



# Australian Customs and Border Protection Service

ADMINISTRATION OF COERCIVE POWERS IN  
PASSENGER PROCESSING

December 2010

Report by the Commonwealth Ombudsman,  
Allan Asher, under the *Ombudsman Act 1976*

REPORT NO. **15|2010**

## Reports by the Ombudsman

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**ISBN 978 0 9807966 7 4**

Date of publication: December 2010

Publisher: Commonwealth Ombudsman, Canberra Australia

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## EXECUTIVE SUMMARY

Each year millions of people travel through Australia's international airports. In doing so, they interact with a number of private and public sector organisations. The Australian Customs and Border Protection Service (Customs) is one of them.

Strong coercive powers are exercised by Customs officers in the airport environment. Customs officers can stop travellers and ask them questions about a range of matters, and examine goods in their possession including diaries, mobile phones, cameras and computers. Officers can copy documents and, in some circumstances, retain a person's possessions for a period of time for further examination.

Complaints are consistently made to the Ombudsman about the exercise of these powers by Customs officers. Travellers often do not understand why they were subject to Customs examination, and they may not accept that the Customs officer was acting within their power to take a particular action.

Good administration of coercive powers requires strong checks and balances to ensure those powers are exercised lawfully and reasonably, with proper regard to the individual's circumstances. Administration needs to be transparent and accountable, and proper records should be maintained in the exercise of those powers.

In this context, the Ombudsman decided to conduct an own motion investigation into Customs' administration of some of its coercive powers in passenger processing, to assess its policy and practice against relevant legislation and principles of good administration. The Administrative Review Council has published twenty best practice principles with respect to the government exercise of coercive information gathering powers, which are referred to throughout this report.

This investigation has identified that Customs' policy and training material on the exercise of coercive powers in passenger processing is generally consistent with relevant legislation and principles of good administration. However, there are areas for improvement with respect to:

- the relevance of questions asked and documents copied in some circumstances
- the timeliness of the return of personal possessions after forensic examination
- gaps between policy and practice with respect to record keeping and the transparency of administration
- the publication of both general and specific information about the powers.

The Ombudsman's recommendations for improving these areas, and Customs' response to those recommendations, are set out in full at Part 5 of the report.

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We appreciate the cooperation and assistance provided by Customs to our office throughout the investigation. The Ombudsman is also pleased to report that Customs has fully accepted seven out of the 10 recommendations made and partially accepted a further two recommendations. Customs has rejected one recommendation.

As is our normal practice, we will follow up with Customs on its implementation of the recommendations in six months time.

## PART 1—INTRODUCTION

### Rationale for investigation

1.1 The Commonwealth Ombudsman receives a steady flow of complaints about the actions of Customs officers at airports.<sup>1</sup> These complaints have commonly related to questioning and baggage examination by officers, the retention of the person's belongings for further examination and the copying of documents carried by the passenger.

1.2 Recurring complaint themes are: that the person feels they were 'treated like a criminal'; that the questioning and examination were intrusive and no justification was given; or that their privacy was invaded. Less frequent have been claims of harassment arising from repetitive Customs interventions when the person travels internationally.

1.3 A Customs officer is able to impede a person's passage through an airport and to ask questions that the person must answer. The officer is allowed to examine the person's baggage and items found within it, including diaries and notebooks, laptop computers, cameras and other electronic storage devices. The officer can in some circumstances copy those documents – for example, the officer may download mobile phone content. The officer is also able to keep an item carried by the person for a period of time after the person has left the airport, to enable it to be examined by another area within Customs with the necessary expertise and equipment. These are strong powers, used by Customs to regulate the movement of people and goods across Australia's border.

1.4 Customs officers' powers are exercisable with respect to all those who depart from and arrive in Australia on international flights. For the most part, passengers will travel through the airport unimpeded. Customs' 2008/09 Annual Report indicated that in that year it processed 24.33 million international air and sea passengers, and on average 97.4 per cent of those passengers were processed through Customs within 30 minutes of joining the inwards queue.<sup>2</sup> Nevertheless, as complaints to this office indicate, when a person is subject to some form of Customs intervention at the airport, it can be cause for significant concern for that person.

1.5 In this context, the Commonwealth Ombudsman decided to conduct an own motion investigation of Customs' administration of coercive powers in passenger processing. The investigation was undertaken under s 5(1)(b) of the *Ombudsman Act 1976* and this report sets out the Ombudsman's investigation, findings and recommendations.

<sup>1</sup> 18 of 106 Customs complaints in 07/08; 16 of 96 Customs complaints in 08/09 and 10 of 99 Customs complaints in 09/10.

<sup>2</sup> Customs, *Annual Report 2008-09*, p. 4 and p. 18.

## PART 2—SCOPE AND METHODOLOGY

### Scope of investigation

2.1 The investigation's objective was to assess the administration of the Customs officer's power to:

- question a passenger with respect to whether they are carrying dutiable, excisable or prohibited goods
- examine a passenger's baggage and goods found within it
- copy documents found as a result of an examination.<sup>3</sup>

2.2 The investigation also looked into record keeping and transparency in the administration of these coercive powers.

2.3 Customs officers exercise a number of strong coercive powers and this report does not cover all of them. For example it does not consider the exercise of personal search powers in the airport environment. It does not cover functional aspects of the use of the powers, such as technical tests or tools, or the efficiencies involved in processing travellers through an airport.<sup>4</sup>

2.4 The investigation did not cover aspects of Customs' role outside of the passenger processing context, such as its cargo and trade functions. Whilst we may examine those aspects in the future, this report focuses on the exercise of those powers that have been the most common cause of complaints to our office.

### Methodology

2.5 The overriding principle for this investigation, referred to previously by the Ombudsman, is that the exercise of coercive power should be closely controlled, to safeguard rights and freedoms that are regarded as fundamental in our society.<sup>5</sup>

2.6 Coercive power may be seen as:

'...the authority given to government officers by legislation to compel individuals and organisations to comply with decisions, orders and directions. Failure to comply may attract a penalty or be enforced by a court order.'<sup>6</sup>

2.7 The powers under consideration here have been defined as coercive for these purposes. The Customs officer's power to question people about whether they are carrying dutiable, excisable or prohibited goods is a compulsory one. The person must answer and failure to do so is subject to a penalty. The powers to examine baggage and copy documents are not framed in coercive terms, however travellers will generally feel compelled to comply, even if there is no legislative penalty for

<sup>3</sup> The specific legislative powers under consideration are ss 195, 186 and 186A of the Customs Act, respectively.

