Act.

enforcement agency to which the corruption issue relates and, where a secondee is involved, the heads of the relevant home agency and any relevant integrity agency, the law enforcement agency staff member to whom the issue relates) of the Integrity Commissioner's decision about how to deal with a corruption issue;³

- where the Integrity Commissioner decides that a law enforcement agency should investigate, or continue to investigate, a corruption issue—giving the head of the law enforcement agency any information or documents the Integrity Commissioner may have that the agency head does not;⁴
- sharing information with another agency for the purposes of a joint investigation;⁵
- keeping the person who referred a corruption issue to the Integrity Commissioner, and the home agency of a secondee and any relevant integrity agency, informed of progress during the investigation;⁶
- including information obtained during a corruption investigation in a report or supplementary report to the Minister and copying the report to the head of a law enforcement agency, the home agency of a secondee and any relevant integrity agency;⁷
- advising the person who referred the corruption issue to the Integrity Commissioner, and the person whose conduct was investigated, of the outcome of the investigation;⁸
- giving a Judge or other issuing officer information in support of an application for an order for a witness to surrender their passport⁹, a warrant for the arrest of an absconding witness¹⁰, a search warrant¹¹ or a warrant for the arrest of a person suspected of committing an offence to which a corruption investigation relates;¹²
- giving evidence of an offence, civil penalty contravention, liability to confiscation of criminal proceeds, breach of duty, misconduct or wrongful conviction to an appropriate authority;¹³ and
- by implication, disclosing information to a person with a view to eliciting a response in the course of a hearing or other inquiries for the purposes of a corruption investigation.

³ Sections 33 to 37 and 39 to 41, LEIC Act. At this point, the Integrity Commissioner would not normally hold any information or documents that had been acquired by the exercise of coercive powers, although exceptional cases may occur where one investigation was being initiated on the basis of information acquired in the course of another investigation.

⁴ Section 44, LEIC Act.

⁵ Section 50, LEIC Act.

⁶ Sections 52 and 53, LEIC Act.

⁷ Section 55, LEIC Act.

⁸ Sections 58 and 59, LEIC Act.

⁹ Section 97, LEIC Act.

¹⁰ Section 99, LEIC Act.

¹¹ Section 108, LEIC Act.

¹² Section 139, LEIC Act and section 3E, *Crimes Act 1914*.

¹³ Sections 142 to 147, LEIC Act.

Discretionary disclosures for other purposes

4.3 Other permitted disclosures include the following actions by the Integrity Commissioner:

- giving information to the head of an agency if the Integrity Commissioner were satisfied that it is appropriate to do so, having regard to the functions of the agency, and that the agency is subject to a confidentiality provision corresponding to section 207;¹⁴
- disclosing information to a person if the Integrity Commissioner is satisfied that it is necessary to do so to protect the person's life or safety;¹⁵ and
- if the Integrity Commissioner were satisfied it is in the public interest to do so—disclosing to the public, or a section of the public, information about the performance of functions, or the exercise of powers, of the Integrity Commissioner or about a corruption investigation or public inquiry under the Act.¹⁶

4.4 A discretionary disclosure cannot be made if:

- it would be contrary to a direction that was given by the Integrity Commissioner under section 90 of the LEIC Act (unless the Integrity Commissioner varies or revokes the direction so as to permit the disclosure—a direction must not be varied or revoked if to do so might prejudice the safety or reputation of a person, or the fair trial of a person who has been, or may be, charged with an offence); or
- it would contravene the terms of a section 149 certificate;¹⁷ or
- if the information were obtained in accordance with a 'law enforcement secrecy provision',¹⁸—it would contravene a law that governs the onward disclosure of the information.

Compulsory disclosures

4.5 ACLEI staff members (including former staff members) may be compelled to disclose information in the following circumstances:

- making a disclosure required under another Commonwealth law;¹⁹ and
- when compelled to disclose information or produce a document by a court or tribunal, other than in circumstances where the LEIC Act provides that current and former ACLEI staff members are not compellable.²⁰

4.6 In addition, under the LEIC Act, the Integrity Commissioner may be compelled to make available to a court evidence that was given at a hearing and is subject to a non-publication direction issued by the Integrity Commissioner.²¹

¹⁴ Subsections 208(3) and (4), LEIC Act.

