



# INFORMATION GUIDELINES

**NOVEMBER 2019**

These Information Guidelines are intended to inform ACLEI staff, witnesses, legal representatives and other interested persons of the restrictions applying to information in the possession of the Integrity Commissioner and ACLEI, and of ACLEI's policies and practices in relation to the release of information to the public and to interested persons.

The Integrity Commissioner expects that legal practitioners will ensure that relevant requirements are observed.

These Information Guidelines are published as part of ACLEI's operational information under its Information Publication Scheme.

The current Information Guidelines, as amended from time to time, may be downloaded from the Australian Commission for Law Enforcement Integrity website at [www.aclei.gov.au](http://www.aclei.gov.au) or requested from ACLEI on **(02) 6141 2300** or via e-mail, [legal@aclei.gov.au](mailto:legal@aclei.gov.au)

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### ABOUT ACLEI

The office of Integrity Commissioner and the Australian Commission for Law Enforcement Integrity (ACLEI) are established under the *Law Enforcement Integrity Commissioner Act 2006* (LEIC Act).

The LEIC Act confers a range of statutory functions and powers on the Integrity Commissioner in relation to corruption issues and integrity matters in prescribed law enforcement agencies. ACLEI supports the Integrity Commissioner in performing those functions and exercising those powers.

The Integrity Commissioner's jurisdiction currently includes:

- the Australian Criminal Intelligence Commission (including the former Australian Crime Commission, former CrimTrac Agency, and former National Crime Authority)
- the Australian Federal Police (including ACT Policing)
- the Australian Transactions Reports and Analysis Centre (AUSTRAC)
- the Department of Home Affairs (including the Australian Border Force), and
- prescribed aspects of the Department of Agriculture (Agriculture).

The Integrity Commissioner investigates corruption issues and, at the Minister's request, conducts public inquiries into any issue about corruption or integrity within the LEIC Act agencies.

In support of the Integrity Commissioner's functions, ACLEI obtains information from a wide range of sources, including through the use of coercive hearings and notices to produce and a range of law enforcement warrants.

## SUMMARY

These Information Guidelines set out how that information is treated by ACLEI and how persons outside of ACLEI can seek access to that information.

Information in ACLEI's possession (ACLEI information) is protected against disclosure by a general confidentiality obligation under s 207 of the LEIC Act. Disclosure of ACLEI information may be additionally restricted by a confidentiality direction made by the Integrity Commissioner under s 90, a certificate issued by the Attorney-General under s 149, or by the secrecy requirements of another Act under which the Integrity Commissioner obtained the information.

As an exception to the general confidentiality obligation, disclosure of ACLEI information is permitted under s 208 of the LEIC Act in a communication made for the purposes of a corruption investigation or otherwise for the purposes of the Act. For example, sharing information with other investigating agencies, reporting the progress and outcome of the investigation to interested parties, giving evidence to courts or prosecuting authorities. The Integrity Commissioner also has a discretion to disclose ACLEI information to a government agency to whose functions it is relevant, or to a person to protect life or safety, or to the public (or section thereof, or a person) where it is in the public interest to do so.

Section 209 of the LEIC Act also provides that the Integrity Commissioner may disclose information to individuals or more broadly if he or she considers it to be in the public interest to do so. In such circumstances, the Integrity Commissioner must consider natural justice and the sensitivity of the information before making a disclosure.

The Integrity Commissioner must report under s 54 of the LEIC Act after completing an investigation but usually must allow procedural fairness to any person criticised (s 51).

The Integrity Commissioner will consider applications for disclosure by individuals who wish to use the information in criminal appeals or to seek review of a conviction (s 147). Applicants should clearly indicate what information they seek and its significance for their case, but the Integrity Commissioner will need to take all relevant considerations into account.

Disclosure of ACLEI information may be required by another law, such as the *Freedom of Information Act 1982* (FOI Act), although much of the material or information that ACLEI holds would be exempt from disclosure under that Act.