<sup>4</sup> For more on these aspects of Customs' administration see Australian National Audit Office, *Processing of Incoming International Air Passengers*, Audit Report No.10 2009–10, Canberra, 2009.

<sup>5</sup> Commonwealth Ombudsman, *Lessons for public administration: Ombudsman investigation of referred immigration cases*, Report no. 11/2007, Canberra, 2007, p. 6.

<sup>6</sup> Commonwealth Ombudsman, *Lessons for public administration*, p. 6.

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failure to do so. Also, refusal to cooperate can lead to further Customs intervention, such that the powers are in practice coercive in nature.

2.8 This report assesses Customs' administration of the coercive powers as evidenced in the following material:

- Customs' comprehensive response to this investigation, including answers to our specific questions and additional enquiries, as well as the policy and training materials Customs provided
- detailed analysis of complaints to the Commonwealth Ombudsman in the 2007/08, 2008/09 and 2009/10 financial years
- research material obtained by Ombudsman staff.

2.9 As part of the investigation, Ombudsman staff visited Customs at Melbourne and Sydney international airports to observe airport infrastructure and Customs' practice.

2.10 The investigation focused on whether administrative action undertaken by Customs in the airport environment is within the boundaries set by Parliament and whether it is fair and reasonable. Australia's system of administrative law has long recognised that action which is authorised by legislation may still be unfair or unreasonable in some circumstances.<sup>7</sup>

2.11 Guidance to government agencies on what is fair and reasonable in the administration of coercive information-gathering powers has been provided by the Administrative Review Council (ARC).<sup>8</sup> The ARC put forward principles to aid the exercise of such powers in a manner that is consistent with administrative law values of fairness, lawfulness, rationality, openness and efficiency. These principles contributed to the Ombudsman's consideration of Customs' administration in this investigation. The full text of the ARC principles is provided in Appendix B to this report. The legal framework is provided by the *Customs Act 1901* relevant extracts are reproduced in this report at Appendix A.

<sup>7</sup> Reflected in s 15 of the Ombudsman Act.

<sup>8</sup> Administrative Review Council, *The coercive information-gathering powers of government agencies*, Report no. 48 May 2008, Canberra, 2008, p. ix.

## PART 3—EXERCISE OF POWERS

### Questioning

#### ***Customs' approach to questioning***

3.1 Customs officers have legislative powers to question travellers departing from and arriving in Australia's international airports, for a variety of purposes. This investigation focused on the questioning power that is most frequently used in the airport environment, which is the power to ask questions as to whether a person is carrying dutiable, excisable or prohibited goods (s 195(1) of the Customs Act). Penalties attach to a failure to answer questions put to a traveller under this provision (s 195(2)).

3.2 Officers also have compulsory questioning powers under other legislation including the *Migration Act 1958*, the *Environment Protection and Biodiversity Conservation Act 1999* and the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*.

3.3 Questioning is undertaken by Customs officers following a risk assessment of passengers. In the case of an incoming air passenger, risk indicators may have come to Customs' attention before the passenger reached Australia or at some stage during their progress through the airport.

3.4 If there are certain factors about a person or their travel which indicate that they might present a risk, an officer will question the person either to allay suspicions or to inform the basis for examining further whether an offence may have been or may be committed. If the officer forms a reasonable belief about the commission of an offence, the officer will treat the traveller as a suspect and caution them under Part 1C of the *Crimes Act 1914*.

3.5 Customs officers receive training in questioning powers and techniques. Training informs officers that, under the coercive power in s 195 of the Customs Act, they can ask questions about the person's travel, the nature and content of their baggage and specific goods. Training materials indicate that officers should be mindful that questions remain relevant to their underlying task.

3.6 During the investigation, staff of this office identified a distinction made in Customs training between questions asked under the coercive power and additional questions that are not an exercise of legislative power, but may be asked in order to assess the person's 'bona fides'. The training material Customs provided to this office indicated that travellers do not have to answer these latter questions.

3.7 The Ombudsman was concerned about the lack of clarity here, as this suggested that an officer could ask a traveller both compulsory and discretionary questions in the same line of questioning, with the traveller not being informed of the difference in their obligation to respond. In response, Customs asserted that questions asked to assess a person's bona fides are questions under s 195(1) of the Customs Act, which must be answered; and there are no 'additional questions'. Customs indicated that it would amend the training material to ensure that the information provided during officer training is clear and unambiguous.

### **Case law on the power to question**

3.8 Court authority on the application of the power to question in s 195 of the Customs Act is limited. *R v Raso* involved the importation of a prohibited good, the applicant having entered Australia with heroin concealed inside a toy turtle. The Victorian Court of Criminal Appeal considered the argument that the applicant's answers to questions said to have been asked under s 195 of the Customs Act should be excluded from evidence. One of the Judges rejected the argument that s 195 confines officers to questioning about the nature of any goods brought in by the person, ownership of the goods and who packed the goods, saying:

'To ascertain whether goods brought by such a passenger are dutiable, excisable or prohibited it would clearly be necessary and appropriate for those officers to ask questions as to the source of the goods, their price and the manner in which they were obtained, to give but a few relevant examples of the type of question which would be appropriate under the section... the disputed questions, namely questions as to where and how the toy turtle was obtained and purchased and as to its price, clearly come within the purview of the section.'<sup>9</sup>

3.9 In *R v Bangura*, the NSW District Court referred to the 'quite extensive' power to question people whom officers suspect may be in possession of dutiable, excisable or prohibited goods. It said that many questions could be asked:

'...with respect to such goods to ascertain the place where the person entered the country, where they had travelled from, and where he or she had commenced their journey. Other questions about the nature and content of the baggage, their knowledge of what was in the bags and who packed them could also be asked.'<sup>10</sup>

Questions officers can ask, therefore, must be connected with or relevant to goods suspected to be in the person's possession. Officers can question quite extensively around this topic, including about the person's travel movements, the content of their baggage and knowledge of its contents. It is compulsory that the person answer such questions, otherwise they will have committed an offence under the Customs Act. If the questions are not relevant they do not have to be answered.

