

OFFICE OF THE INFORMATION COMMISSIONER (QLD)

Information Sheet - Access to information obtained in the course of criminal investigations

The Information Commissioner receives numerous applications for review of agency decisions refusing access to documents created in the course of investigations of possible criminal offences. Not all of those investigations have resulted in a conviction, or even in a court hearing. In some cases, the investigation has ended without charges being laid; in others there has been an early admission of guilt or an early guilty plea, so that it was not necessary for evidence gathered by investigators to be disclosed to the subject of investigation, or disclosed in a public trial or hearing.

This is an area in which the outcome of cases very much turns on their particular facts and circumstances. However, this Information Sheet explains the outcomes that most commonly occur when information relating to criminal investigations is sought under the FOI Act.

Who applies, and what do they apply for?

The applicant is usually:

- a person whose complaint or information led to an investigation, and who is seeking information about its progress or outcome (especially if the investigation did not result in the laying of charges, or if s/he does not believe that the charges, or any penalty imposed, were adequate);
- the subject of the investigation, who believes that s/he has not been given adequate or timely access to all relevant information; or
- a third party who provided information in the course of the investigation, and who objects to the disclosure of that information, and/or of his/her identity as the source of information.

Sometimes, where an investigation has attracted media attention, the applicant is a journalist, or a Member of Parliament.

The agencies from which access to records of criminal investigations are usually sought are the Queensland Police Service and the Crime and Misconduct Commission. However, other agencies, including local government authorities, which investigate breaches of offence provisions in legislation they administer, or investigate misconduct by employees, may also hold documents of this kind.

The kinds of documents created during criminal investigations are likely to include:

- a record of the complaint or information which led to the investigation;
- records of interview and statements provided by potential witnesses (usually including the complainant/informant) and the subject of the investigation;
- any interim reports made during the investigation; and
- a report on the outcome of the investigation, containing the investigator's recommendations on what action (if any) should be taken.

What is involved in a review of this type?

Several competing interests must be carefully balanced, including:

- how much information should be disclosed to fairly inform a complainant/victim of crime of the progress and outcome of an investigation;
- accountability of the investigating agency for the efficient and effective discharge of its functions;
- the need to protect the interests, and/or the personal privacy, of people other than the applicant; and
- the need to safeguard the flow of information to law enforcement agencies by not unduly inhibiting co-operation from citizens, so that those agencies can deal effectively with complaints made to them in future.

Each case must be carefully evaluated according to its particular facts and circumstances. The amount of information which agencies are initially prepared to disclose in response to an access application necessarily varies from case to case, depending on the stage the investigation has reached, the need for the agency holding the documents to respect any applicable obligations or understandings of confidence, and any relevant privacy considerations.

The Information Commissioner, in reviewing an agency's decision, will have regard to the circumstances at the time of the external review. If this is some time after an investigation has been finalised, especially if there has been a trial or other hearing, it may be possible for additional matter to be disclosed because disclosure under the FOI Act would no longer have the adverse effects contemplated by the agency when it made its initial decision.

The FOI Act exemption provisions commonly relied upon in these cases are s.42(1)(a) and (e) (see the information sheet on *Law Enforcement Investigations*); s.42(1)(b) (see the Information Sheet on *Exempting Identities of Complainants and Information Providers*); s.44(1) (see the Information Sheet on *Personal Affairs*); and s.46(1)(a) and (b) (see the Information Sheets on *Breach of Confidence* and *Communicated in Confidence*). In the case of an agency investigation of employee misconduct, an agency may also rely on s.40(c) (substantial adverse effect on management of an agency's personnel).

This Information Sheet can only give guidance as to the general principles that apply in relation to criminal investigation cases. You may also wish to read the other Information Sheets listed above for particular types of matter which may be in issue in those cases.

What kinds of information have been disclosed in previous reviews?

