



Guidelines on Disclosure of Commission Information under the LECC Act

November 2020

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1. Disclosure of information in the public interest - s 180(5)(d)

- 1.1 Subsection 180(2) of the LECC Act imposes an obligation of secrecy in relation to all information obtained in the exercise of the Commission's functions, irrespective of the inherent confidentiality of the information or its importance to the Commission's operations. Pursuant to s 180(5)(d) of the *Law Enforcement Conduct Commission Act 2016* (the LECC Act), the Law Enforcement Conduct Commission (the Commission) may, however, if satisfied that it is "necessary in the public interest" to disclose information obtained in the exercise of the Commission's functions, so certify and direct that the information be disclosed to any person.
- 1.2 It is by this general power that the Commission is able to disclose information for purposes unconnected with the exercise of its functions under the LECC Act. Requests for access to the Commission's holdings (and records of the Police Integrity Commission and the Royal Commission into the NSW Police Service) by members of the general public (including parties to legal proceedings which do not arise from a Commission investigation) are dealt with under this provision.

"Necessary in the public interest"

- 1.3 The Commission's discretion to authorise the disclosure of information pursuant to s 180(5)(d) requires the positive identification of a public interest to necessitate the disclosure. The negative does not apply to enable the disclosure of information on the ground that the public interest does not require it to be kept in confidence by the Commission.
- 1.4 The Commission does not consider the word as it is employed in s 180(5)(d) of the LECC Act to mean absolutely necessary or essential, but to involve consideration as to what is reasonably required for the achievement of the public interest in a common sense way:

It may be stated as a general rule that those things are necessary for the doing of a thing which are reasonably required or which are legally ancillary to its accomplishment.¹

- 1.5 However imprecise an art it may be to identify the existence of any public interest in any given situation, it is plain that the public interest entails more than purely private interests:

... the interest must be the interest of the public and not mere individual interest which does not involve a public interest.²

Balancing competing interests

- 1.6 Once a public interest capable of necessitating the disclosure of information is identified, it remains to be considered whether any public interest(s)

¹ *State Drug Crime Commission v Chapman* (1988) 12 NSWLR 447 per Allen J.

² *Sinclair v Maryborough Mining Warden* (1975) 132 CLR 473 at 480 per Barwick CJ.

militating against disclosure exist and, if so, to determine where the balance of competing interests lie. It has been observed that:

Ascertainment in any particular case of where the public interest lies will often depend on a balancing of interests, including competing public interests, and be very much a question of fact and degree.³

1.7 Commonly arising factors of public interest include, on the side of non-disclosure of information held by the Commission:

- potential prejudice to present or future investigations by the Commission;
- the protection of confidential informers;
- the need to ensure prospective complainants of police misconduct are not discouraged from coming forward in the future;
- the preservation of secret investigative methodologies.

1.8 Where information held by the Commission is sought for the *legitimate* 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.⁴

2. Application for disclosure of information in the public interest – procedures

Form of application

2.1 A form for an Application for Disclosure of Information and Documents under section 180(5)(d) has been developed to assist in making an application to the Commission for the disclosure of information in the public interest. The form is attached to these guidelines at Attachment B.

2.2 While it is not essential for the form to be used when making an application, its format may prove helpful in ensuring that the application is sufficiently formed. The following matters should be addressed in any application.

Step 1 - Specifying the materials being sought

2.3 The Commission's holdings, and those of the Police Integrity Commission and the Royal Commission before it, are voluminous. Before any request is made to the Commission for the disclosure of information, there should be some concrete basis to believe that the Commission might hold information of the kind being sought.

2.4 The Commission will rarely entertain generally and broadly framed requests to the effect of "any information relating to person X/event Y". Requests of this kind are suggestive of fishing in the hope of catching information of an unknown character, and do little to commend the disclosure of information in the public interest. They also impose an unduly onerous burden upon the

³ *Re Queensland Electricity Commission; Ex parte Electrical Trades Union of Australia* (1987) 72 ALR 1 per Mason CJ, Wilson and Dawson JJ. Applied by the NSW Court of Appeal in *WorkCover Authority (NSW) v Law Society of NSW* (2006) 65 NSWLR 502; [2006] NSWCA 84 at [146].