### **Selection for intervention**

3.10 Customs intervention may be based on specific intelligence about the risk the traveller presents. In other cases there may not be a clear picture of the risk presented, but there will be some indicators that raise suspicions of unlawful activity.

3.11 It is generally the role of relatively junior officers to intervene with travellers at the airport and to undertake questioning to assess a person's 'bona fides'. This is not an exact science; most questions are not prescribed by policy and are asked according to the particular circumstances at hand.

3.12 The Ombudsman has previously discussed the importance of tight control of the use of coercive powers, which are often complex and exercised by relatively junior staff. This is the case here. Those powers require the exercise of discretion, often under pressure in a busy airport environment.

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<sup>9</sup> *R v Raso* (1993) 115 FLR 319 at 343 (Ormiston J).

<sup>10</sup> *R v Bangura* (2006) 3 DCLR(NSW) 179 at 185 (Blackmore DCJ).

**Case study: risk indicators**

*A Customs officer saw overseas-born Australian citizen Mr A standing back from the baggage carousel and watching her working. The officer considered this unusual and decided to question him on this basis. During questioning the officer identified that Mr A had travelled from a high risk country and then examined his baggage. Mr A complained that the officer's actions were based on his appearance and felt that the officer had no justification for intervening with him instead of other passengers from the same flight.*

**Questioning to establish bona fides**

3.13 While this investigation focused on questioning to detect dutiable, excisable or prohibited goods, it is important to recognise that Customs carries out a number of functions at the airport. These additional areas of administration include immigration, law enforcement, national security, quarantine and environmental protection. Hence any one Customs intervention may be aimed at detecting unlawful activity over a range of areas.

3.14 The process of questioning can be complex. Officers are trained not only to ask direct questions about a person's travel and baggage, but to use techniques aimed at assessing body language and identifying inconsistencies in the person's story, in an attempt to determine genuineness or deception. Taking into account all available information, if the officer believes that the person might be attempting to deceive them, questioning may continue or a baggage examination (or personal search, which is not within the scope of this report) may ensue.

3.15 Customs officers are trained to assess a traveller's 'bona fides' or the genuineness of their travel in this manner. These concepts are not legislative, but are risk assessment tools used to identify whether a person may be attempting to conceal an offence against Customs or other relevant legislation.

3.16 The Ombudsman recognises that asking a range of questions is likely to assist an officer to develop a sense of whether the person is attempting to conceal an offence. Thus questioning on topics that superficially do not appear relevant may allow the officer to assess the traveller's motivations for the purposes of the relevant legislation. Rather than questioning about certain goods or possible unlawful activities, the officer questions the person about whether they have a legitimate reason for their travel. If questioning reveals inconsistencies or the person's manner alerts the officer to the possibility that the traveller is lying, questioning will continue. There may be a baggage examination or the matter might otherwise be escalated.

**Case study: private living arrangements**

*A Customs officer questioned Mr B about his accommodation in his country of origin and his living arrangements. A number of questions were asked about matters Mr B considered to be personal, including who he lived with, what their relationship was, how he knew the person, how long he had known her, whether she was his partner and whether he was married. Mr B claimed that he was told by the officer that if Mr B's reply did not satisfy him he would be detained. Customs explained to this office that, to convey his concern about Mr B's refusal to answer questions, the officer had discussed with Mr B that a Customs officer may detain a traveller.*

*Mr B informed this office that he did not want to answer the questions because they were unduly invasive and personal. His reluctance was considered by the Customs*

*officer to be a further indicator that Mr B may have had something to hide, so the questioning continued. Questioning was not ‘as to’ the carriage of prohibited goods, but was about whether Mr B’s story stood up to the officer’s scrutiny.*

3.17 This method involves the asking of questions which are sometimes, at best, only remotely connected to whether the person is carrying dutiable, excisable or prohibited goods. As noted above, Customs considers the questions to be compulsory ones asked under s 195(1) of the Customs Act; failure to answer is an offence, even if the person does not know their conduct in failing to answer is unlawful.<sup>11</sup> In the case of a genuine traveller, it is not surprising that such questions are found to be objectionable.<sup>12</sup>

3.18 The Ombudsman’s concern is that in cases like this, questions that lack the required nexus to the subject matter concerned (the suspected importation of prohibited goods, for example) and are not an exercise of a legislative power to question, are being held out as such. People are not informed whether questions are compulsory and will not know, unless they raise concerns with the officer. If they do raise concerns, reluctance to answer questions can be interpreted as a sign of deception and considered to be grounds for further questioning or escalation to a personal search.

3.19 In an environment where many people will wish to cooperate with Customs officers and are encouraged to do so, the Ombudsman is concerned about the practice of asking the traveller for information that does not have a clear connection to their baggage, goods or travel. In addition, if the person may commit an offence by failing to answer a question, it is all the more important that it is made clear to the person which questions are compulsory.

3.20 The boundaries of reasonableness are difficult to establish precisely in an environment where officers, who routinely ask potentially intrusive questions, are dealing with travellers from a multiplicity of cultural and social backgrounds and perspectives.<sup>13</sup> There will be differences between passengers in terms of their tolerance to questioning and particular areas of sensitivity. While Customs officers do receive cultural awareness training in recognition of this issue, there are differences of opinion between Customs and complainants to this office about what is routine or standard, and what is out of the ordinary, intrusive or offensive. Mr C’s complaint illustrates this point.

**Case study: different perspectives**

*A Customs officer asked Mr A questions including how long had he lived in Australia, and commented on Mr A’s lack of accent. Customs indicated that these questions were not formal ones, but were asked at the completion of the examination in an attempt by the officer to engage Mr A in conversation to alleviate a stressful situation. Mr A maintained that the questions were part of the overall intervention. He found the questions to be personal and irrelevant, and to demonstrate a tendency to make assumptions about him based on his ethnicity.*

<sup>11</sup> Section 195(3) of the Customs Act provides that the offence of not answering questions put under s 195(1) is one of strict liability.

<sup>12</sup> Of 34 complaints to this office since the beginning of 2008 about passenger processing, 21 have included claims about being ‘treated like a criminal’ by Customs officers, officers being rude or asking personal or irrelevant questions. Not all of those complaints were investigated, but the figure illustrates how frequently members of the public raise officer conduct and questioning as one of the concerns that they hold.