Generally speaking, a **complainant or informant** – particularly one who is a victim of crime or a relative of a deceased victim of crime – could usually expect to be given access to his/her own statement/s, the substance of relevant information provided by third parties (whether or not their identities are disclosed), any response of the alleged wrongdoer to the allegations, and sufficient information about the investigation to be satisfied that the agency has conducted a satisfactory investigation (for instance, that the agency has endeavoured to interview all relevant witnesses nominated by the complainant), and reached a fair and realistic decision about whether the available evidence was sufficient or insufficient to justify any formal action being taken in respect of the complaint. This is particularly significant to a complainant where the investigation has concluded with no recommendation for a person to be charged.

The **subject of the complaint** could usually expect to be given access to his/her own statement/s and record of interview; information disclosing the substance of any complaint or allegation made against him/her which is under investigation, and sufficient information about the investigation to be satisfied that the agency has conducted an adequate investigation. If information provided by witnesses during the investigation (including their identities) was given in confidence, and the process has not reached the stage where, for example, it is necessary to disclose the evidence to be relied on by the prosecution to support charges that are contested, the information provided by witnesses may remain confidential unless and until disclosure becomes necessary to accord procedural fairness to the person charged.

Documents disclosed to an applicant may be subject to the deletion of matter of the kinds discussed below. Matter of that kind may also be found to be exempt in a review applied for by a "reverse FOI applicant" who has objected to its disclosure (usually a witness invoking privacy/breach of confidence grounds), if the "reverse FOI" applicant can satisfy the Information Commissioner that it qualifies for exemption.

Matter which may not be disclosed

Information provided in confidence

Whether or not an understanding or obligation of confidence applies to the identity of a source of information, and/or to information provided to an investigator by that source, depends upon an examination of all the relevant circumstances. The principles to be applied are explained in the separate Information Sheets on s.42(1)(b), s.46(1)(a) and s.46(1)(b) of the FOI Act referred to above.

It is important to note that the confidentiality attaching to a person's identity, or to information provided in a criminal investigation, may be conditional and not absolute. The Information Commissioner has held that, in circumstances which warrant a finding that the identities of witnesses, and/or the information they provided, were communicated in confidence, that understanding or obligation of confidence will usually be subject to conditions or exceptions permitting disclosure, if that is required:

- by a duty to accord procedural fairness;
- for the more effective conduct of the investigation; or
- in order to give a satisfactory account to a complainant/victim of crime of the reasons for the outcome of the investigation.

People providing information in an investigation must usually expect that their accounts of relevant events may need to be used or disclosed in the course of the investigation. For example, it may be necessary to put information to other possible witnesses to jog their memories or to test their respective accounts of relevant incidents, or to put information to the subject of investigation in order to obtain a response. Information supplied in such circumstances may be subject to a conditional understanding that it will be treated in confidence, unless and until disclosure becomes necessary for one of the reasons stated in this paragraph or in the preceding paragraph.

In some cases, the investigator may proceed without reference to the subject of investigation, until it is determined whether there is sufficient reliable evidence to warrant the laying of a charge. Where an investigation concludes without the subject being charged, and it did not become necessary for information which was provided in confidence during the investigation to be disclosed, its confidentiality can be maintained.

A person who provides relevant evidence to support a criminal charge could not usually have any expectation of confidential treatment beyond the point where a charge is laid. The prosecution is normally obliged to inform the person charged of the identities of witnesses and the evidence they will give. However, sometimes an early guilty plea may make that disclosure unnecessary, and permit confidentiality to be maintained.

Information identifying a complainant, where the complainant is the victim of the alleged crime, will rarely be confidential simply because it would ordinarily be impracticable to conduct a proper investigation on that basis. Where the complainant knows that the information supplied by him/her must be disclosed to the subject of complaint to obtain a response, it is likely that no express or implicit mutual understanding of confidence will exist. This will certainly be the case once the investigation reaches the point where it is necessary to put the allegations of wrongdoing to the subject of the complaint.

Similarly, it may be impracticable for an investigating agency to keep confidential the identities of any material witnesses to an incident of alleged wrongdoing whose identities are known to, or can easily be worked out by, the alleged wrongdoer. On the other hand, a person who gives alibi evidence for someone who is a subject of investigation is not usually concerned to keep that information confidential from the subject of investigation.

