



Government of **Western Australia**  
Department of **Mines, Industry Regulation and Safety**  
**Consumer Protection**

# **Disclosure Policy**

**September 2019**

**Consumer Protection Compliance Compendium**

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## **1. EXPLANATORY NOTES**

### **1.1 Organisational Background**

The Department of Mines, Industry Regulation and Safety (Department) is the State government department that brings together leadership in regulation and related activities for mines, petroleum, building, consumer protection, labour relations, and energy and worker safety.

The Consumer Protection Division (CP) assists Western Australians navigate local, national and global markets by helping consumers and traders, regulating business and enforcing consumer protection laws. The legislation administered by CP (CP legislation) varies from time to time.

The key responsibilities of CP include providing information and assistance to consumers and traders about their rights and responsibilities; helping consumers resolve disputes with traders; monitoring compliance with CP legislation; investigating complaints about unfair trading practices; prosecution and other enforcement action against traders who breach CP legislation; regulating and licensing a range of occupational activities and developing, reviewing and amending legislation that protects consumers.

In the course of its operations, CP obtains information. Some of this information is confidential and may only be disclosed in accordance with confidentiality provisions contained in various statutes in CP legislation, particularly if it pertains to or identifies individuals.

This disclosure policy (Policy) applies to every State government public officer who is empowered to carry out functions with respect to CP legislation.

A reference to CP in this Policy includes a reference to the Commissioner for Consumer Protection.

## **1.2 When did this Policy Come into Operation?**

This Policy came into effect in 2009. It was reviewed and updated during 2019.

## **1.3 What does this Policy Achieve?**

This Policy promotes a consistent approach to the manner in which CP handles the disclosure of information. It sits below the DMIRS policy which promotes transparency in material managed by the Department: the **DMIRS Transparency Policy** (in final draft form at the time that this version of the Disclosure Policy was endorsed).

## **1.4 What is the Purpose of this Policy?**

The purpose of this Policy is to:

1.4a provide general information to the public; and

1.4b provide a guide to CP officers,

about the manner in which the CP collects, handles and discloses information it obtains through undertaking its legislative functions.

## **1.5 To Whom does this Policy Relate?**

This Policy relates to CP's dealings with the public as a whole in respect of the matters that it regulates in Western Australia. This Policy is relevant to information collected from all parts of the community:

1.5a consumers;

1.5b complainants to CP about contraventions of CP Legislation;

1.5c persons suspected of contraventions of CP Legislation;

1.5d persons engaging in occupational, trade, commercial and business enterprises, whether regulated or unregulated;

1.5e Federal, State and local government agencies;

- 1.5f non-government organisations and interest groups;
- 1.5g the media;
- 1.5h legal practitioners; and
- 1.5i Department staff engaged in Consumer Protection work.

## **1.6 What is the Scope of this Policy?**

The scope of this policy covers all information obtained by CP.

## **1.7 What is the Legal Status of this Policy?**

This Policy provides general information and guidance about CP's approach to the disclosure of information. This policy:

- 1.a is not legally binding on CP, any other division within the Department, the Department, other organisations (such as other government agencies) or statutory bodies empowered to regulate occupations in this State;
- 1.7b is general in nature and does not exhaustively address all the specific statutory limitations and considerations that may be relevant under CP legislation;
- 1.7c does not confine, restrain or limit the discretion of CP to take any action; and
- 1.7d is not intended as a substitute for legal advice, legal processes or the professional judgment of CP's officers.

Individuals/corporations/others should obtain independent legal advice on their legal rights and obligations.

## 2. COLLECTING INFORMATION

### 2.1 Information Generally

CP requires accurate and up-to-date information in order to fulfil its obligations under CP legislation.

The information CP obtains may be:

2.1a publicly available;

2.1b provided to CP voluntarily; or

2.1c provided to CP under compulsion.

There are clauses in several statutes in CP legislation that restrict the way in which certain information obtained by CP may be disclosed. These clauses vary from statute to statute. Most statutes define “information” or “personal information” broadly, for example, as “*information concerning the affairs of a person*”. This might include, for example, a person’s name and address or information received about a person in the course of an investigation.