3.21 As the above case study shows, Customs activity may be routine to the officer but to the traveller it is often not. Additional care should be taken to recognise that questioning is not routine or standard for many travellers who experience it.

3.22 The Ombudsman's view is that the coercive power in s 195(1) of the Customs Act should not be relied on to obtain information that is remotely connected to the suspected importation of dutiable, excisable or prohibited goods. The power is not unlimited; the legislation does not support an approach whereby general questioning is undertaken in order to assess a person's credibility. There must be a closer connection between questioning and the goods the person is suspected of carrying.

3.23 This is not intended to constrain Customs' ability to carry out its functions. Officers may ask other questions. However, in the airport environment it is likely that the majority of travellers will still feel to compelled to answer. Before an officer asks questions that are not directly connected to the person's travel, their baggage or specific goods they are carrying, the officer should weigh up whether the level of risk and the probable importance of the information they might obtain justifies the asking of often personal and intrusive questions, and whether the information they are seeking is necessary for their current requirements. In its principles 2 and 3, the ARC recommends that such questions are asked before coercive powers are exercised.

3.24 For a lawful exercise of the power in s 195 of the Customs Act, questions must be connected to the dutiable, excisable or prohibited goods that the traveller might be carrying. In the interests of rationality, efficiency and fairness, the questioning undertaken should be proportionate to the level of risk according to the cluster of indicators present. The greater the risk, the more justified remote and intrusive questioning may be. Conversely, the lower the risk the greater the care that should be taken to avoid undue interventions.

3.25 During examination by a Customs officer, if issues arise with respect to the relevance or appropriateness of the questions being asked, it would be reasonable for the officer to tell the person under examination that certain questions are compulsory and that escalating to baggage examination is an option. However, escalation to baggage examination or the exercise of other powers should not be used as a threat to induce answers to voluntary questions. Baggage examination must only take place for a valid purpose consistent with the legislation and never as a punitive measure.

3.26 The power to require answers to questions is not unlimited. In our view it is unreasonable for Customs to take the position that all questions asked to assess a traveller's 'bona fides' are sanctioned under s 195 of the Customs Act.

## **Baggage examination**

3.27 Officers have a general power to examine any goods subject to the control of Customs under s 186 of the Customs Act.<sup>14</sup> The use of this power in examining a departing or incoming traveller's baggage, including electronic items and documents found within that baggage, is particularly relevant to this report.

3.28 In examining goods brought through an airport by a traveller, an officer can do whatever is reasonably necessary to permit the examination of the goods concerned. The officer can also arrange for another officer or person with the necessary experience to inspect the goods (s 186(2) of the Customs Act).

<sup>14</sup> Sections 30 and 71 of the Customs Act set out when goods shall be subject to the control of the Customs.

3.29 There is no threshold test or requirement that must be met to enable a Customs officer to exercise this power. As a general rule, an officer will examine goods if there are indicators leading to a suspicion that an offence may have been or may be committed by the traveller. Before exercising this power the officer is required to ask questions, as discussed in the preceding section, which may allay their suspicions without the need for baggage examination.

3.30 In some circumstances Customs relies on this power to enable officers to retain electronic devices carried by a traveller after the traveller has left the airport. Complaints to this office indicate that the kinds of devices retained have included MP3 players, cameras, laptop computers and mobile phones. This may occur if an officer sees the need for a more specialist examination of an item found in a person's baggage and sends it to an electronic examination unit within Customs for 'forensic examination'. This enables further scrutiny of the device to determine whether it contains prohibited material or indicators of an offence. This process is distinct from that for the seizure of goods under the Customs Act.<sup>15</sup>

3.31 The general power to examine goods subject to Customs' control is broad. The Ombudsman accepts that it is sufficiently broad to allow the retention of an item for a period of time to enable its proper analysis. However, this is an action that can cause anxiety and inconvenience for a member of the public, who is left without their possession until the item is returned.

**Case study: deprivation of possessions**

Mr D complained to our office that his MP3 player, camera, various memory cards, USB flash drives and mobile phones were 'confiscated' by Customs. Without his phone, he was unable to contact a family member who had planned to meet him at the airport. He was concerned because he would be in Australia for a short time only and during that time would not have access to those devices. He was concerned about arranging the return of the items before he departed Australia a few weeks later.

3.32 Customs has indicated that these examinations are prioritised and officers endeavour to minimise delays, but timeliness is an important issue for members of the public whose possessions are retained in this way.

**Case study: return of possessions**

*Mr E complained that devices including his laptop computer, hard drive, USB flash drives, mobile phone and MP3 player, had been retained by Customs. He claimed that the time taken to return his belongings was affecting his work. It took one month for the items to be examined, after which they were returned to Mr E (with the exception of one item, which was seized).*

3.33 Customs does not have agency-wide timeliness standards for the examination and return of items that have been retained under s 186 of the Customs Act. The timeframe for the examination process will depend on the type of examination required. Any internal guidance on the time that should be taken will generally be provided for in guidelines or operational procedures specific to the relevant referral area. Our understanding is that there is no specific timeframe for the examination and return (where cleared) of electronic items withheld in this context.

<sup>15</sup> Section 203B of the Customs Act deals with the seizure of special forfeited goods.

3.34 Customs advised us that after goods have been examined and cleared they are returned to the person via its warehouse facility in the relevant State. These facilities are also used for the handling and destruction of seized goods. This means from the time that the person presents at the airport with the item, it is handled by another two areas within Customs before it is returned to the person. Double or triple-handling of the item can delay its return to the owner. It is preferable that items are returned to the owner directly by the referral area, such as the Electronic Examination Unit. The referral of items for forensic examination is discussed further in Part 4 – Administration and Accountability.

### Copying documents

3.35 In certain circumstances Customs officers have the power to copy documents found in a traveller's possession. These conditions are set out in the Customs Act and are defined by the potential relevance of the document to the commission of certain offences or to specific intelligence and security functions.<sup>16</sup> The term 'document' in this context includes electronic documents and images.<sup>17</sup> In this investigation we considered the administration of the power to copy documents potentially relevant to offences against the Customs Act, or against Acts prescribed in regulation 167 of the *Customs Regulations 1926*.