ACLEI staff members are only compellable to give ACLEI information in evidence in court proceedings that arise from ACLEI business. If the Integrity Commissioner has issued a confidentiality direction under s 90 of the LEIC Act in relation to evidence given in a hearing before him or her, a court may require the Commissioner to disclose the evidence to the court, so that it can consider whether it should be disclosed in the interests of justice (s 96AD).

## **1. INTRODUCTION**

### **1.1 Purpose of Information Guidelines**

1.1.1 These Information Guidelines are intended to inform ACLEI staff, witnesses, legal representatives and other interested persons of the restrictions applying to information in the possession of the Integrity Commissioner and ACLEI, and of ACLEI's policies and practices in relation to the release of information to the public and to interested persons.

### **1.2 The LEIC Act and its objects**

1.2.1 ACLEI is a Commonwealth statutory agency established by the LEIC Act. The objects of the LEIC Act are to facilitate the detection, investigation, prosecution and prevention of corrupt conduct, and to maintain and improve the integrity of staff members, in law enforcement agencies (s 3(1)).

### **1.3 The Integrity Commissioner and ACLEI**

1.3.1 ACLEI is headed by the Integrity Commissioner. The LEIC Act confers on the Integrity Commissioner a range of investigation, intelligence and reporting functions in relation to corruption in law enforcement agencies (s 15). The function of ACLEI is to support the Integrity Commissioner in performing those functions.

1.3.2 Subsection 5(1) provides the definition of 'law enforcement agency' for the purposes of the Act and prescribes those agencies within jurisdiction. Section 10 prescribes those persons who are 'staff members' of law enforcement agencies for the purposes of the Act.

### **1.4 Investigations**

1.4.1 The Integrity Commissioner conducts:

- investigations of corruption issues under Part 6, and
- public inquiries, requested by the Minister.

1.4.2 In these Information Guidelines, when the distinction is not significant, Part 6 investigations and Part 8 inquiries are collectively referred to as 'investigations'.

### **1.5 Sources of ACLEI information**

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

- voluntary statements
- material gathered by ACLEI investigators during the course of a corruption investigation or a public inquiry
- provision of information by an agency under ss 20, 21, 32, and 46 of the LEIC Act
- submissions made to the Integrity Commissioner under s 51 of the LEIC Act
- information, documents and things provided in response to a request or direction (notice to produce) issued under s 75 of the LEIC Act
- 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 s 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* (TIA Act)
- accessing telecommunications data in accordance with the TIA Act
- using surveillance devices in accordance with the *Surveillance Devices Act 2004* (SD Act)
- accessing AUSTRAC information under the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (AML/CTF Act), including the use by the Integrity Commissioner of notices under s 49 of that Act, and
- receiving information disclosed by the Commissioner of Taxation under Division 355 of Schedule 1 to the *Taxation Administration Act 1953* (TA Act).

## **1.6 Assistant Integrity Commissioner and ACLEI SES employees**

- 1.6.1 The Integrity Commissioner may delegate to an Assistant Integrity Commissioner any power under the LEIC Act (s 219). The Integrity Commissioner may also delegate to an ACLEI Senior Executive Service (SES) employee any power under the LEIC Act, other than the power to hold a hearing for a Part 8 inquiry and the powers under Divisions 1, 2 and 3 of Part 9 [in relation to the use of coercive information gathering powers] (ss 219(3) and (4)).
- 1.6.2 Unless otherwise indicated, a reference to the Integrity Commissioner in these Hearing Guidelines includes an Assistant Integrity Commissioner and/or an ACLEI SES employee acting under such a delegation.

## **1.7 References to legislation**

- 1.7.1 Unless otherwise indicated, all references to legislation in these Information Guidelines are to the LEIC Act.

## **2. THE GENERAL OBLIGATION OF CONFIDENTIALITY**

- 2.1 Part 13, Division 5 strictly controls the disclosure of information acquired by ACLEI under the provisions, or for the purposes, of the LEIC Act. Under s 207, 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.
- 2.2 There are a number of exceptions to the general obligation of confidentiality. These exceptions are listed in s 208 and include:
- a disclosure or record made for a purpose connected with the Integrity Commissioner's functions and powers;
  - a disclosure or record made as part of complying with a duty or a permission under the LEIC Act to communicate that information;
  - a disclosure made to the heads of certain prescribed agencies where the Integrity Commissioner is satisfied that the disclosure is appropriate having regard to the functions of the agency concerned;
  - a disclosure required under another law of the Commonwealth;
  - a disclosure to a particular person if the Integrity Commissioner were satisfied that the disclosure is necessary to protect the person's life or physical safety.