¹⁵ Subsection 208(6), LEIC Act.

¹⁶ Subsection 209(1), LEIC Act.

¹⁷ Subsections 208(7) and 209(3), LEIC Act.

¹⁸ As defined in subsection 5(1), LEIC Act.

¹⁹ Subsection 208(5), LEIC Act.

²⁰ Section 211, LEIC Act sets out the exceptions to compellability.

5. Discretionary disclosure in the public interest

General principles

5.1 The Integrity Commissioner may disclose information about specified topics covering most of his or her official activities, either to the public at large or to a section of the public, if satisfied that it is in the public interest to do so.²² This discretion is subject to the right of a person who, or agency which, would be criticised by the information to an opportunity to be heard before the criticism is published, and to any section 149 certificate which may prohibit disclosure of particular information.²³

5.2 If the information in question includes sensitive information, a term which is defined by the LEIC Act, the Integrity Commissioner must, in deciding whether to disclose, seek to balance appropriately the public interest in disclosure of that information against the potential prejudicial consequences of the disclosure.²⁴

5.3 Once information has been disclosed to the public or a section of the public, there is no restriction on its onward disclosure. Accordingly, all public interest disclosures are in effect disclosures to the public at large even if they are initially directed to a particular class of persons.

5.4 If the disclosure of the existence or non-existence of a document or information would itself be contrary to the public interest, the Integrity Commissioner will neither confirm nor deny the existence of the document or information.

Applications for exercise of the discretion

5.5 This discretion would normally be exercised by the Integrity Commissioner on his or her own motion. However, there may be occasions when an individual believes it would be both in their personal interests and in the public interest for particular information to be published; for example, for the purposes of:

- a petition for review of a conviction; or
- casting doubt on the credibility of evidence given in a criminal prosecution, either during the prosecution or on appeal.

In such cases, the Integrity Commissioner will consider an application for publication of specified information.

²¹ Subsections 90(4) and (5), LEIC Act.

²² Subsection 209(1), LEIC Act.

²³ Subsection 209(2) and (3) and section 210, LEIC Act.

²⁴ Subsection 209(4), LEIC Act.

5.6 An applicant should bear in mind that:

- there must be a positive identification of a public interest in publication—it is not enough merely to demonstrate that no public interest requires the information to be kept secret;
- identifying the public interest involves a discretionary value judgment made on the basis of undefined factual matters, the ambit of the discretion being confined only in so far as the subject matter, scope and purpose of the enabling legislation might enable;²⁵
- public interest entails more than purely private interests;²⁶
- once a public interest capable of justifying the disclosure of information is identified, it must still be considered whether any public interest militating against disclosure exists and, if so, to determine where the balance of competing interests lies;²⁷ and
- where information held by ACLEI is sought in good faith for the purposes of proceedings before a court or tribunal, there will exist a public interest in the information being available for the due administration of justice.²⁸

5.7 The following matters should be addressed in any application:

- the materials, publication of which is sought, identified as specifically as possible;
- the precise purpose for which the materials are sought, eg to support a particular argument or assertion in a specific legal action (in which case copies of the key documents setting out the issues in the case should be attached); and
- the reasons why it is contended that publication of the materials is in the public interest (for example, a genuine requirement to support a legal action or defence will commonly establish a public interest in favour of publication).

Any imprecision that suggests the application is a mere fishing expedition will militate against publication.

5.8 The Integrity Commissioner will need to take account not only of the material set out in the application but also of other information available to the Integrity Commissioner (for example, confidential information held by ACLEI) that indicates a public interest in the publication or the continuing confidentiality of the materials in question. If there were competing public interests pointing in different directions, the Integrity Commissioner will need to balance these, making a value judgment as to which aspect of the public interest is the most important in the circumstances. For example, it may be necessary to consider the probative value of the material as evidence in relation to, on the one hand, an ongoing corruption investigation or pending prosecution arising from such an investigation and, on the other, in a prosecution of the applicant, and the centrality of the issues to which it relates in either case.

