



**ASIC**

Australian Securities & Investments Commission

## INFORMATION SHEET 181

### Providing information and documents to private litigants

Enforcing the laws that govern corporate, securities and financial services is not exclusive to ASIC. Private rights and obligations are created by the law and these may be enforced through private litigation, including class actions.

Our policy, supported by legislation, is that we will generally assist litigants by providing information and documents if requested, subject to:

- avoiding potential prejudice to our investigations
- any legal limitations on our ability to disclose confidential or private information
- the rights of third parties affected by the provision of information.

This information sheet provides general information on ASIC's powers to provide non-public information and documents to private litigants, or persons contemplating litigation. It covers:

- [our powers to provide information or documents](#)
- [release of transcripts and related books](#)
- [release of books compulsorily produced or seized under a notice or warrant](#)
- [responding to a subpoena or summons](#)
- [responding to a notice requiring non-party discovery or a notice to produce](#)
- [limitations on release of information or documents.](#)

For general information about our policy on release of non-public information (i.e. not only to third parties engaged in private litigation), see Regulatory Guide 103 *Confidentiality and release of information* ([RG 103](#)).

For general information about how to obtain access to publicly available information and documents, visit our website at [www.asic.gov.au](http://www.asic.gov.au), where you can obtain published documents and search ASIC registers.

### Our powers to provide information or documents

The *Australian Securities and Investments Commission Act 2001* (ASIC Act) and the *National Consumer Credit Protection Act 2009* give ASIC the power to provide certain types of information or documents to private litigants in the following circumstances:

Information sheets provide concise guidance on a specific process or compliance issue or an overview of detailed guidance.

- we may provide copies of transcripts of examinations conducted by ASIC to third parties in certain circumstances (see [Release of transcripts and related books](#) below)
- we may allow documents acquired through the exercise of compulsory information-gathering powers to be used for the purposes of a proceeding or allow a person to inspect those documents (see [Release of books compulsorily produced or seized under a notice or warrant](#) below).

We must respond to a valid subpoena or summons to provide evidence or documents relevant to the issues being decided by a court or tribunal (see [Responding to a subpoena or summons](#) below), subject to any limitations on the release of the information: see [Limitations on release of information or documents](#) below.

We may also need to respond to a notice of non-party discovery (or third-party discovery) or a notice to produce: see [Responding to a notice requiring non-party discovery or a notice to produce](#) below.

## Release of transcripts and related books

We may provide transcripts of examinations that are conducted by ASIC to a person's lawyer if the person is commencing a proceeding in a matter to which the examination related.

RG 103 explains our approach to releasing transcripts or related books. In deciding whether to release copies of transcripts, we exercise a general discretion, but we will also consider whether:

- we are satisfied that the person is commencing a proceeding
- we are satisfied that the proceeding relates to a matter to which our examination relates
- an ASIC investigation or enforcement action would be jeopardised by the release of the transcripts
- other people may be adversely affected by the release of the transcripts.

Additionally, we may give transcripts and related books to any person, even if that person is not commencing proceedings, provided that the disclosure is authorised in some other way, such as under another legislative provision.

We may impose conditions limiting the use and further disclosure of the information we have released in addition to conditions imposed by legislation.

We may also delete portions of information that are confidential to other people if they are not necessary to the purpose of the disclosure or if we decide that they should not be disclosed: see [Limitations on release of information or documents](#) below.

Note: For more information on the conditions we may impose on a release of information under s25, see [RG 103.34–RG 103.38](#).

## Release of books compulsorily produced or seized under a notice or warrant

We may permit the use of any books that we have obtained under a compulsory notice or warrant (issued under the ASIC Act) for the purposes of a court or tribunal proceeding. 'Books' are defined broadly in the ASIC Act and include financial records, documents and 'any other record of information'.

We may release the relevant compulsorily acquired books to third parties for use by them in proceedings. In making a decision about release, we will consider a number of issues in order to comply with the ASIC Act. These include:

- verifying how the books were obtained by us
- verifying that the books are proposed to be used in a proceeding

- considering what conditions, if any, should be imposed.

Additionally, we must permit a person entitled to inspect books to inspect any books that are in our possession. For example, a liquidator is entitled to inspect books (including those produced by the company before external administration) under the *Corporations Act 2001* (Corporations Act) and we must permit them to inspect those books if they are in our possession.

We consider that the right to inspect books includes the right to obtain copies of documents, so we are therefore authorised to allow another person to inspect the books.

We may impose conditions – for instance, limiting the use and further disclosure of the information on inspections.

Note: For more information on ASIC’s approach to release of books, see [RG 103.20–RG 103.22](#).

## Responding to a subpoena or summons

A subpoena or a summons is a tool for parties to use to obtain documents or evidence that could have relevance to issues before a court. We may be served with a subpoena or summons even if we are not a party to the proceeding.