These exemptions are discussed in detail in part 6 of these Information Guidelines.

- 2.3 Additionally, the Integrity Commissioner has a general power to disclose information to the public, or to a section of the public, about certain matters connected with the Integrity Commissioner's jurisdiction (s 209(1)). In exercising this power, there are certain restrictions upon the information the Integrity Commissioner can disclose, or factors to be considered. This power, and the restrictions, are discussed in detail below at paragraph 6.5 of these Information Guidelines.
- 2.4 The LEIC Act also includes additional protections in respect of particular sensitive information. These protections are discussed in detail below in part 5 of these Information Guidelines.
- 2.5 It is critical for interested persons to note that there is no ability for the Integrity Commissioner, or ACLEI staff, to make any voluntary disclosure of ACLEI information that does not fall within an exception to this general duty of confidentiality.

### **3. ADDITIONAL RESTRICTIONS IMPOSED BY OTHER ACTS**

- 3.1 In addition to this general obligation of confidentiality, particular information obtained from certain sources will have specific confidentiality requirements in respect of its use and disclosure. An example is the stringent restrictions on use and disclosure of intercepted telecommunications content imposed by the TIA Act, but such requirements arise under many other enactments, including the TA Act, the TIA Act, the SD Act and the AML/CTF Act. 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.
- 3.2 The Integrity Commissioner takes the view that any specific restrictions in relation to a class or type of information override the specified exceptions in Part 13, Division 5 to the extent of any inconsistency.

### **4. PRIVACY ACT CONSIDERATIONS**

- 4.1.1 The Integrity Commissioner is exempt from the operation of the *Privacy Act 1988* (Privacy Act) (s 7(1)(a)(iii)). Acts and practices in relation to a record that has originated with, or has been received from, the Integrity Commissioner or a staff member of the ACLEI, also are exempt (s 7(1)(ga)).
- 4.1.2 However, the Integrity Commissioner and ACLEI have due consideration to the personal privacy of individuals and align ACLEI's information handling processes and policies, as much as possible, to the Privacy Act.
- 4.1.3 The Privacy Act also permits the disclosure to ACLEI of information on a voluntary basis, or on request by ACLEI, by agencies and bodies that are subject to the Australian Privacy Principles (APPs).
- 4.1.4 The Integrity Commissioner is defined as an 'enforcement body' under s 6(1) of the Privacy Act. Accordingly, personal information may be disclosed to the Integrity Commissioner if the disclosing entity reasonably believes this is necessary for an 'enforcement related activity'<sup>1</sup> conducted by the Integrity Commissioner—including where the disclosure is for the purpose of preventing, detecting, investigating or prosecuting criminal offences, or the prevention, detection, investigation or remedying of serious misconduct.<sup>2</sup>

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<sup>1</sup> Defined in s 6(1), Privacy Act.

<sup>2</sup> APP 6.2(e), Schedule 1, Privacy Act

- 4.1.5 Where the information is disclosed voluntarily to ACLEI, or in response to a request for voluntary production, the LEIC Act does not impose any requirements to prohibit the making of a written note in relation to the disclosure having been made. However, where a coercive power under the LEIC Act is used to compel the production of information or documents, the notice to produce or summons may include a notation prohibiting (for certain periods of time) any disclosure about the making of the request, the issue of the summons or the supply of material to ACLEI. Further details can be obtained, in the appropriate case, from ACLEI's *Hearing Guidelines* or *Notice Guidelines*, which are available from ACLEI's website at [www.aclei.gov.au](http://www.aclei.gov.au).