⁴ Eg. *Alister v R* (1984) 154 CLR 404.

Commission's resources in searching out any and all information relating to particular persons or events, which may be dotted throughout a diverse range of records across the Commission's holdings.

- 2.5 The application should specify, as far as practicable and with as much precision as possible, the documents or information that are believed to be held by the Commission, by reference to such things as:
- the particular person, thing or event to which the document or information relates;
 - the date upon or time period during which the document or information was brought into existence;
 - the particular investigation of the Commission or Royal Commission, if any, which resulted in the document or information being generated.

Step 2 - Indicating the purpose for which the materials are sought

- 2.6 Next, the application should indicate, again with reasonable precision and clarity, the reason(s) why the material believed to be held by the Commission is being sought.
- 2.7 Where materials are being sought for the purposes of legal proceedings, the relationship, or potential relationship, between the issues involved in the proceedings and the information being sought must be identified, by reference to:
- the issues involved in the legal proceedings and their factual basis;
 - the relevance or potential relevance of the information being sought to those issues; and
 - the likely or potential evidential value of the information being sought.
- 2.8 Generally, an applicant should also provide a copy of any statement of claim and defence filed in the proceedings, or any statement of facts.

Step 3 - Submissions on matters of the public interest

- 2.9 Finally, the applicant may wish to make brief submissions on any factors of the public interest that are considered to fall on the side of disclosure of the materials identified for the reasons stated.
- 2.10 Where materials are being sought for the purposes of legal proceedings, if the application has sufficiently detailed the nature of the materials and their actual or potential relevance to the issues involved in the proceedings, the public interest falling on the side of disclosure for the due administration of justice will usually be evident with nothing more. It will remain, of course, for the Chief Commissioner of the LECC to weigh and balance any competing considerations in determining whether it is necessary in the public interest to disclose any relevant materials.

3. General approach to exercise of the s 180(5)(d) discretion

- 3.1 While each application for the disclosure of information under s 180(5)(d) of the LECC Act must be assessed and dealt with according to its merits, the

following is a general guide as to how the Commission's discretion may be exercised, according to the existence or non-existence of public interest factors.

Where there is no public interest in favour of disclosure

- 3.2 Where no discernible public interest would be served by a disclosure, the Commission's discretion can only be exercised in the negative. Regardless of whether any information held by the Commission is itself of a confidential or sensitive nature, the secrecy obligations of s 180(2) of the LECC Act will mandate that no information may be disclosed.

Where there is a public interest in favour of disclosure

- 3.3 Where an identified public interest would be served by a disclosure, and there are no competing factors of the public interest on the side of confidentiality, the information will usually be disclosed.

Where there are public interest factors for and against the disclosure

- 3.4 Where an identified public interest would be served by a disclosure, and there are competing factors of the public interest on the side of confidentiality, information may or may not be disclosed, according to the balance of competing considerations.
- 3.5 The balancing of competing public interest considerations requires the making of a value judgment as to which aspect of the public interest would, in net effect, be better served. Decisions of this kind are often delicately poised and invariably come to an assessment of the relative worth of the subject information to the achievement of, or avoidance of harm to, the public interest in each competing respect.
- 3.6 For example, if the value of the information as evidence of police misconduct relevant to an issue in criminal proceedings is only slight, it may be that the danger of potential prejudice to an ongoing investigation by the Commission will be the prevailing public interest factor. On the other hand, if the information goes to the very heart of issues in a criminal trial, the scales may be tipped on the side of disclosure.

4. Existence and strength of public interest factors in favour of disclosure

- 4.1 The following comments and observations may be of assistance in the formulation of certain kinds of applications for the disclosure of information, insofar as demonstrating the existence and strength of any public interest factors in favour of disclosure.

Petitions for review of conviction

- 4.2 The Commission may receive an application for the disclosure of information in the context of petitions for the review of convictions pursuant to Part 7 *Crimes (Appeal and Review) Act 2001* (formerly Part 13A of the *Crimes Act 1900*). Before considering whether information it may hold should be

released for the purposes of a petition the Commission takes the view that it is necessary to first satisfy itself that there is a bona fide claim for an inquiry.