Information identifying an informant is unlikely to be disclosed where the informant may be vulnerable to some form of retribution, or where the informant's identity is not required to be disclosed (e.g., in the event that no charges are ultimately laid) such that a conditional understanding as to confidential treatment can be maintained.

Information about the personal affairs of third parties

Information about the personal affairs of anyone other than the FOI access applicant may be exempt from disclosure under s.44(1) of the FOI Act. The Information Commissioner has held that the fact that a person has been willing to provide information to an investigating authority relating to an incident, is itself information concerning that person's personal affairs. The Information Commissioner has also held that a reference to a person (other than a government employee in the course of performing official duties: see *Re Griffith and Queensland Police Service* under "Further Reading" below) in connection with some possible but unproven wrongdoing, is information concerning that person's personal affairs. In both instances, information of that kind will be exempt unless its disclosure to the applicant would, on balance, be in the public interest.

Statements and records of interview may also contain information about the personal affairs of the persons giving them; for example, witness statements given to police usually contain information about the age, address, marital status *etc.* of the witness. They may contain information about the emotional reactions of witnesses to what they have seen, their relationships with other persons involved in the investigation, or about their health and domestic situations. Matter of this type will be exempt, unless disclosure to the applicant would, on balance, be in the public interest. Often, however, deletion of that type of matter from a statement, transcript of interview, *etc.* will not prevent the applicant from understanding the substance of what has been said about him or her in relation to the allegations under investigation.

Legal documents

If an agency obtains legal advice in relation to a criminal investigation, that advice will usually attract legal professional privilege, and be exempt from disclosure under s.43(1) of the FOI Act.

Access to information outside the FOI Act

Other legal arrangements exist for obtaining access to information about criminal investigations outside the FOI Act; for example:

- the *Criminal Offence Victims Act 1995* Qld requires that police inform a complainant of the progress of, and decisions made in, an investigation of a violent offence;
- the *Crime and Misconduct Act 2001* Qld requires that a complainant be informed of certain matters in respect of the investigation of his/her complaint of official misconduct.

Where an investigation has led to a prosecution in the Supreme Court or District Court, a member of the public may be able to inspect exhibits tendered in the court case or to obtain a copy of a document from the court file, under the *Criminal Practice Rules 1999* Qld. In addition, upon payment of the prescribed fee, transcripts of court proceedings may be obtained from the State Reporting Bureau under the *Recording of Evidence Act 1962* Qld. Court judgments may also be obtained from the court concerned.

Further Reading

Relevant decisions of the Information Commissioner are available on the Office's website at www.infocomm.qld.gov.au, or by telephoning the Office on: (07) 3005 7100. The following cases may be of interest if you want to read more about—

- circumstances in which the identity of, and certain information provided by, an independent witness questioned by police did not qualify for exemption from disclosure to the complainant: *Re Godwin and Queensland Police Service* (1997) 4 QAR 70 (97011);
- circumstances in which the identity of a person who supplied information to assist a police investigation qualified for exemption from disclosure to the subject of a complaint: see *Re McCann and Queensland Police Service* (1997) 4 QAR 30 (97010);
- implied exceptions to an understanding that information will be kept confidential: *Re McCann* at paragraphs 56-58, and *Re Godwin* at paragraph 29 and 48-53;
- the application of exemption provisions in the context of an internal investigation of alleged misconduct by a Queensland Police Service (QPS) officer, against whom disciplinary action was taken: *Re Griffith and Queensland Police Service, Thorpe (Third Party)* (97013);
- the application of exemption provisions to information supplied by police officers and civilian employees of the QPS, for the purposes of an investigation into possible misconduct or breach of discipline by a police officer: *Re McCann*;

- information that had been subject to a mutual understanding of confidence at the time the information was supplied, but which ceased to be confidential once the fact that the complainant had supplied the information about the subject of investigation entered the public domain: *Re Criminal Justice Commission and Director of Public Prosecutions; Harris (Third Party)* (1996) 3 QAR 299 (96012) at paragraphs 18-19.

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Information Sheets are introductory only. They deal with issues in a general way. Additional factors may be relevant in particular cases. Detailed consideration of the exemption provision is set out in the cases referred to in the Information Sheet. The Information Commissioner considers each case on its merits.