Note: A subpoena (or a summons) differs from a discovery order, which may be issued by one party to proceedings to another party to the proceedings. It is improper to issue a subpoena as a means of discovery.

The scope of the subpoena should be clear (i.e. what documents are being sought) and the documents sought should have a legitimate forensic purpose in the proceeding in which the subpoena or summons is issued.

If the subpoena or summons is valid, the court or tribunal issuing it can compel the recipient to respond to it, but this is subject to any [limitations on release of information or documents](#).

Note: For information about how we assess fees for complying with subpoenas, see Regulatory Guide 17 *Fees for subpoenas* (RG 17). Information about serving legal documents on ASIC may be found on our website at [www.asic.gov.au](http://www.asic.gov.au) under ‘About ASIC’.

## Responding to a notice requiring non-party discovery or a notice to produce

A court may require us to produce documents in our possession that are directly relevant to an allegation in a case being conducted by third parties. We must produce the documents required to be produced by the notice within the required period of time.

Note: For information about claims of legal professional privilege, see Information Sheet 165 *Claims of legal professional privilege* ([INFO 165](#)).

We may seek payment from the other party for the costs and expenses of complying with the notice.

## Limitations on release of information or documents

ASIC’s power to release non-public information or documents is subject to limitations, both general and specific to the statutory powers under which we may release them.

In most cases, we will not provide information or documents where to do so could potentially compromise an ASIC investigation or enforcement action.

General limitations on our ability to release information or documents may apply in any situation. Limitations that may apply in specific circumstances may include whether:

- the terms on which we received the information limit and/or prohibit the use or disclosure of the information or documents
- any of the information is claimed to be covered by legal professional privilege – we will generally treat this information as confidential, but the privilege holder retains responsibility for asserting or maintaining privilege where we are compelled by law to disclose the information (such as responding to a subpoena)
- the information is personal, as defined in the *Privacy Act 1988* (Privacy Act).
- the information is confidential or protected, limiting to whom we may disclose it, or for what purpose
- the proposed recipient has the authority to receive the information
- the purpose for which the information is proposed to be used is an authorised purpose (e.g. under a legislative provision)
- procedural fairness should be provided to any person directly and materially adversely affected by a disclosure, after which we will make a decision about disclosure (see [Procedural fairness](#) below).

Note: For further information on legal professional privilege, see [INFO 165](#).

We may impose conditions to restrict the use, or further disclosure, of the information in appropriate circumstances. Additionally, the Privacy Act sets out rules about how Commonwealth agencies such as ASIC may collect, use, store and disclose personal information.

### Procedural fairness

Procedural fairness in this context involves giving a person an opportunity to be heard (which may include making a written submission). Before we make a decision to disclose information we must generally provide procedural fairness to a person directly and materially adversely affected by the decision. A person whose reputation or confidences would be directly adversely affected is regarded as a ‘person affected’ by ASIC. Whether a particular person in a specific case must be afforded procedural fairness will depend on the circumstances.

If we are ourselves compelled to provide confidential information about a person (e.g. under subpoena), we have no discretion whether to release it so no obligation to provide procedural fairness will arise. However, we will ordinarily give notice of the fact of our compulsion to release the information to a person who may be directly and materially adversely affected by its release to enable them to take whatever action may be necessary to protect their interests.

For more information on the different considerations relevant to the question of whether there is an obligation to provide procedural fairness, see [RG 103](#).

### Where can I get more information?

- Download copies of:
  - Regulatory Guide 17 *Fees for subpoenas* ([RG 17](#)), and Regulatory Guide 103 *Confidentiality and release of information* ([RG 103](#)); and
  - Information Sheet 145 *ASIC’s compulsory information-gathering powers* ([INFO 145](#)), Information Sheet 151 *ASIC’s approach to enforcement* ([INFO 151](#)), Information Sheet 165 *Claims of legal professional privilege* ([INFO 165](#)) and Information Sheet 180 *ASIC’s approach to involvement in private court proceedings* (INFO 180).
- Contact ASIC on 1300 300 630.
- Submit a question online at [www.asic.gov.au/question](http://www.asic.gov.au/question).

## **Important notice**

Please note that this information sheet is a summary giving you basic information about a particular topic. It does not cover the whole of the relevant law regarding that topic, and it is not a substitute for professional advice. Omission of any matter on this information sheet will not relieve a company or its officers from any penalty incurred by failing to comply with the statutory obligations of the Corporations Act.

You should also note that because this information sheet avoids legal language wherever possible, it might include some generalisations about the application of the law. Some provisions of the law referred to have exceptions or important qualifications. In most cases your particular circumstances must be taken into account when determining how the law applies to you.