- 4.3 Pursuant to s 77(1) of the *Crimes (Appeal and Review) Act 2001*, as a result of the consideration of a petition made by or on behalf of a convicted person, an inquiry into the relevant conviction or sentence may be directed by the Governor, the case may be referred to the Court of Criminal Appeal by the Minister (ie. Attorney General) to be dealt with as an appeal under the *Criminal Appeal Act 1912*, or the Minister may request the Court of Criminal Appeal to give an opinion on any point arising in the case.
- 4.4 Subsection 77(2) provides that any of the above steps may be taken only "if it appears that there is a doubt or question as to the convicted person's guilt, as to any mitigating circumstances in the case or as to any part of the evidence in the case". In *Rendell*⁵ Hunt J considered this test, as it then existed under s 475 of the *Crimes Act 1900*, to come down to a question of whether the relevant material causes the person considering the matter "unease or a sense of disquiet" in allowing the conviction to stand.
- 4.5 Accordingly, unless such information as might be held by the Commission is of itself sufficient to show that the relevant conviction has been improperly obtained, an application for the disclosure of information for the purposes of a Part 7 petition should indicate the reason(s) why there is "unease or a sense of disquiet" about the conviction. In the absence of an objectively tenable claim for the review of the relevant conviction, it will be difficult to justify the disclosure of information under the provisions of s 180(5)(d) of the LECC Act, as there will be nothing concrete to put on the public interest scales on the side of disclosure.

Criminal trial and appeal proceedings

- 4.6 In *R v Vastag*⁶ the NSW Court of Criminal Appeal considered the potential value of Police Royal Commission materials as "fresh evidence" warranting the quashing of a conviction on the grounds of miscarriage of justice. Being mindful of the undesirability of any fixed test, "no more than [the following] guide" was stated:

Material from the Royal Commission should be considered to determine whether it is capable of disclosing conduct or, possibly a reputation therefore, pointing to a preparedness in the officer to act corruptly, at least by dishonesty, in his performance of his duties in criminal investigations. The closer the suggested adverse conduct is in the Royal Commission material to that which is relevant to the particular trial the more persuasive will be the position of an appellant in an appeal of this nature.

- 4.7 Applying this statement generally to any criminal trial or appeal proceedings in which issues of alleged police misconduct arise, it would seem to the Commission that evidence gathered in an investigation by it or the Police

⁵ (1987) 32 A Crim R 243.

⁶ Unreported, 20 June 1997, per Levine J (Studdert J agreeing). Cited with approval by the NSW Court of Criminal Appeal in *R v Kanaan* [2005] NSWCCA 385.

Integrity Commission may be categorised as follows in descending order as to its potential relevance and/or probative value:

- where the evidence involves admissions or strong inferences of misconduct by police concerning the very matters the subject of the appeal;
- where the evidence does not involve admissions of misconduct concerning the matters the subject of the appeal, but admissions or strong inferences of misconduct in other similar matters;
- where the evidence involves admissions or strong inferences of misconduct in relation to matters or activities dissimilar to those the subject of the appeal;
- where the evidence involves no admissions or strong inferences of misconduct, but the police officer has merely been made the subject of adverse allegations or cross-examination in any of the above respects.

4.8 Of course, even information falling into the weakest or most remote category may warrant disclosure in public interest if it would be of some tangible assistance to the administration of justice in the particular proceedings. This would particularly be so where there are no competing considerations on the side of non-disclosure.

4.9 However, where competing factors of the public interest militate against the disclosure of information by the Commission, the stronger and more proximate the connection between the information held by the Commission and the particular matters of alleged police misconduct involved in the relevant criminal appeal or trial proceedings, the greater the weight in favour of disclosure.

Lifting of witness codenames

4.10 Where information is already in the public domain by virtue of a public hearing of the Commission, the Police Integrity Commission or Police Royal Commission, but the name of a witness has been suppressed so that he or she is publicly known only by a pseudonym, special considerations arise in relation to the disclosure of his/her real identity.

