

**Explanatory Note on Section 121 of the Insurance
Ordinance (Cap. 41) – Non-disclosure
requirement in relation to information obtained in
the course of inspection, investigation or
disciplinary action**

Insurance Authority

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1. Introduction

- 1.1. This Explanatory Note, which includes a set of frequently asked questions, is issued by the Insurance Authority (“IA”) to provide guidance on certain matters regarding section 121 of the *Insurance Ordinance*, (Cap. 41) (“the Ordinance”). It is not intended to be a comprehensive guide and does not constitute legal advice. It does not have the force of law and should not be interpreted in a way that would override the provision of any law. You should seek independent legal advice if you are unsure about how section 121 of the Ordinance applies to you.

2. Non-disclosure obligations imposed

- 2.1. The non-disclosure obligation in section 121 of the Ordinance seeks (a) to preserve the integrity of an inspection, investigation or disciplinary action by preventing suspected wrongdoers from being tipped-off about enforcement activities; and (b) to prevent harm being done to the reputation of a person under investigation or who is the subject of inspection or disciplinary action, which may result from such matters becoming public, even though no findings are made against the person.
- 2.2. In broad terms, section 121 of the Ordinance prohibits disclosure of information obtained in the course of an inspection, investigation or disciplinary action undertaken by the IA. It applies to persons on whom a requirement has been imposed by an investigator or inspector appointed by the IA (under specified sections of the Ordinance empowering the investigator or inspector to impose such requirements) or to a person against whom the IA decides to take disciplinary action and to whom the IA gives notice of such decision (subsections 121(1), (2) and (3)).
- 2.3. A person who contravenes the prohibition against disclosure in section 121 commits a criminal offence and is liable to a fine at level 4 (subsection 121(6)).
- 2.4. The prohibition against disclosure of information in section 121 is subject to certain exceptions (and disclosure of information within these exceptions would not contravene section 121). These exceptions are stated in subsection 121(4) and include, where the disclosure is for seeking advice from, or giving advice by, a counsel or a solicitor, or any other professional advisor acting or proposing to act in a professional capacity, in connection with a matter arising under the Ordinance.
- 2.5. The IA’s view is that the sort of person envisaged as falling within the category “professional advisor acting or proposing to act in a professional capacity”, is someone qualified to advise on the issues relevant to the subject of the inspection, investigation or disciplinary action (e.g. an actuary, a forensic accountant or other expert witness as the case may be depending on the circumstances of the case) and who is acting in a professional capacity towards the person being advised.

3. Obtaining consent to disclosure from the IA

- 3.1. Beyond the exceptions stated in subsection 121(4) the only other circumstance under which a person may disclose information without contravening section 121 is where the IA consents to such disclosure (under subsection 121(2)(a) or 121(3)(a)).
- 3.2. As a general principle, the IA will only grant consent to such disclosure on a “need-to-know” basis and provided that such disclosure would not risk compromising the integrity of the inspection, investigation or disciplinary process (being one of the main purposes for the prohibition in section 121). Any application to obtain the IA’s consent should, therefore, be made in writing, state the full extent of the information sought to be disclosed, the persons to whom it is proposed to be disclosed and the reasons for the proposed disclosure. The IA may ask further questions with the applicant to satisfy itself of the justification for the proposed disclosure. Where the IA grants consent, it will do so in writing, setting out the information to which the consent relates, the persons to whom disclosure may be made and any conditions to which the consent is subject (under subsection 121(5)) (which would likely include conditions that aim to continue to preserve the secrecy of the information).