## **4.2 Data Breaches**

- 4.2.1 ACLEI will always take great care in its handling of any personal information. Since February 2018, the Privacy Act has required that agencies take action in any case where personal information has been lost or improperly disclosed. Despite the Privacy Act not applying to many ACLEI activities, ACLEI has prepared an internal plan to deal with any breaches that may occur. Any person who becomes aware of a loss or disclosure of ACLEI personal information should inform ACLEI immediately so that corrective action can be taken and any information protected from compromise.

## **5. SPECIFIC LEIC ACT DIRECTIONS RESTRICTING DISCLOSURE**

### **5.1 Confidentiality directions by the Integrity Commissioner**

- 5.1.1 Under s 90, 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 used or disclosed, or may only be used or disclosed 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 2 years imprisonment or a fine of 120 penalty units, or both.
- 5.1.2 The Integrity Commissioner has a discretion to give such a direction in any case where it appears appropriate, and must give a direction in relation to a private 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 s 149). The Integrity Commissioner must not vary or revoke a direction if to do so would have any of these consequences.

### **5.2 Section 149 certificates issued by the Attorney-General**

- 5.2.1 Under s 149, 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 s 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: for instance, 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.



5.2.2 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 s 149 certificate that prohibits such a disclosure. Such disclosures include the various reporting functions given to the Integrity Commissioner under the LEIC Act, whereby the Integrity Commissioner is prohibited from disclosing matters the subject of a s 149 certificate.

5.2.3 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.

## **6. PERMITTED DISCLOSURES**

### **6.1 Procedural fairness**

6.1.1 Procedural fairness (also known as natural justice) is a common law principle and is reflected in ss 5(1)(e) and 6(1)(a) of the *Administrative Decisions (Judicial Review) Act 1977*. Where procedural fairness is owed in relation to an administrative decision, denial of procedural fairness is a ground of judicial review of that decision. Procedural fairness is concerned not with the merits of a particular exercise of power, but rather with the procedure that must be observed in the exercise of that power.<sup>3</sup>

6.1.2 At a general level, the obligation to provide procedural fairness consists of three requirements:

- the 'hearing rule', which generally requires that a decision-maker should provide a person with an opportunity to be heard before making a decision affecting the interests of that person;
- the 'rule against bias', which requires that a particular decision-maker should not make a decision where the circumstances would lead to a reasonable doubt about the decision-maker's impartiality; and
- the 'no evidence rule', which requires that a decision-maker base his or her decision on 'logically probative' evidence.

6.1.3 In the context of these Information Guidelines, the hearing rule deserves particular comment. Disclosure of information may be capable of directly and adversely affecting a person's rights or interests (eg. reputation) so as to attract an obligation owed by the Integrity Commissioner to accord the person procedural fairness—particularly if such further disclosure will involve public dissemination (and thereby cause real harm to a person's reputation).<sup>4</sup>

6.1.4 Some provisions of the LEIC Act import a form of the hearing rule, requiring the Integrity Commissioner to allow an opportunity for affected persons to comment. These provisions include ss 51 and 210, in relation to, relevantly, reports prepared under s 54 and information disclosed to the public under s 209.

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<sup>3</sup> *Kioa v West* (1985) 159 CLR 550.

<sup>4</sup> *Johns v Australian Securities Commissioner* (1993) 178 CLR 408.

