
IPOLA GUIDELINE

Interpreting the legislation – Information Privacy Act 2009

QPP 6 – Use or disclosure for natural justice

This guide does not reflect the current law.

It highlights important changes to the *Information Privacy Act 2009*.

This guide does not constitute legal advice and is general in nature only. Additional factors may be relevant in specific circumstances. For detailed guidance, legal advice should be sought.

1.0 Overview

Queensland government agencies¹ are required to comply with the Queensland Privacy Principles (QPPs) in the *Information Privacy Act 2009* (Qld) (**IP Act**) when collecting, storing, using and disclosing personal information.

Section 12 of the IP Act provides that personal information means information or an opinion about an identified individual or an individual who is reasonably identifiable from the information or opinion, whether the information is true or recorded in a material form.

The individual does not need to be directly identified in the information for it to be personal information. It is sufficient if they can reasonably be identified by reference to other information.

2.0 When can an agency use and disclose personal information?

QPP 6 sets out the rules for using and disclosing personal information.² QPP 6 permits personal information to be used and disclosed in a number of situations, including where the use or disclosure is required or authorised under an Australian law.³

'Australian law' is defined in the IP Act to include the common law.⁴

¹ In this Guideline, reference to an 'agency' includes a 'Minister' unless otherwise specified.

² The concepts of 'use' and 'disclosure' are defined in section 23 of the IP Act.

³ QPP 6.2(b).

⁴ Schedule 5 of the IP Act.



3.0 What is Natural Justice?

The duty to afford persons natural justice (also called procedural fairness) is a part of Australian common law.⁵ Exceptions in the QPPs permitting activities where required or authorised under an Australian law will therefore include dealings with personal information undertaken for the purposes of affording natural justice.⁶

Natural justice is the right to be made aware of, and respond to, information which will be used in the course of a decision that will negatively affect the person.⁷ For example, a decision to discipline an employee, fine someone for a breach of the law, refuse to give someone a licence or take away a benefit, such as a travel concession.

In the context of a complaint, natural justice requires that the subject of the complaint be given enough information that they can understand and respond to the complaint made against them. This will generally be only a small part of the information collected in the course of the complaint process.

Non-adverse information, adverse information which is not being relied on, and information that would merely be of interest⁸ to the person does not trigger a natural justice obligation to provide the person with the information.

4.0 Natural justice: required by law

The obligation to accord natural justice is a requirement of the government decision making process. It applies before the agency relies on the adverse information to make the decision; once the decision has been finalised, the obligation no longer applies.

Agencies that fail to comply with the requirements of natural justice risk having their decisions declared invalid by a court or tribunal. However, the obligation to accord natural justice does not oblige the agency to use or disclose all relevant material.⁹ The agency is only required to use or disclose enough information—which must be credible, relevant and significant to the adverse finding—about the material to allow the recipient to effectively respond.¹⁰

As discussed above, the obligation to accord natural justice is required under Australian law, but only the minimum amount of personal information necessary can be used or disclosed; any irrelevant personal information must be removed or held back.

⁵ *Kioa v West* (1985) 159 CLR 550. (*Kioa v West*).

⁶ While this Guideline focusses on the exception in QPP 6.2(c) permitting use or disclosure where authorised or required by an Australian law, a similar exception appears in other QPPs – see, for example, QPP 3.4(a) concerning the collection of sensitive information, and QPP 3.6(a)(ii) – collection of personal information from someone other than the individual concerned. The principles discussed in this Guideline apply equally to those exceptions.

⁷ See Brennan J, in *Kioa v West*.

⁸ For example, the identity of the complainant is invariably a subject of interest to the person complained about. However, in most cases this identity is not relevant to the subject matter of the complaint.

⁹ *Kioa v West* at 584.

¹⁰ *Kioa v West* at 629.



Note

The onus will be on the agency to establish that the use or disclosure is necessary. If natural justice can be given using de-identified information the use or disclosure of personal information will not be authorised.

5.0 Complaint handling and natural justice

Regardless of the complexity and circumstances, *all* complaint processes will involve natural justice obligations, for example:

- complainants, who may need to be given natural justice, for example, where the complaint process involves a decision that will negatively affect a complainant.¹¹
- where the agency proposes to decline to accept a complaint, for example because the agency considers that it lacks jurisdiction, natural justice may require giving the complainant the opportunity to make submissions on why the agency should accept the complaint, prior to any decision.
- telling the person the details of the complaint against them and the evidence the agency is relying on to make a decision.