3.36 Legislation, as well as Customs' internal policies, provide that the decision to copy a document can only be made if the document has been examined under the Customs Act and, as a result of that examination, the officer becomes satisfied that it may be relevant to one of the matters listed in the Act. According to Customs, in practice officers make this judgment based on the document itself and other available information (for example information from a law enforcement agency that the person is under investigation in connection to an offence).

#### **Case study: decision made before examination**

*Mr F was stopped twice by Customs in a three week period. Relying on information from the Australian Federal Police available to them before Mr F travelled, Customs officers decided that they would intervene in his movement through the airport so they could copy any documents he was carrying. Because the decisions to copy the documents were made prior to examining them, the power was not validly exercised on either occasion.*

3.37 Customs' response to our investigation of Mr F's complaint, and its policy and training documentation provided in connection with this investigation, indicate that officers receive training and guidance in how to properly exercise this power. Nonetheless, Mr F's case highlights the risks in the exercise of coercive powers without a proper appreciation of their nuances and limitations. It reinforces the need for strong checks and controls on the use of coercive powers, so that such powers are only exercised where the proper circumstances exist.

3.38 Information gathered through the exercise of this power is evaluated by Customs and may be disclosed to an external agency, such as the Australian Federal Police, with an interest in the traveller. In this way, border crossing in the airport environment is used as an opportunity to gather intelligence about a person of interest to Customs or its partner agencies. If the copied documents are later

<sup>16</sup> Section 186A of the Customs Act. See also regulation 167 of the *Customs Regulations 1926*.

<sup>17</sup> Section 4(1) of the Customs Act defines 'documents'.

determined to be of no relevance, Customs policy requires that they are destroyed by the person making that evaluation.

3.39 The threshold test recommended by the ARC for the exercise of a coercive power in connection with a formal investigation is that the decision-maker has reasonable grounds for the belief they must form before exercising the power.<sup>18</sup> Customs' expectation of its officers, expressed in its internal policies, is that the power to copy documents will not be exercised by an officer unless he or she has reasonable grounds for the belief that the documents may be relevant. This policy complies with the ARC principle.

3.40 The Customs officer is tasked to assess a document's potential relevance to an offence; however they will not necessarily have sufficient background in the area of law or the specific investigation to make a fully informed assessment. Customs advised that documents can be copied even if they may not appear to be relevant on their face (a foreign language document is a straightforward example), taking into account information otherwise available to the officer about the traveller's possible criminal activities and considering the information network that might lie behind the document.

**Case study: unclear reason for copying documents**

*Mr G was questioned and had his baggage examined by Customs. During this process, an officer copied Mr G's documents including mobile phone content, credit cards, business cards, bankbooks, a receipt, Medicare card, lotteries card and drivers licence. Mr G was concerned about the removal of his belongings and felt he had been poorly treated by Customs officers. This office was concerned about the apparent lack of relevance of Mr G's documents to a matter listed in s 186A of the Customs Act, required to trigger the power to copy them. If they were not relevant, the decision to copy them was not lawfully made. Customs maintained that the exercise of power was lawful, because the information lying behind the documents might have been relevant when considered in light of other information available about Mr G.*

3.41 The Ombudsman remains concerned about the use of the power to copy documents to gather information that is not on its face relevant for the purposes of s 186A of the Customs Act. The power to copy documents was originally limited to documents that may have contained information relevant to an importation or exportation of prohibited goods.<sup>19</sup> This was extended in 1999 to allow the copying of documents potentially relevant to other offences. The purpose of extending the power, specifically in response to people smuggling at the time, was to:

*'...go some way towards addressing situations where officers have discovered documents in passenger's [sic] bags at the airport and have been satisfied that they may contain information relevant to the commission of an offence under Migration Act 1958 (if that Act is prescribed in the regulations). Under new subparagraph 186A(1)(b)(ii) the officer will be able to make copies or take extracts if the Migration Act 1958 is prescribed in the Customs Regulations.'*<sup>20</sup>

<sup>18</sup> ARC Principle 1.

<sup>19</sup> Customs Legislation Amendment Act (No. 1) 1999 (No. 137, 1999), Item 48.

<sup>20</sup> Explanatory Memorandum, Border Protection Legislation Amendment Act 1999 (No. 160, 1999), paragraph 94.

3.42 The amended provision would enable officers to take an opportunity to copy information discovered during an examination when the opportunity arose, and refer it to other agencies as appropriate.

3.43 Problems arise because Customs' interpretation and application of the power allows an officer to copy a document for the purposes of intelligence gathering, when the possible relevance of the document is not evident to the officer. The officer is the person required by the Act to be satisfied that the document may be relevant, but in fact, all that the officer may know is that the person is under suspicion in connection with an offence. The officer copies the document, as it is possible that it might be found to be relevant to the person's suspect activities when subject to analysis at a later stage.

3.44 The intention of this report is not to interpret this provision in a manner that would frustrate its usefulness in a law enforcement context or unduly constrain Customs' exercise of its functions. However, the power of Customs officers to copy documents carried through an airport by a passenger enables the collection and in some circumstances disclosure of information that could otherwise not be obtained without a warrant. Members of the public who contact this office frequently view this as an invasion of privacy, as being treated 'like a criminal' without any corresponding rights being accorded to them.

3.45 One of the key factors upon which officers base a decision to use the power to copy documents is the information that is available to them about the traveller, including information contained in a watchlist. A person may be placed on a watchlist by Customs or one of several other agencies, to enable the targeting and identification of people of interest when they travel to or from Australia. The person might be of interest for various reasons, for example they may be suspected in connection with the importation of prohibited goods, breaches of the criminal law or migration offences.

3.46 The content of watchlist information is dealt with in guidelines published by Customs for its staff as well as those of other agencies responsible for the placement of names on a watchlist. These guidelines state that watchlist information must meet the entry criteria specified in the guidelines. Information that must be set out in the watchlist includes detail about what kind of 'person of interest' the person is (e.g. 'criminal') and what action should be taken if a person matches against the watchlist. In order to assist officers in their risk assessment and any examination and questioning, the guidelines require the narrative text field in the watchlist to include a concise summary of the background and why the person has been placed on the watchlist.

3.47 In the context of the exercise of the power to copy documents, the Ombudsman's view is that this background information must be sufficiently detailed to allow the officer to form the state of mind required by the Customs Act. For example, if the law enforcement information accessible by Customs officers contains no detail about the particular offence that the person might have committed, then it is difficult to see how an officer could form a reasonable view that a document may contain information relevant to that offence. This will be the case particularly where on its face the document has no reasonable connection to unlawful activity.