²⁵ *O'Sullivan v Farrer* (1989) 168 CLR 210 at 216.

²⁶ *Sinclair v Maryborough Mining Warden* (1975) 132 CLR 473 at 480 per Barwick CJ.

²⁷ *Re Queensland Electricity Commission; Ex parte Electrical Trades Union of Australia* (1987) 72 ALR 1 per Mason CJ, Wilson and Dawson JJ. The balancing process will often be subject to the requirements of subsection 209(4), LEIC Act.

²⁸ Eg. *Alister & Ors v The Queen* (1983-1984) 154 CLR 404.

Special issues—alleged wrongful conviction

5.9 A person may apply to the Integrity Commissioner for disclosure of information in relation to a petition, or proposed petition, for exercise of the Royal prerogative of mercy on the grounds that a person was wrongly convicted of an offence. In that case the Integrity Commissioner will generally not grant disclosure unless the application:

- sets out objectively tenable reasons why there is a doubt or question whether the convicted person is guilty of the offence of which he or she was convicted, or
- seeks disclosure of information held by ACLEI that would in itself, or together with other matter set out in the application, demonstrate the existence of such reasons.

Special issues—criminal trial and appeal

5.10 A person may apply to the Integrity Commissioner for disclosure of information in relation to a criminal trial, or an appeal, in which the defence wishes to raise the possibility that the credibility of prosecution evidence may be affected by police misconduct. In such cases the Integrity Commissioner must weigh the strength and proximity of the connection between the information held by ACLEI and the particular allegations of police misconduct being raised in the relevant trial or appeal against any competing considerations of public interest that militate against disclosure. If the Integrity Commissioner concludes that the information or document should be disclosed, it will be disclosed to all parties to the proceedings simultaneously and without restriction on onward publication.

6. Disclosures required by another law

6.1 In principle, disclosure of a document held by ACLEI may be required by the *Freedom of Information Act 1982* (the FOI Act), if a person requests access to the document. In practice, the bulk of ACLEI documents are likely to be exempt documents under section 37 (documents affecting enforcement of law and protection of public safety) or other provisions of the FOI Act. Under section 14 of the FOI Act, it remains open to the Integrity Commissioner to disclose exempt documents otherwise than under the FOI Act, for example in the exercise of the discretion to disclose in the public interest.

6.2 If disclosure were required by the FOI Act, there is no restriction on the onward disclosure of the document, so such disclosure is tantamount to publication.

7. Compulsory disclosures to courts

Restricted compellability of ACLEI staff members as witnesses

7.1 The general obligation of confidentiality is supported by section 211, which provides that a current or former ACLEI staff member cannot be compelled, in any proceeding before a court or other body with the power to require answers to questions or the production of documents, to disclose information or a document obtained under the LEIC Act or because the person was an ACLEI staff member.²⁹

7.2 However, there is an exception to this rule in the case of:

- a proceeding brought to give effect to a provision of the LEIC Act;
- a prosecution, civil penalty proceeding or confiscation proceeding brought as a result of an investigation conducted, managed or overseen, or a public inquiry conducted, under the LEIC Act, or
- a proceeding to which the Integrity Commissioner or a person acting on his behalf is a party.³⁰

7.3 As a consequence of section 211 of the LEIC Act, a subpoena issued against a current or former ACLEI staff member in proceedings that do not fall within the exceptions to that section would be without effect. Accordingly, legal practitioners should exercise care, when causing subpoenas to be issued against the Integrity Commissioner and ACLEI, to ensure that such subpoenas do not go beyond the bounds set by section 211. If a subpoena that exceeds these bounds were issued, the Integrity Commissioner will, unless the subpoena is promptly withdrawn, move the court to have it set aside and, in an appropriate case, will seek costs.