### 2.2 Publicly Available Information

CP conducts market surveillance in respect of publicly available information to inform itself of developments in the market.

### 2.3 Information Provided Voluntarily

CP will obtain information voluntarily, for example: complaints from the public and information provided during compliance visits and investigations.

### 2.4 Information Provided Under Compulsion

CP Legislation and other broader legislation such as the [Criminal Procedure Act 2004](#) contain various powers to obtain information under compulsion. In summary, these powers take the form of the following:

2.4a **Statutory notice**, that can require the recipient to produce documents and/or answer questions e.g. section 69 of the Fair Trading Act 2010 (the FTA)

2.4b **search warrant**, that allows the entry onto premises and the collection of information for the purposes of carrying out an investigation e.g. section 71 of the FTA;

2.4c **compliance check** at both regulated and unregulated person's business premises, that can authorise an officer to enter a person's business premises without obtaining a warrant to determine whether:

- a regulated person is complying with conditions of their authorisation, the requirements of their registration or the code of conduct or
- an unregulated person is complying with relevant legislative requirements,

and then the officer can then exercise the powers in sections 69, 79 and 87 once entry is made, for example section 88E of the FTA;

2.4d **record keeping**, when some CP Legislation e.g. [Associations Incorporation Act 2015](#) requires certain records to be kept and either lodged with Consumer Protection for entry on public registers or made available for inspection or when records are required to be kept but are not to be made public;

2.4e **licensing**, when some CP legislation e.g. [Motor Vehicle Dealers Act 1973](#) requires certain information to be submitted when a licence is sought; and

2.4f **court actions**, CP may acquire information in court actions through the disclosure/discovery or summons processes which must remain confidential.



### **3. KEEPING INFORMATION**

#### **3.1 General Principles**

Information obtained by CP may be used by CP officers, their legal advisers and consultants to carry out CP's functions under CP legislation.

If CP obtains information in the course of dealing with one matter, it may use that information in another matter, provided this use is permitted by CP legislation.

If CP obtains information in the course of an action before a court or tribunal, it will be bound by the rules of that court or tribunal or any consequential orders made relating to the use of that information.

### **4. DISCLOSING INFORMATION**

Access to comprehensive, pertinent information can increase the effectiveness of CP and other agencies in their regulatory roles. As such, CP shares relevant information with other agencies when it is in the public interest to do so and permitted by the relevant legislation. Such disclosure must be consistent with the following principles and in accordance with the limitations in relevant legislation discussed in the following sections.

#### **4.1 General Principles**

4.1a CP officers must approach the disclosure of information in a responsible manner.

4.1b CP officers must only disclose information as authorised or required by law.

4.1c CP officers should be cognizant of and act in accordance with the provisions of the FTA that allow divulging or communicating personal information for purposes of performing a function under or in connection with the FTA or the Acts listed in Schedule 2 of the FTA.

- 4.1d CP officers must ensure that disclosure is made by a person who is authorised under the statute in question to make that disclosure.
- 4.1e CP officers must attempt to inform those persons to whom the information relates of any proposed disclosure, where practical, unless to do so would restrict CP's performance of its functions or would be unlawful.
- 4.1f When information obtained using compulsory powers is disclosed, CP officers must advise the recipient of the disclosed information that the information is confidential and ensure that restrictions are placed on the use of that information in order to maintain its confidentiality
- 4.1g Where information obtained voluntarily is, in the assessment of CP officers, confidential, CP officers must also seek to ensure that restrictions are placed on the use of that information in order to maintain its confidentiality e.g. identity of complainant where the complainant has requested to remain anonymous.

## 4.2 Overview of Disclosure under CP Legislation

The FTA, being the umbrella piece of consumer protection legislation, contains provisions regarding confidentiality and the limited circumstances in which personal information can be disclosed. It is a criminal offence for any personal information held by CP to be disclosed unless the relevant legislation provides for the disclosure.