3.48 The Ombudsman considers that amendment to the guidelines is required to ensure that the information placed on a watchlist by Customs and other agencies contain an adequate level of detail to support a proper exercise of s 186A of the Customs Act.

3.49 Customs has also indicated to our office that officers do not universally provide travellers with information about how the copied documents might be used or disclosed. Complaints also reveal that the legal basis for copying is not clearly identified.

**Case study: information about copying**

*In Mr H's case the documents copied included mobile phone content, his passport, an invoice, an email and business cards. He felt that this was an invasion of his privacy and was not satisfied with the explanation officers gave to him when he questioned the activity (i.e. that it was authorised by the Customs Act). When he approached this office, he remained uncertain of the basis for the officers' actions.*

3.50 In response to this investigation Customs advised that it is considering introducing a script whereby officers will inform individuals whose documents are copied of the general purpose for which the information is being collected, legal authorisation for the collection and possible disclosure of the information. This script would be intended to address the requirements of privacy law with respect to any personal information collected.

3.51 We support Customs developing and implementing such a script, and suggest that a written summary of the reasons for copying the documents and the legal basis for doing so be provided to the individual affected. Providing this information, as well as information about Customs' complaints process, will help people address any concerns they may have.





4.12 The 'Client Service Charter and Standards' on the website outlines what the public can expect from Customs and what Customs expects of the public. Statistics on interceptions of prohibited goods are published, as well as Customs' performance, for example relating to queue times and public satisfaction or otherwise.

4.13 The ARC recommends that to facilitate internal and external scrutiny of the use of coercive powers and to engender community confidence in their exercise, agencies should regularly publish information about their use of the powers.<sup>25</sup> While Customs' publishes a significant volume of information about detections, it does not publish statistics showing how many baggage examinations result in a detection or how often travellers' documents that are copied at the airport prove not to be relevant for Customs or another agency with an interest at the border. This latter figure is not a statistic gathered by Customs.

4.14 Flowing from the ARC principle, Customs could publish additional information about the exercise of its powers at the airport. This information could support Customs' current practices and reassure members of the public that its activities at the airport are justified, properly balancing the rights of individuals with the greater public good resulting from those activities. Alternatively, it could assist in the identification of areas for improvement.

4.15 The ARC recognises the importance of agencies publishing sufficient information about their use of coercive powers to allow people to assess the use of the powers, without jeopardising continuing investigations or revealing the details of important investigatory methods.<sup>26</sup> Several travellers who have approached this office have complained that they do not understand why Customs officers have chosen them, sometimes repetitively, for questioning and examination as they passed through Australian international airports.

**Case study: lack of reasons for repetitive selection**

*Having been the subject of Customs' intervention on four trips through an Australian airport in a seven month period, the reason for his being repetitively selected was the central issue raised in the case of Mr D, referred to earlier in this report. Mr D had not been informed why this was happening and had begun to consider this intervention as harassment. He wanted to know why he was subject to Customs' attention so that he could understand it and identify what he could do about it.*

4.16 Being open and informative is sometimes at odds with Customs' administration of the coercive powers, as Customs' actions can be sensitive for reasons of confidentiality, public interest immunity and disclosure of investigation methods.

4.17 Customs publications make travellers generally aware that if they are arriving in or departing Australia they may be questioned by Customs and have their baggage examined. Absent from these publications is more detailed information about what officers are empowered by law to question travellers about, whether travellers are in all circumstances required to respond, what the consequences of not responding might be and in what specific circumstances an officer can copy a traveller's documents.

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<sup>25</sup> ARC Principle 4.

<sup>26</sup> ARC Principle 4.

4.18 People are asked to be open, honest and cooperative in their dealings with Customs.<sup>27</sup> This request is of course not unreasonable, but it gives no comfort to a traveller who does not wish to answer (what they consider to be) unduly personal or irrelevant questions.

4.19 Complaints have revealed a lack of understanding among some of the travelling public regarding the breadth of Customs' powers, and also of their limitations.

**Case study: any requirement to give password to Customs?**

*During a baggage examination Mr N was asked to tell the Customs officer the password to unlock his electronic diary. Mr N told the officer his password, but was concerned because the diary contained his personal information. One of the issues he raised in his complaint to this office was his uncertainty about whether he could have refused to give the officer his password or whether he was legally required to reveal it to Customs.*

**Case study: attempts to verify Customs' powers**

*Like other travellers who contact our office, Mr O did not believe that it was fair that he was subject to baggage examination and questioning, maintaining that he had done nothing wrong. Although a Customs officer told him under what provision of the Customs Act they were examining his electronic devices, when he tried to check this by looking at the Act himself he could find no reference to this authority.*

4.20 It would not be an easy task for a member of the public to research and interpret Customs' powers without further plain English guidance. While the publication of additional general information might not satisfy a traveller as to the specific reason for their selection at the airport, it would give them a better basis upon which to assess whether they were fairly treated and improve the foundation for any complaint they might wish to make.

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<sup>27</sup> Customs, *Client Service Charter and Standards*, 2009.









**Recommendation 10**

Customs should publish a plain English guide to officers' powers, targeted at travellers. The guide could include more detailed information about the powers to question, examine baggage (and retain items for forensic examination) and copy documents. It could inform travellers about questions they have to answer, under law. It could explain the person's options for making a complaint at the airport or otherwise. It need not disclose Customs' investigation or enforcement methods.

**Customs' response: recommendation accepted**

Customs and Border Protection will publish a plain English guide to officers' powers aimed at travellers and including more detailed information about the powers to question, examine baggage, retain items for forensic examination and copy documents.



the officer of Customs may make a copy of, or take an extract from, the document, or arrange for another officer of Customs or other person having the necessary experience, to make such a copy or take such an extract.

- (2) Without limiting the generality of subsection (1), a copy may be made of, or an extract taken from, a document:
  - (a) by photocopying the document or a part of the document; or
  - (b) by photographing the document or a part of the document; or
  - (c) by electronically scanning the document or a part of the document; or
  - (d) by making an electronic copy of information contained in the document or a part of the document; or
  - (e) by making a written copy of information contained in the document or a part of the document.