4.11 Usually, the witness will have been granted anonymity in order to encourage assistance with the relevant inquiry, and/or to protect him/her from physical harm or reputational damage. The direction prohibiting publication of the identity of the witness (and substituting for public purposes a pseudonym) will have been made on the basis of its desirability or necessity in the public interest.⁷

4.12 Accordingly, unless circumstances have changed since the direction suppressing publication of the identity of a witness was initially made, the public interest, or at least an aspect of it, will contraindicate the disclosure of the witness's name. However, depending at all times upon the merits of a particular application and the surrounding circumstances, the Commission may nevertheless reveal the identity of a witness if, on balance of competing

⁷ See s 176 of the LECC Act.

public interest considerations, it proves necessary. Factors that may be relevant to the exercise of the Commissioner's discretion include:

- the time that has elapsed since the suppression order was made;
- the reason(s) for which anonymity was granted to the witness in the first instance, and whether those reasons persist;
- whether it is necessary for the identity of the witness to be disclosed in order for the transcript of his/her evidence before the Commission to be utilised for the purposes of the relevant legal proceedings;
- whether the witness is at any appreciable risk of harm should his/her identity be publicly revealed;
- whether the witness consents to his/her identity being revealed; and
- whether it is reasonably practicable for the identity of the witness to be strictly quarantined to the legal proceedings in respect of which the disclosure is requested.

4.13 Where application is made for the purposes of legal proceedings, the Commission may vary the relevant non-publication directions on condition that the applicant makes application to the court for suppression orders or otherwise takes steps to ensure the codenamed witness's identity is not revealed in open court.

5. General Policy and Procedure

Disclosures in the negative

5.1 Where an application for the disclosure of information is not met with a positive response by the Commission, its usual policy is to neither confirm nor deny that it in fact holds information of the kind being sought.

5.2 Were the Commission to adopt a general practice of indicating that it does not hold information about a particular person or subject matter, its failure to so indicate in any particular instance would could be interpreted as confirmation that it does in fact hold information. Lack of denial might thereby work in the negative as a constructive disclosure of information in contravention of s 180(5) of the LECC Act, and/or reveal the existence of information which the public interest requires to be kept secret.

5.3 In most instances, therefore, in advising of the refusal of an application for the disclosure of information, the Commission will simply state that it holds no information which it considers necessary to disclose in the public interest. This should not be construed as confirmation that the Commission either holds, or does not hold, information of the kind requested.

Disclosure to all parties

5.4 Where it is deemed necessary in the public interest to disclose information for the purposes of legal proceedings, the Commission's usual practice is to disclose the relevant information to all parties to the proceedings. The Commission does this on the premise that information is not properly disclosed by reason of it being "necessary in the public interest" in

circumstances which afford a personal or private advantage to a party to litigation. Put simply, the public interest in the due administration of justice usually entails all parties to relevant proceedings being apprised of information of potential relevance to the issues at hand.

- 5.5 Should an applicant consider it inimical to the proper administration of justice for the Commission to release material the subject of a successful application under s180(5)(d) of the LECC Act to other parties to the proceedings, detailed submissions should be made as to the reasons why.

Confidentiality

- 5.6 Applicants may be assured that the Commission will hold the details of the application in strict confidence and not reveal their reasons for seeking the materials to any person external to the Commission, except in the case described above where the information is relevant to all parties involved in proceedings, including the court.

Public transcripts of the Royal Commission into NSW Police Service

- 5.7 It is not necessary to make application to the Commission pursuant to s 180(5)(d) of the LECC Act in order to gain access to the public transcripts of the Royal Commission Into the Police Service of NSW. Persons wishing to view the transcripts may do so via the State Library of NSW.

Completed applications

- 5.8 Completed applications or inquiries relating to requests for information about all matters should be addressed to the Manager, Registry and Security, Law Enforcement Conduct Commission, GPO Box 3880, Sydney NSW 2001, Ph: (02) 9321 6700 or Freecall 1 800 657 079, Facsimile: (02) 9321 6799, Email: contactus@lecc.nsw.gov.au.