- 6.1.5 The Integrity Commissioner considers that, given the absence of a clear legislative intent to such effect, the LEIC Act cannot be taken to have abrogated common law procedural fairness rights.<sup>5</sup> Accordingly, in making any disclosure which is not subject to an express statement in the LEIC Act mandating prior consultation, the Integrity Commissioner will consider if the disclosure would adversely and directly affect a person's rights or interests and whether an opportunity for the person to be heard prior to disclosure may be necessary.
- 6.1.6 Additionally, the Integrity Commissioner considers that LEIC Act provisions such as ss 51 and 210, which import a form of the hearing rule, do not constitute exhaustive statements of the Integrity Commissioner's procedural fairness obligations.<sup>6</sup> Accordingly, if the Integrity Commissioner intends to include an opinion or finding in a report under s 54, or disclose information to the public under s 209, that would directly affect the rights or interests of an entity that is neither a natural person nor a 'government agency', the Integrity Commissioner will accord that entity procedural fairness.
- 6.1.7 Whether an obligation under the hearing rule would in fact arise and, if so, what the content of the obligation would be, depends on the particular circumstances of a case. When procedural fairness must be accorded, what is required to discharge that obligation in a particular situation will also turn on the facts. The purpose of the disclosure may also be relevant. When information is disclosed pursuant to particular sections of the LEIC Act or in other circumstances, and at the time of disclosure there is no reason to anticipate that such disclosure will adversely and directly affect a person's rights or interests (for example, by damaging their reputation publicly), the Integrity Commissioner considers no procedural fairness obligations are owed.
- 6.1.8 It is critical for interested persons to note—in accordance with the current state of the law on the hearing rule—that if giving a person an opportunity to comment upon a proposed external disclosure would prejudice an ongoing corruption investigation (including having the effect of disclosing that an investigation is underway or contemplated), the content of the Integrity Commissioner's procedural fairness obligations may be nil and the Integrity Commissioner is unlikely to consult with the person affected.<sup>7</sup> Additionally, if information were disclosed to enable another agency to conduct a non-public investigation, it is unlikely that procedural fairness will be owed, as a person's interests are not directly adversely affected, in the relevant sense, by the mere fact of being investigated.

## **6.2 Communications for the purposes of the LEIC Act**

- 6.2.1 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 Act (ss 208(1) and (2)).
- 6.2.2 This exception expressly includes communications by the Integrity Commissioner that are required or permitted by a provision of the LEIC Act (s 208)). Examples include:
- where it is appropriate or necessary to advise interested parties (the Minister; the person who referred the corruption issue to the Integrity Commissioner; the head of the law enforcement agency to which the corruption issue relates—and, where a secondee is involved—the heads of the relevant home agency and any relevant

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<sup>5</sup> See *Re Minister for Immigration and Multicultural Affairs; ex parte Miah* (2001) 206 CLR 57,

<sup>6</sup> See *Re Minister for Immigration and Multicultural Affairs; ex parte Miah* (2001) 206 CLR 57,

<sup>7</sup> See *Kioa v West* (1985) 159 CLR 550;

- 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 (ss 33–37, 39–41).
- 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 (s 44);
  - sharing information with another agency for the purposes of a joint investigation (s 50);
  - 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 (ss 52–53);
  - 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, or a person identified by the LEIC Regulations (s 55);
  - 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 (ss 58–59);
  - giving a Judge or other issuing officer information in support of an application for an order for a witness to surrender their passport (s 97), a warrant for the arrest of an absconding witness (s 99), a search warrant (s 108) or a warrant for the arrest of a person suspected of committing an offence to which a corruption investigation relates (s 139 and *Crimes Act 1914*, s 3E);
  - 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 (ss 142–147); 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.

Some particular examples of note are discussed further below.

***Example: Opportunity to respond to adverse opinions or findings***

- 6.2.3 The Integrity Commissioner is obliged to report upon all completed corruption investigations that relate to a law enforcement agency (s 54). Before finalising any such report, s 51 requires that, before including an opinion or finding that is critical of a person in a report, the Integrity Commissioner must give the person a reasonable opportunity to appear before him or her and make submissions in relation to the opinion or finding.
- 6.2.4 Accordingly, the Integrity Commissioner is impliedly authorised to release to such a person sufficient information and documents to enable that person to be able to make submissions in respect of the proposed critical opinion or finding.

***Example: Seeking advice about whether subject to investigation***

- 6.2.5 From time to time, persons who are—or have been—a staff member of a law enforcement agency within the Integrity Commissioner's jurisdiction direct enquiries to ACLEI to ascertain whether or not their conduct is the subject of a corruption investigation. This enquiry may or may not also take the form of a request for access to documents under the FOI Act.