## 195 Power to question passengers etc.

- (1) An officer of Customs may question:
  - (a) any person who is on board a ship or an aircraft or an installation of the kind referred to in paragraph 187(b), (c), (d) or (e); or
  - (b) any person who has, or who the officer has reason to believe has, got off a ship or out of an aircraft; or
  - (c) any person who the officer has reason to believe is about to board a ship or an aircraft; as to whether that person or any child or other person accompanying him or her has on his or her person, in his or her baggage or otherwise with him or her any:
    - (d) dutiable goods; or
    - (e) excisable goods; or
    - (f) prohibited goods.

- (2) A person shall answer questions put to him or her in pursuance of subsection (1).

Penalty: 10 penalty units.

- (3) Subsection (2) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

## Customs Regulations 1926

### 167 Prescribed Acts — general regulatory powers

- (1) The *Fisheries Management Act 1991*, the *Migration Act 1958*, the *Quarantine Act 1908* and the *Torres Strait Fisheries Act 1984* are prescribed for the following provisions of the Act:
  - (a) subsections 184A (2), (4) and (5);
  - (b) subparagraph 185 (2) (d) (i);
  - (c) sub-subparagraph 185 (2) (d) (ii) (A);
  - (d) paragraph 185 (3) (a);
  - (e) subparagraph 185 (3) (c) (i);
  - (f) subsection 185B (1);
  - (g) paragraph 185B (2) (b);
  - (h) subparagraph 185B (2) (c) (i);
  - (i) subparagraph 186A (1) (b) (ii).o

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- (2) The *Fisheries Management Act 1991* and the *Torres Strait Fisheries Act 1984* are prescribed for the following provisions of the Act:
- (a) subsections 184A (6) and (7);
  - (b) sub-subparagraph 185 (2) (d) (ii) (B);
  - (c) subparagraph 185 (3) (c) (ii);
  - (d) subparagraph 185B (2) (c) (ii).
- (3) For subparagraph 186A (1) (b) (ii) of the Act, the following Acts are prescribed:
- (a) *Aviation Transport Security Act 2004*;
  - (b) *Family Law Act 1975*;
  - (c) *Crimes Act 1914*;
  - (d) *Crimes (Aviation) Act 1991*;
  - (e) *Crimes (Internationally Protected Persons) Act 1976*;
  - (f) *Criminal Code Act 1995*;
  - (g) *Proceeds of Crime Act 1987*;
  - (h) *Financial Transaction Reports Act 1988*;
  - (i) *Crimes (Hostages) Act 1989*;
  - (j) *Crimes (Ships and Fixed Platforms) Act 1992*;
  - (k) *Geneva Conventions Act 1957*;
  - (l) *Crimes (Torture) Act 1988*;
  - (m) *Bankruptcy Act 1966*.

## **Appendix B: ARC Principles**

### **Setting the threshold and scope**

#### **Principle 1**

The minimum statutory trigger for the use of agencies' coercive information-gathering powers for monitoring should be that the powers can be used only to gather information for the purposes of the relevant legislation.

If a coercive information-gathering power is used in connection with a specific investigation, the minimum statutory trigger for using the power should be that the person exercising it has 'reasonable grounds' for the belief or suspicion that is required before the power can be exercised.

If an information-gathering process escalates from monitoring to specific investigation, agency officers should, to the extent operationally possible, inform the subject of the investigation of that change in status.

#### **Principle 2**

##### *Before using the powers*

Before using coercive information-gathering powers agency officers should do two things:

- consider alternative means that could be used to obtain the information sought
- weigh up whether the probable importance of information obtained through using coercive information-gathering powers is justified, having regard to the cost of compliance for the notice recipient.

##### *Drafting notices*

When drafting information-gathering notices agency officers should seek only the information that is necessary for their current information-gathering requirements.

To the extent operationally possible, it is desirable that agency officers consult proposed notice recipients in order to determine the probable scope and nature of information held.

##### *Exercising the powers*

When exercising coercive information-gathering powers agency officers must choose the most efficient and effective means of obtaining the information. For example, if information is held on computer, the issuing of a notice requesting identification of records held on the system could in the first instance be the most effective and efficient course of action. This could then be followed by a notice requesting the production of relevant documents.

## Record keeping

### Principle 3

When an agency uses its information-gathering powers for the purpose of a specific investigation it is good administrative practice for the agency officer concerned to prepare a written record describing the basis on which the threshold trigger for the use of the powers was deemed to have been met.

If the powers are used for monitoring or if an agency regularly issues large numbers of notices, a written record of the fact of the use of the powers is also desirable; it should name the officer who authorised the use of the powers.

## Transparency

### Principle 4

To facilitate internal and external scrutiny of the use of coercive information-gathering powers and to engender community confidence in the exercise of those powers, each agency should regularly publish information about its use of the powers. The information provided should be sufficient to allow anyone seeking to assess the use of the powers to do so, yet should not be such as to jeopardise continuing investigations or reveal details of important investigatory methods.

## Contempt of court

### Principle 5

Agencies should regularly monitor developments in case law relating to contempt of court. In this regard, training and support for officers exercising coercive information-gathering powers are essential.

## Authorisation and delegation

### Principle 6

Legislation should specify who may authorise the exercise of an agency's coercive information-gathering powers.

If failure to comply with a notice would attract a criminal penalty, the legislation or administrative guidelines should specify the category of officer to whom the power to issue a notice can be delegated.

### Principle 7

It is important that an agency has in operation procedures for ensuring that coercive information-gathering powers are delegated only to suitably senior and experienced agency officers.

The officers to whom the powers are delegated should be sufficiently senior and experienced to be able to deal effectively with questions associated with procedural fairness and privilege that can arise in the conduct of examinations and hearings.

## Training

### Principle 8

If the right to exercise coercive information-gathering powers were linked to training or accreditation programs this would help agency officers exercising the powers to gain the requisite competency.

For an agency with a large number of officers exercising coercive information-gathering powers, development of an accredited training program specific to the agency would represent good administrative practice.

## Accountability

### Principle 9

When an agency confers authority to exercise coercive information-gathering powers on people who are not officers of the agency—for example, state officials or employees of agency contractors—the agency should remain accountable for the use of those powers.