Section 112 of the FTA provides for divulging or communicating personal information for purposes of performing a function under or in connection with the FTA or the Acts listed in Schedule 2 (a number of Registration Acts also referred to as "occupational licensing" Acts). Section 112 also provides for divulging personal information to a body established by law if the information concerns a regulated (or formerly regulated) person or relates to the body's statutory functions. As such, the FTA provides some latitude for CP to share information, however this must be done with discretion.

Many pieces of CP legislation, such as the *Associations Incorporation Act 2015* and the *Motor Vehicle Dealers Act 1973*, apply the FTA confidentiality provisions (subject to some exclusions) as if they are part of that Act. Other Acts, such as the *Residential Tenancies Act 1987* (the RT Act) contain their own confidentiality provisions.

With each proposed disclosure, CP officers will need to consider the confidentiality provisions of the statute under which the information was collected. Generally, a confidentiality provision will provide that information may not be disclosed unless the disclosure is done:

4.2a in the course of duty; or

4.2b where it is specifically or impliedly allowed by the statute in question;  
or

4.2c for the purposes of investigating an offence; or

4.2d where the information is de-personalised; or

4.2e where the person to whom the information relates consents.

### 4.3 In the Course of Duty

For the purposes of section 112(3)(c) of the FTA, the Commissioner for Consumer Protection is of the opinion that when information retained by or on behalf of the Commissioner is relevant to the performance of statutory functions of another agency, then disclosure of that information is necessary and desirable for the performance of the Commissioner's functions in section 56(1) of the FTA. However, again, such disclosure of information on behalf of the Commissioner must be done with discretion.

Disclosure of information "in the course of duty" may include, but is not limited to, the following.

4.3a **Disclosure pursuant to a request for information made under the [Freedom of Information Act 1992 \(WA\)](#)** (FOI Act) - The FOI Act does exempt certain categories of information from disclosure and requires CP to consult with persons to whom information relates in some circumstances.

4.3b **Disclosure in the course of litigation** - When CP participates in litigation in a court or tribunal, it will be bound by the rules relating to the court or tribunal in question. These will require information to be produced by way of disclosure or discovery, in response to notices to produce and by way of evidence.

4.3c **Responding to statutory notices.** Other Federal or State agencies may require CP to produce information in response to statutory notices.

- 4.3d **Responding to a subpoena or summons** in litigation in which CP is not a party. CP may be served with a subpoena or a summons to give evidence or produce documents in court actions in which CP is not a party.
- 4.3e **Procedural fairness**, that is providing sufficient detail to an applicant of a licensing decision or providing sufficient detail to allow a person to respond to an allegation in the course of an investigation.
- 4.3f **Preparing submissions** to inquiries conducted on behalf of the State government.
- 4.3g **Sharing information** with another area of the Industry Regulation and Consumer Protection Group in DMIRS in accordance with the Protocol at **Appendix A**.
- 4.3h **Sharing information** with another WA agency or inter-State consumer protection agency for the purposes of a joint program, initiative or investigation.

#### 4.4 Disclosure Allowed by Statute

Some statutes comprising part of CP legislation may expressly or impliedly allow the disclosure of information.

Example: section 57 FTA expressly authorises the Commissioner to disclose information that identifies particular goods, services, business practices and persons. Such disclosure is permitted in the public interest as part of a warning to the public about unsatisfactory goods or services and unfair business practices.

Example: section 56(3) FTA permits the Commissioner to co-operate with other fair trading agencies in order to make recommendations to the Minister on certain matters. This provision impliedly authorises the Commissioner to disclose information to the extent that it is necessary in order to fulfil the obligations under this section.

Example: some provisions, such as section 162 of the *Associations Incorporation Act 2015* specifically permit any person to inspect or purchase copies of documents lodged with the Commissioner, authorising release of those documents by officers in the course of undertaking their duties.

Example: section 218 ACL (WA) allows the regulator to accept a written undertaking from a person in relation to conduct which the Commissioner considers is a breach of the ACL. It is a term of an enforceable undertaking that it is not confidential and may be published by the Commissioner. However, it is the Commissioner's practice to redact signatures of the trader and any third party details (for example the consumers' names, before publishing an undertaking on the Department's website.

Permission to disclose will usually not be implied into a statute unless the purpose of the statute could not be fulfilled without the disclosure taking place.