7.4 In the case of an accused person in a prosecution that is not covered by the exceptions to section 211, an alternative procedure to compel provision of evidence by ACLEI may be available under subsection 90(4) (see paragraphs 7.8 and 7.9 below), but generally the approach described in the following paragraph will be the most convenient means of obtaining such evidence.

7.5 The Integrity Commissioner considers that section 211 would not preclude an ACLEI staff member from voluntarily giving testimony or producing documents in proceedings to which that section applies³¹. In such cases, the Integrity Commissioner will give consideration to a written request by a party to the proceedings, setting out the details of the testimony or documents that are sought and the reasons why the request should be granted. The Integrity Commissioner will take into account the interests of justice in the case, together with any competing interests (including any immunities, privileges or other grounds for objection that would apply if the matter were amenable to a subpoena) or legal obligations of ACLEI.

7.6 In cases where current and former ACLEI staff members are compellable under section 211, the Integrity Commissioner retains the right to object to a subpoena

²⁹ Subsections 211(1) and (2), LEIC Act.

³⁰ Subsection 211(3), LEIC Act.

³¹ *Canadian Tobacco Co v Stapleton* (1952) 86 CLR 1, 7, 10–11.

on all grounds that would normally be available. For example, the Integrity Commissioner will not comply, or accept that another staff member should comply, without objection if the Integrity Commissioner considers there is no legitimate forensic purpose for a requirement in a subpoena or that compliance would be contrary to the public interest.

7.7 The Integrity Commissioner is not authorised to initiate prosecutions, civil penalty proceedings or confiscation proceedings. Whether such proceedings are ‘brought as a result of’ a corruption investigation or public inquiry under the LEIC Act is a matter for commonsense judgment and will often be readily apparent. In cases of doubt, the Integrity Commissioner will form a view taking account the following guiding principles:

- a proceeding will have been brought as a result of a corruption investigation or a public inquiry, if an essential element of the case to be established depends upon evidence gathered during the course of a corruption investigation or a public inquiry under the LEIC Act, such that *prima facie* proof of the element would not otherwise exist; and
- a proceeding will not have been brought as a result of a corruption investigation or a public inquiry, if evidence gathered during the investigation or inquiry merely forms a non-essential part of the body of evidence against the defendant, unless the proceeding was initiated because the Integrity Commissioner recommended that consideration be given to initiating the particular proceeding.

Disclosure of ACLEI evidence to a criminal court in the interests of justice

7.8 Evidence given at an ACLEI hearing that is subject to a direction prohibiting its publication, given under section 90 by the Integrity Commissioner, may be made available to a defendant in criminal proceedings under a special procedure.

7.9 The defendant must first persuade the court that it may be desirable in the interests of justice for the evidence to be made available to the defendant or, failing that, to a legal representative of the defendant. If so satisfied, the court may give a certificate to that effect to the Integrity Commissioner. In that case, the Integrity Commissioner must make the evidence available to the Court. The court will then examine the evidence and, if satisfied that the interests of justice so require, it may make the evidence available to the defendant or the defendant’s legal representative.³²

Public interest immunity, section 149 certificates and the courts

7.10 In any case where the Integrity Commissioner can be compelled to give evidence, the Integrity Commissioner would be entitled to assert public interest immunity in relation to appropriate evidence. However, the existence of a section 149 certificate would not compel the court to decline to order disclosure of the evidence. The court would expect the case for immunity to be argued in the normal manner.

³² Subsections 90(4) and (5), LEIC Act.

8. Secrecy obligations arising from other legislation

8.1 In addition to obligations arising under the LEIC Act, the use and onward disclosure of information governed by the *Taxation Administration Act 1953*, the *Telecommunications (Interception and Access) Act 1979*, the *Surveillance Devices Act 2002* or the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* is restricted by provisions of those Acts. These restrictions attach to the product, because of its origin in a privacy invasive process in which the information subject is not consulted, irrespective of any transfer of the information from one agency to another.

8.2 These restrictions override the specified exceptions in Part 13 Division 5 of the LEIC Act to the extent of any inconsistency.