- 6.2.6 The LEIC Act limits the way the Integrity Commissioner can respond to such requests. The Integrity Commissioner can advise a person to whom a corruption issue relates of the critical decisions the Integrity Commissioner makes about how to deal with the corruption issue (s 37—corruption issues referred or notified to the Integrity Commissioner; s 41—corruption issues that the Integrity Commissioner has decided to investigate on his or her own initiative). Such notification is entirely within the discretion of the Integrity Commissioner, and does not entitle the person to details of the corruption issue or details of the investigative process undertaken (if any), nor establish any right to be kept informed of the progress of the investigation.
- 6.2.7 The Integrity Commissioner commonly receives information or allegations that raise a corruption issue where no suspect has been identified. For this reason alone, it is unlikely that the Integrity Commissioner will ever be in a position to state definitively that a particular staff member of a LEIC Act agency is not under investigation.
- 6.2.8 Additionally, many of the Integrity Commissioner’s investigations are undertaken covertly. Care is taken throughout to avoid prejudice to the conduct of the corruption investigation and any other investigations undertaken by police and ACLEI, to prevent damage to reputation in circumstances where no formal findings have yet been published, and to protect the safety of investigators, witnesses, and other persons connected with the Integrity Commissioner’s investigations. Often, it will not be in the wider public interest for details of the Integrity Commissioner’s investigations to be made available to the public.
- 6.2.9 However, when a disclosure can properly be made, the Integrity Commissioner will not arbitrarily withhold information about the status of persons presently under investigation. In any case, as noted above, the LEIC Act provides a person who may be the subject of adverse opinions or findings an opportunity to respond prior to the finalisation of the Integrity Commissioner’s report (s 54).
- 6.2.10 If the Integrity Commissioner discloses that a person is not presently under investigation, that is all the information that person will receive. The Integrity Commissioner does not have authority under the LEIC Act to advise a third party about the existence or progress of a corruption investigation unless the disclosure is a necessary part of the conduct of the investigation, or unless that third party has been nominated to receive updates by the person who referred the corruption issue (ss 34(4) and 58(6)). Further, advice that a particular person is not under investigation—while it will be given in good faith at the time—cannot guarantee that the person will not be investigated at some future time if new information comes to light.
- 6.2.11 Interested parties should bear in mind that the fact that they may be asked questions by an ACLEI investigator does not necessarily mean that they are suspected of corrupt conduct. In most ACLEI investigations, a range of people other than the suspect will be interviewed or required to give evidence at a hearing. For privacy and operational reasons, and because of the confidentiality requirements of the LEIC Act, the Integrity Commissioner and ACLEI investigators will often not be free to explain the full background to the questions they are asking.
- 6.2.12 Subject to some formal requirements, any person has a legally enforceable right to request information and documents under the FOI Act. Interested persons should note that in many cases the same restrictions on disclosure and considerations as outlined above will also be relevant to possible exemption under the FOI Act.

### 6.3 Discretionary disclosures for other purposes

6.3.1 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 s 207 (ss 208(3) and (4));
- disclosing information to a person if the Integrity Commissioner were satisfied that it is necessary to do so to protect the person's life or safety (s 208(6)); and
- if the Integrity Commissioner were satisfied that 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 LEIC Act (s 209(1)).

6.3.2 A discretionary disclosure cannot be made if:

- it would be contrary to a direction that was given by the Integrity Commissioner under s 90 (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 s 149 certificate (ss 208(7) and 209(3)); or
- if the information were obtained in accordance with a 'law enforcement secrecy provision' or a 'taxation secrecy provision' as defined in s 5(1)—namely, that disclosure of the information would contravene that provision.

### 6.4 Compulsory disclosures under law

6.4.1 ACLEI staff members (including former staff members) may be obliged to disclose information when making a disclosure required under another Commonwealth law (s 208(5)).

#### ***Example: Freedom of Information***

6.4.2 In principle, disclosure of a document held by ACLEI may be required by the FOI Act, if a person requests access to the document. In practice, a large proportion of ACLEI documents is likely to be exempt under s 37 (documents affecting enforcement of law and protection of public safety) or other provisions of the FOI Act.

6.4.3 The FOI Act contains a specific provision that can apply in relation to a document exempt under s 37(1) of that Act. In the case of such a document, ACLEI may neither confirm nor deny the existence of a document if information about whether or not the document exists would itself be exempt. This would commonly be the case in relation to documents related to an ongoing investigation being conducted in private as to disclose whether the document existed would disclose whether an investigation is underway, thus prejudicing the conduct of any such investigation.