#### **4.5 Disclosure to Enable Investigation of Offence by CP**

Generally, information obtained by CP under the FTA may be disclosed to another part of CP in order for an offence against CP legislation to be investigated. Section 113 of the FTA provides that information obtained under the FTA may be disclosed in connection with the performance of any function under the FTA or any function under any other written law that is administered through the Department.

#### **4.6 Disclosure in Response to a Request from another State or Federal Agency**

##### ***Fair Trading Act 2010***

The confidentiality provisions under the FTA (and by extension the CP legislation which adopt these provisions) permit disclosure of information:

4.5a by CP to another Western Australian agency when such information relates to a person regulated by CP or a person formerly regulated by CP (that is, a person licensed under a Schedule 2 Act) and is given in relation to the performance by the receiving agency of its statutory functions (see section 112(3)(da) of the FTA); or

4.5b to any State, Territory or Federal agency for the purposes of the receiving agency investigating any suspected criminal offence or the conduct of proceedings against any person for a criminal offence (see section 112(3)(e) of the FTA).

In these two situations, there is no requirement under the FTA that the information may only be disclosed under a warrant or by compulsory notice. Note that the ability to disclose information for the purposes of investigation relates only to investigations of **criminal offences**.

Even when the FTA or other CP legislation do not require a compulsory notice for disclosure of information, it is best practice to seek such a notice from the agency requesting the information.

### ***Residential Tenancies Act 1987***

The confidentiality provisions under the RT Act permit disclosure of information:

4.5c when it is incidental to carrying out a person's functions and duties of employment **and** in response to a compulsory notice; that is it is not limited only to disclosures in the discharge of functions and duties which are specifically cast upon an office holder by statute (see section 11A(2)(c) of the RT Act); or

4.5d to any State, Territory or Federal agency for the purposes of the receiving agency investigating any suspected criminal offence or the conduct of proceedings against any person for a criminal offence (see section 11A(2)(c) of the RT Act).

Note that, in the first situation, a compulsory notice is required. For the purposes of section 11A(2)(c), when an officer is compelled to disclose information by a body with legal authority to compulsorily obtain information, the disclosure is incidental to the officer's statutory duties and functions. However, information must not be disclosed in the absence of a compulsory notice.

In the second situation, there is no requirement that information be disclosed under a warrant or compulsory notice provided the disclosure is for the purposes of the investigation of or proceedings for a **criminal offence**. However, the information **must** be required for the investigation of or proceedings for a criminal offence. It cannot be a speculative or "fishing" request for information; there must be some factual basis for "suspecting" the criminal offence occurred. Further, CP has the discretion to refuse the request for information in the absence of a compulsory notice.

Even when the RT Act does not require a compulsory notice for disclosure of information, it is best practice to seek such a notice from the agency requesting the information.

#### **4.7 Depersonalised Information**

Information may often be disclosed if the disclosure is made in a manner that could not reasonably be expected to lead to the identification of any person to whom the information relates e.g. in statistical format. Where the information would be otherwise confidential, legal advice should be obtained prior to any such disclosure.

#### **4.8 Consent**

Information may usually be disclosed if the person to whom the information relates, or each of them if there is more than one, consents.

### **5. MEMORANDA OF UNDERSTANDING**

#### **5.1 General Principles**

CP has entered a number of memoranda of understanding with external agencies. A list of the memoranda of understanding currently in force is included in the Department Annual Report.

The purpose of these memoranda of understanding is to provide a structured and formal arrangement for information sharing where the parties have a common interest or legislative responsibility.

In most cases the scope of these memoranda of understanding is limited to selected areas of mutual interest and there are limited powers of request and exchange.

However, any disclosure of information pursuant to a memorandum of understanding must be done in accordance with CP Legislation and the principles set out above.

#### **Note**

This Policy has been developed for CP's specific requirements. In creating this Policy, regard has been had to policies used by other agencies, in particular, the ACCC.