6. Requesting information from the LECC under the *Government Information (Public Access) Act 2009* (the GIPA Act)

- 6.1 The *Government Information (Public Access) Act 2009* (the GIPA Act) came into force on 1 July 2010.

- 6.2 Under the GIPA Act there are four ways that information can be made available to the public:

- the mandatory release of "Open Access Information";
- the proactive release of information for which there is no overriding public interest against disclosure;
- the informal release of information in response to an informal request for which there is no overriding public interest against disclosure in; and
- the formal release of information in response to an access application for which there is no overriding public interest against disclosure. It is intended under the GIPA Act that formal applications be the last resort for accessing government information.

- 6.3 The Commission may be requested to disclose information in response to formal access applications made under the GIPA Act. However, Schedule 2 of the GIPA Act provides that information which relates to the Commission's "corruption prevention, handling of misconduct matters, investigative and reporting functions" is "excluded information" and cannot be made the subject of an access application.
- 6.4 It is also conclusively presumed by Schedule 1 of the GIPA Act that there is an overriding public interest against disclosing information the disclosure of which would be prohibited by the LECC Act.
- 6.5 Information which falls within the above two categories is not publicly disclosed by the Commission except under limited circumstances, usually when the Chief Commissioner certifies that it is in the public interest to do so.
- 6.6 The Commission's Open Access Information, disclosed under the GIPA Act, can be found on the Commission's website under 'Access to Information'. Information about making an access application under the GIPA Act can also be found on the Commission's website through the following link: <https://www.lecc.nsw.gov.au/what-we-do/access-to-information>.

7. Attachment A – Information for Applicants

What information can I apply for?

Applications can be made for information and documents arising from investigations of the Commission, the Police Integrity Commission and the Royal Commission into the NSW Police Service. Requests for public information, such as public reports of Commission investigations and public hearing transcripts do not require an application as they can be accessed via the LECC website. Information on availability and costs can be obtained by calling (02) 9321 6700. The State Library of NSW also holds Reports of the Police Integrity Commission, and the Reports and public hearing transcripts of the Royal Commission into the NSW Police Service.

Do I have a right to have information released?

No. Applications under s 180(5)(d) are at the Commissioner's discretion.

How long will it take before a decision is made?

Generally the Commission will usually respond within 3 weeks of receipt of an application, but some applications can take longer to determine.

What costs will there be?

The Commission generally does not charge for copies of documents. If a charge is to be imposed, the Commission will notify you beforehand.

Why was my request refused?

Reasons that a request is refused can be due to factors which cannot be disclosed. It does not necessarily mean that there was no public interest in releasing the information or documents to you, but that on considering all the circumstances, the Commissioner determined it was not necessary in the public interest to disclose the requested information and documents.

Can I ask for a review of a decision to refuse access?

The Commissioner will review a decision only where circumstances have changed. If there is some additional information you wish to be considered, or further submissions you wish to make, you can ask the Commissioner to consider your request again once it is provided.

Can I ask for reasons for refusal?

Detailed reasons will not generally be provided in relation to decisions not to release information or documents.

8. Attachment B – Section 180(5)(d) Application Form

Application for Disclosure of Information and Documents under section 180(5)(d) of the *Law Enforcement Conduct Commission Act 2016*

A. Applicant details

First Name:

Last Name:

Date information is required by*:

*Note: Your request should be made as far in advance as possible. Requests at short notice cannot usually be met unless there are special circumstances.

Postal Address:

Email:

Telephone:

Solicitor (if applicable):

Address:

Telephone:

D. Additional Submissions

*Note: If enough detail has been provided above about the documents/information and its relevance to the legal proceedings, the public interest will generally be evident without a submission under this part.

I submit it is necessary in the public interest that the information and/documents requested be released because:

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E. Lodging of Applications

Applications can be sent by post to:

Manager, Registry and Security
Law Enforcement Conduct Commission
GPO Box 3880
Sydney NSW 2001

Or by email to: contactus@lecc.nsw.gov.au