6.4.4 Under s 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. But any exercise of this discretion must be construed in the light of the general obligation of confidentiality under the LEIC Act.

- 6.4.5 If disclosure were required by the FOI Act, there is no restriction on the onward disclosure of the document. Additionally, the FOI Act requires the publication of documents released by an agency under the Act on the agency's disclosure log (FOI Act, s 11C) unless an exception applies. Accordingly, a release of documents under the FOI Act may result in broader.
- 6.4.6 The FOI Act also requires an agency to maintain an Information Publication Scheme (IPS; FOI Act, Part II). Under its IPS, ACLEI is obliged to publish its 'operational information'—that is, information held by ACLEI for the purpose of performing or exercising its functions or powers in making decisions or recommendations affecting members of the public or a particular person or entity, or classes of persons or entities, including rules, guidelines, practices and precedents relating to those decisions and recommendations, but not exempt matter (FOI Act, s 8C(1)). These Information Guidelines are published as part of ACLEI's operational information.

## **6.5 Discretionary disclosure in the public interest**

- 6.5.1 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 (s 209(1)). 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 s 149 certificate which may prohibit disclosure of particular information (ss 209(2) and (3), and 210).
- 6.5.2 If the information in question includes sensitive information (as that term is defined by s 5(1) of the LEIC Act), the Integrity Commissioner must, in deciding whether to disclose, seek to weigh the public interest in disclosure of that information against the potential prejudicial consequences of the disclosure (s 209(4)).
- 6.5.3 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 were initially directed to a particular class of persons.

## **6.6 Compulsory disclosures to courts**

- 6.6.1 ACLEI staff members (including former staff members) may be compelled to disclose information by a court or tribunal, other than in the circumstances listed in s 211 (in which current and former ACLEI staff members are not compellable).
- 6.6.2 In addition, the Integrity Commissioner may be compelled to make available to a court any evidence that was given at a hearing and which is subject to a confidentiality direction issued by the Integrity Commissioner (ss 90(4) and (5)).
- 6.6.3 Section 211 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. It is the practice of the Integrity Commissioner to invoke this immunity whenever the issue arises.

- 6.6.4 Subsection 211(3) provides certain exceptions to the general rule, by which the Integrity Commissioner and ACLEI staff may otherwise be compellable in the following types of matters:
- 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 or her behalf is a party.
- 6.6.5 The Integrity Commissioner is not authorised to directly 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 common sense 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 (or would have recommended) that consideration be given to initiating the particular proceeding.
- 6.6.6 As a consequence of s 211, 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 s 211. If a subpoena that exceeds these bounds is 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.
- 6.6.7 In cases where current and former ACLEI staff members are compellable under s 211, the Integrity Commissioner retains the right to object to a subpoena 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 were to consider there is no legitimate forensic purpose for a requirement in a subpoena, or that compliance would be contrary to the public interest.
- 6.6.8 In any case in which the Integrity Commissioner can be compelled to give evidence, he or she would be entitled to assert public interest immunity in relation to appropriate evidence. However, the existence of a s 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 although the grounds for the s 149 certificate would likely be relevant to any immunity claim.

### ***Special issue: Voluntary production***

- 6.6.9 In the case of an accused person in a prosecution that is not covered by the exceptions to s 211, an alternative procedure to compel provision of evidence by ACLEI may be available under s 90(4) (see paragraphs 6.6.10 and 6.6.11 below), but generally the approach described in the following paragraph will be the most convenient means of obtaining such evidence.
- 6.6.10 The Integrity Commissioner considers that s 211 would not preclude an ACLEI staff member from voluntarily giving testimony or producing documents in proceedings to which that section applies<sup>8</sup>. 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.

### ***Special issue: ACLEI hearing evidence***

- 6.6.11 Evidence given at an ACLEI hearing that is subject to a direction prohibiting its use or disclosure, given under s 90 by the Integrity Commissioner, may be made available to a defendant in criminal proceedings under a special procedure. 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 (ss 90(4) and (5)).