### Principle 10

Senior officers of an agency should regularly audit and monitor the exercise of coercive information-gathering powers within the agency. In addition to ensuring the continuing suitability and accuracy of delegations, the senior officers should ensure that officers exercising the powers have received the necessary training, possess the requisite skills, and have continuing access to assistance, advice and support.

## Sharing resources and experience

### Principle 11

Subject to considerations of privacy and confidentiality, agencies are encouraged to share their ideas and experiences in relation to the exercise of coercive information-gathering powers in the following ways:

- establishing an agency network for the exchange of educational materials, including training manuals and ideas. Discussion and circulation of information about relevant cases and the content and upgrading of instructional materials would be useful—especially for smaller agencies
- establishing an informal peer network within and between agencies for discussion, training and information sharing
- conducting periodic meetings between ‘like agencies’
- identifying important across-agency or sectoral topics for inclusion in agency training programs and manuals.

## Conflict of interest

### Principle 12

Agencies should adopt procedures and offer training aimed at avoiding conflict of interest in relation to the exercise of coercive information-gathering powers.

*Decision Making: natural justice*, guide 2 in the Council's series of best-practice guides for administrative decision makers, provides an overview of the law in this area and of its practical application.

## Identity cards

### Principle 13

If face-to-face contact is involved, at a minimum officers or external experts exercising coercive information-gathering powers should carry official photographic identification and produce it on request.

In a formal investigative procedure it is good administrative practice if officers and external experts are also able to produce written evidence of the extent of their authority.

## Notices

### Principle 14

All coercive information-gathering notices should do the following:

- identify the legislative authority under which they are issued, the time, date and place for compliance, and any penalties for non-compliance
- in relation to specific investigations, set out the general nature of the matter in relation to which information is sought
- consistent with the requirements of the *Privacy Act 1988* (Cth) in relation to personal information, clearly state whether it is the usual lawful practice of the agency to hand information collected in response to notices to another area of the same agency or to another agency
- provide details of a contact in the agency to whom inquiries about the notice can be addressed
- inform notice recipients of their rights in relation to privilege.

### ***Notices to provide information or produce documents***

It is good administrative practice to specify how the notice recipient should provide the information or how the document should be produced and to whom.

### ***Notices to attend an examination or a hearing***

Notice recipients should be told whether they may be accompanied by a lawyer or third party and, to the extent possible, the name of the person who will be conducting the examination.

### ***The time frame for compliance***

Agency legislation should specify a minimum period for the production of information or materials or for attendance for examination or hearing. The legislation should also allow for exceptions to the rule in specified circumstances.

### ***Materials covered by a notice***

To facilitate compliance, a notice or its supporting correspondence should clearly identify the sorts of materials covered by the notice, including materials held on computer.

### **Principle 15**

Compliance would be further encouraged if terms such as ‘information in the possession of’, ‘in the custody of’ or ‘under the control of’ the notice recipient were defined. Pro forma notices can be useful if differences in expression occur in the legislation of a single agency.

## **Examinations and hearings**

### **Principle 16**

Unless there are special reasons to the contrary, examinees should be entitled to:

- a private hearing—subject to the presence of authorised individuals
- in the absence of exceptional circumstances, the option of having legal (or, if appropriate, other) representation.

The reason for holding a public examination or for denying legal or other representation should be explained and a record of this kept.

Among the matters that should be taken account of in legislation are the taking of evidence on oath or affirmation and the admissibility of the evidence taken at the examination in subsequent proceedings.

Among other matters that may be dealt with *without* legislation are provision for viewing and correction by the examinee of a transcript of proceedings and, where relevant, the circumstances in which a third party may be given a copy of the transcript within the scope of agency privacy and secrecy provisions.

Examinees should be told if legislation precludes subsequent disclosure of information obtained during an examination or hearing. Agencies should clearly differentiate this situation from one in which there is no such legislative restriction.

## Privilege

### Principle 17

Client legal privilege and the privilege against self-incrimination—including the privilege against self-exposure to penalty—are fundamental principles that should be upheld through legislation. Abrogation of the privileges should occur only rarely, in circumstances that are clearly defined, compelling and limited in scope. Legislation should clearly state whether or not the privileges are abrogated and when, how and from whom the privileges (including a use immunity) may be claimed.

Agencies should keep written records of the situations in which the privileges apply, and especially when they are waived. Agency guidelines to supplement legislative directions should also be developed in relation to privilege; among the topics covered should be the procedures to be adopted by agencies in responding to a claim of privilege and the nature and effect of a waiver of privilege.

## Disclosure of information

### Principle 18

The complexity and inconsistency of agencies' secrecy provisions mean that special care is needed when dealing with inter-agency disclosure of information.

In notices and requests it is necessary to carefully describe the information agency officers require in the exercise of their coercive information-gathering powers and the probable uses of that information.

Agencies should provide to their officers guidance about situations in which the use of information for purposes not reasonably foreseen at the time of collecting the information might be contemplated.

Guidelines and training for agency officers in both these areas and in relation to the effect of and interaction between the *Privacy Act 1988* (Cth) and agencies' secrecy provisions are essential.

It is good administrative practice to develop memorandums of understanding between agencies, clarifying the responsibilities of agency officers in disclosing information obtained through, among other things, the use of coercive information-gathering powers.

### Principle 19

Subject to limited exceptions, it is desirable that inter-agency disclosure of information obtained in the exercise of coercive information-gathering powers be subject to a threshold trigger of the same calibre as that governing the initial issuing of a notice (see principle 1). Additionally, privilege and use immunity should be taken into account when the release of information to another agency is being considered.

Examples of situations in which exceptions to the threshold trigger would be apposite are when there is an immediate and serious risk to health or safety and when limited information is required for a royal commission.

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As noted, the discretion to disclose information obtained through the use of coercive information-gathering powers should rest with senior, experienced agency officers.

**Record management**

**Principle 20**

Agency strategies and guidelines should operate to ensure the integrity, proper management and accurate recording of information received in the exercise of an agency's coercive information-gathering powers. Wherever possible, receipts should be given for documents and materials furnished to the agency.

An agency that has used its information-gathering powers to obtain information or documents from someone should keep under continuing review the need to keep the person informed, as appropriate, about whether an investigation is still current, when documents can be returned to the person, or whether other arrangements can be made for the person to be given interim access to the documents or a copy of the documents.