## **APPENDIX A**

### **Protocol for Sharing of Information across the Industry Regulation and Consumer Protection (IRCP) Group**

The Building Commissioner (BC) is the person designated for the purposes of the Building Services (Complaint Resolution and Administration) Act 2011 (BSCR Act) and related legislation including the Building Services (Registration) Act 2011 (BSR Act).

The Commissioner for Consumer Protection (CCP) is the person designated for the purposes of the Fair Trading Act 2010 (FT Act) and related legislation.

The Director of Energy Safety (DES) is the person appointed to the position established under the Energy Coordination Act 1994 (EC Act) with functions, duties and powers under various statutes.

The Plumbers Licensing Board (PLB) is established under section 59 of the Plumbers Licensing Act 1995 (PL Act) with functions under the PL Act and associated regulations.

#### **Sharing of Information by or on behalf of the Building Commissioner**

In accordance with section 101 of the BSCR Act, when information is obtained, recorded, retained or stored by the BC in the performance of the BC's functions, that information may be disclosed to the CCP for the performance of the CCP's functions under the FT Act. As such, information retained in the performance of the BC's functions may be requested by and provided to any officer involved in the performance of the CCP's functions.

There is no similar provision for disclosure of information by the BC for the performance of the functions of the DES or the PLB. As such, information retained in the performance of the BC's functions may be sought by or on behalf of the DES under the inspection powers in section 14 of the EC Act. The PLB has no similar provisions for compulsorily obtaining information from the BC.



### **Sharing of Information by or on behalf of the Commissioner for Consumer Protection**

For the purposes of section 112(3)(c) of the FT Act, the CCP is of the opinion that when information obtained, recorded, retained or stored by the CCP is relevant to the performance of the functions of the BC, the DES or the PLB, then disclosure of that information to the BC, the DES or the PLB is necessary and desirable for the performance of the CCP's functions in section 56(1) of the FT Act. Information retained in the performance of the CCP's functions may be requested by and provided to any officer involved in the performance of the BC's, the DES's or the PLB's functions.

### **Sharing of Information by or on behalf of the Director of Energy Safety**

In accordance with section 24(1) of the EC Act, information obtained in the exercise of the functions of the DES can be disclosed **only**:

- for the purposes of performing functions under the EC Act;
- with the written consent of the person to whom the information relates; or
- as required or allowed by the EC Act or another written law.

As such, information retained in the performance of the DES's functions may be sought by or on behalf of:

- the BC under the powers for obtaining information and documents in section 68 of the BSCR Act, or
- the CCP under the powers for investigation and inquiries in section 69 of the FT Act.

The PLB has no similar provisions for compulsorily obtaining information from the DES.

### **Sharing of Information by or on behalf of the Plumbers Licensing Board**

In accordance with section 60B of the PL Act, a person performing functions under the Act may disclose information obtained in the course of duty **only**:

- for the purposes of performing functions under the PL Act;
- with the written consent of the person to whom the information relates;
- in other prescribed circumstances; or
- as required or allowed by the PL Act or under another written law.

As such, information retained in the performance of the PLB's functions may be sought by or on behalf of:

- the BC under the powers for obtaining information and documents in section 68 of the BSCR Act,
- the CCP under the powers for investigation and inquiries in section 69 of the FT Act, or
- the DES under the powers of inspection in section 14 of the EC Act.

### **Manner of Sharing Information**

When information is being required under "another written law" appropriate compulsory notices/directions/requests must be used.

When information is being shared by the BC or CCP under the terms of the BSCR Act or FT Act respectively, disclosure of the information will occur in the manner determined by the CCP and BC, which includes but is not limited to:

- exchanging physical documents and evidence;
- giving access to electronic records;
- producing statistical or other summary records or data; and
- jointly attending meetings or interviews with complainants and respondents, persons the subject of investigations or inquiry, or other stakeholders.

Information obtained under the terms of this Protocol must not be disclosed to a third party or made available in the public domain by any officer without the express authorisation of the officer's General Manager/Manager, Director or Commissioner.

Any officer who has concerns about providing information under the terms of this Protocol must refer those concerns to the officer's General Manager/Manager. Any proposal to refuse to provide information under the terms of this Protocol must be referred to the officer's General Manager/Manager or Director before a decision to refuse is made.