## **7. VOLUNTARY PROVISION OF INFORMATION TO ACLEI**

- 7.1 Any person, who believes him or herself to be in possession of information that may be of interest to the Integrity Commissioner or ACLEI, can provide that information to ACLEI at any time. The Integrity Commissioner is empowered to receive an allegation, or information, that raises a corruption issue, from any member of the public, be they current or former staff members of LEIC Act agencies, or not (s 23).
- 7.2 ACLEI will accept information anonymously, although members of the public should be aware that a lack of personal details and/or detail about the allegation may impede the Integrity Commissioner's assessment of the corruption issue and how it may be dealt with. ACLEI may also wish to follow up the information provided, and seek additional detail from the source, which may be difficult where a source has elected to remain anonymous.
- 7.3 ACLEI pays due regard to issues of the personal safety and well-being of any person who supplies information to the Integrity Commissioner. A principal consideration for ACLEI is to ensure that people's reputations are not prejudiced by mere fact of an ongoing corruption investigation. For these reasons, the Integrity Commissioner's investigations are largely covert, and most if not all hearings held by the Integrity Commissioner are held in private. ACLEI takes appropriate steps to protect the identity of persons who have supplied information.

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<sup>8</sup> *Canadian Tobacco Co v Stapleton* (1952) 86 CLR 1, 7, 10–11.



- 7.4 However, the Integrity Commissioner's powers and duties are both defined and constrained by the LEIC Act. The Integrity Commissioner does not have a unilateral discretion in how he or she deals with ACLEI information, and has certain obligations (discussed above) in relation to how ACLEI information is to be dealt with. For example, the Integrity Commissioner must pass on ACLEI information in the circumstances prescribed in ss 142, 143, 146 and 147.
- 7.5 Accordingly, while ACLEI will accept information from members of the public in circumstances of privacy and secrecy, the Integrity Commissioner cannot make any promises that the information will be confidential (in the sense of 'restricted to ACLEI'). Additionally, the Integrity Commissioner cannot agree to any restrictions on the further use or disclosure of volunteered information.
- 7.6 ACLEI staff members are available to discuss the measures that are available to protect persons who may wish to provide information to the Integrity Commissioner. Corruption issues can be reported, and information provided, by way of ACLEI's Corruption Hotline (available 24 hours a day, 7 days a week) on **02 6141 2345**, at [contact@aclei.gov.au](mailto:contact@aclei.gov.au), or online at [www.aclei.gov.au](http://www.aclei.gov.au) via the link 'Report a corruption issue'.

## 8. APPLICATIONS FOR ACCESS TO ACLEI INFORMATION

8.1 In most cases where a discretionary disclosure of information is made by the Integrity Commissioner, that discretion would normally be exercised by the Integrity Commissioner on his or her own initiative. 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.

8.2 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 require;<sup>9</sup>
- public interest entails more than purely private interests;<sup>10</sup>
- 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;<sup>11</sup> and

<sup>9</sup> *O'Sullivan v Farrer* (1989) 168 CLR 210 at 216.

<sup>10</sup> *Sinclair v Maryborough Mining Warden* (1975) 132 CLR 473 at 480 per Barwick CJ.

<sup>11</sup> *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.

- 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.<sup>12</sup>

8.3 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 being sought—for example, 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 search for information without knowledge of whether the requested information exists will weigh against publication.

8.4 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 factors, making a 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:

- an ongoing corruption investigation, or pending prosecution arising from such an investigation, on the one hand; and
- any current charges against the person, and the centrality of the issues to which the material relates, on the other hand.

***Special issue: Alleged wrongful conviction***

8.5 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 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 material set out in the application, demonstrate the existence of such reasons.

***Special issues: Criminal trial and appeal***

8.6 A person may apply to the Integrity Commissioner for disclosure of information in relation to a criminal trial, or an appeal, in which the person wishes to raise the possibility that the credibility of prosecution evidence may be affected by police misconduct.

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<sup>12</sup> Eg. *Alister and Ors v The Queen* (1983-1984) 154 CLR 404.

- 8.7 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.

Integrity Commissioner

14 November 2019