Where a complaint is made by one individual against another individual, the complainant or their interests will not necessarily be directly¹² affected by the outcome of the complaint. For these complaints, while natural justice will always apply to the person complained about, it will rarely apply to the complainant or witnesses.

Limits of the authorisation

In a complaint process, the authorisation will only apply to disclosures that are necessary to satisfy natural justice and it will only apply to information that is credible, relevant, and significant to that complaint.

If an agency uses or discloses personal information which is not required to give someone natural justice, it may breach the privacy principles and could give rise to a separate privacy complaint.

5.1 Identity of the complainant

For many complaints, the identity of the complainant will have no bearing on the subject matter of the complaint. Agencies commonly acknowledge this fact by allowing complaints to be made anonymously or for the complainant's identity to be treated confidentially.¹³ Additionally, QPP 2 requires agencies to allow

¹¹ See for example, section 268 of the *Local Government Act 2009* (Qld).

¹² The complainant may nonetheless have an indirect connection to the complaint. For example, a person who complains about a neighbour's barking dog will be interested in an outcome where the dog ceases barking.

¹³ For more information on this topic refer to OIC's Guideline *Privacy in complaints management: anonymity and confidentiality*.



anonymous or pseudonymous interactions unless it is not legal or practicably possible.¹⁴

In some complaints, for example a complaint about harassment, the complainant's identity will be relevant to the investigation and will need to be disclosed to the person the complaint is about. However, even with these complaints, only some of the complainant's personal information will be relevant. Irrelevant information, such as any personal damage the complainant suffered because of the behaviour complained about, should not be provided.

5.2 Identities of witnesses

In most cases, information given by a witness concerning the subject matter of the complaint will need to be provided to the person complained about. In some cases, the witnesses' identities may also be relevant to the subject of the complaint. In these circumstances, agencies should advise witnesses the first time they speak with them or when taking their statement of the possibility that their personal information may need to be given to the subject of the complaint.

5.3 De-identification and redaction

Natural justice does not automatically require that the subject of a complaint be given unedited copies of relevant documents. Agencies should consider whether it would be appropriate to provide de-identified information or documents, outlines of the complaint details and relevant allegations, and/or summaries of evidence and witness statements.

Example

Mary Jones has the use of a departmental vehicle on the condition that she only uses it for travel between her home and the office. Another officer of the Department, Michael Smith, makes a complaint that Mary frequently uses the car for personal shopping and to transport her children to and from school.

In investigating the complaint, the Department finds that Mary's vehicle logs show more kilometres travelled than can be accounted for by the permitted travel. Consequently, the Department commences disciplinary proceedings against Mary.

Before a decision is made in the proceedings, the Department provides the complaint allegation and vehicle logs to Mary to give her the opportunity to respond. Mary demands to know who made the complaint, claiming that natural justice gives her the right to challenge the credibility of the complainant.

The Department refuses to reveal Michael's identity on the basis that his identity is not information necessary for Mary to understand the allegation made against her or the evidence on which the Department would base a decision to discipline her. If the Department had told Mary that Michael had made the complaint he would have strong grounds on which to make a privacy complaint against the Department.

¹⁴ Refer to QPP 2 – *Dealing anonymously with an agency* for more information.

6.0 Information about the outcome of a complaint

The outcome of the investigation, the findings of the investigator, and any actions taken against the person the complaint was about are that person's personal information. Natural justice cannot require giving that information to a third party, such as the complainant (if their interests were not the subject of the complaint) or witnesses.

Complainants often have expectations they will be supplied information concerning the outcome of a complaint; the best time to address these expectations is when the complaint is made.

Agencies that want to communicate the personal information of the subject of the complaint to other persons must ensure they do not breach the privacy principles when doing so, and should consult ***Complaint status and outcomes – what can you tell a complainant?*** (guideline under development) for more information.

For additional IPOLA assistance, please contact the IPOLA team by email IPOLA.Project@oic.qld.gov.au

For information and assistance on current legislation, please refer to the OIC's guidelines, or contact the Enquiries Service on 07 3234 7373 or by email enquiries@oic.qld.gov.au

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