4. Assumed consent to disclosure of limited information

- 4.1. Unless the IA has expressly specified that the person must keep the matter entirely secret, the person who is subject to the prohibition against disclosure in section 121 (whether an individual or a body of persons that is either a corporate or an unincorporated entity) can assume the IA’s consent to disclosure of the following information (and only the following information) without the need to make a formal application (“Assumed Consent”):
 - 1) the fact that he or she (or it, in the case of a corporation, etc.) is bound by a non-disclosure obligation;
 - 2) the general nature of the matter (but without revealing anything specific about it), which has given rise to the non-disclosure obligation (e.g. disclosing only that the person is subject to a requirement imposed by an investigator appointed by the IA to produce information or attend an interview);
 - 3) the means by which he, she or it came to be bound by the non-disclosure obligation (e.g. the person has received a statutory notice imposing on him, her or it a requirement under section 64ZZH of the Ordinance); and
 - 4) the date, time and place at which he, she or it is required to provide information or documents to the IA or attend an interview by an investigator appointed by the IA, if disclosed only:
 - a) to his/her employer, spouse or partner;

- b) to his/her firm's responsible officers, compliance officers, chief executive or key persons in control functions (for individual who is a regulated person);
- c) to a person who is in a position to direct him/her to or put him/her in contact with a counsel or solicitor to obtain legal advice or legal representation (and where the disclosure is made solely for this purpose); or
- d) to an indemnity insurer providing insurance coverage to the person in relation to the matter which is the subject of the requirement, in order to preserve the right to make a claim under such insurance and where the disclosure is made only to the staff of the indemnity insurer handling the relevant insurance notification.

4.2. If a person is in any doubt as to whether or not any intended disclosure falls within the scope of the Assumed Consent above, he/she should err on the side of caution by contacting the IA or by making an application in writing to the IA for consent.

The IA reserves the right to review and update this Explanatory Note from time to time.

5. Frequently Asked Questions

Q1: What is the statutory non-disclosure obligation under section 121 of the Ordinance?

A1: The non-disclosure obligation in sections 121(2) and 121(3) of the Ordinance prohibits disclosure of information obtained in the course of an inspection, investigation or disciplinary action undertaken by the IA unless any of the statutory exemptions applies (such as, disclosure for seeking legal advice which is exempted under section 121(4)(b)), or if the IA consents to the disclosure (per section 121(2)(a) or 121(3)(a)).

A person who contravenes section 121 commits an offence and is liable to a maximum fine at level 4 (which is currently set at \$25,000 according to Schedule 8 of the *Criminal Procedure Ordinance*, (Cap. 221)).

Q2: Is the statutory non-disclosure obligation under section 121 of the Ordinance different for persons directly under investigation and for persons who are assisting in the investigation because he/she is in possession of relevant documents/information?

A2: Section 121 of the Ordinance is directed at preserving confidentiality of an inspection, investigation and disciplinary action, and imposes the same non-disclosure obligation on those involved, regardless of the reason for their involvement. So long as a requirement referred to in section 121(1) of the Ordinance has been imposed on a person, then the non-disclosure obligation applies to that person, regardless of the person's role in the investigation.

Q3: I have received one of the following four types of notice issued by the IA under the Ordinance: (i) a notice requesting written answers to the questions listed in the notice; (ii) a notice requesting production of records and documents listed in the notice; (iii) a notice requiring my attendance at an interview with the IA's investigator; (iv) a notice informing me of the IA's proposed/final decision to take disciplinary action against me. Can I disclose the notice or any information contained in the notice to any person?

A3: Section 121 of the Ordinance prohibits you from disclosing any information obtained in the course of investigation or disciplinary process to any other person unless any of the statutory exemptions applies, or unless the IA consents to the disclosure under section 121(2)(a) or 121(3)(a). The statutory exemptions are stated in section 121(4) of the Ordinance, which include disclosure for seeking advice from a counsel/solicitor or any other professional advisor acting in a professional capacity in connection with a matter arising under the Ordinance.

If none of the exemptions stated in section 121(4) apply, then you may only disclose the information contained in the notice with the IA's consent. Note, however, that unless the IA has expressly specified that you must keep the matter entirely secret, you can assume the IA's consent to disclosure of the certain limited specified information (and only the specified

information) as stated in the body of the Explanatory Note under the heading “Assumed consent to disclosure of limited information” without the need to make a formal application to the IA.

Q4: I have received a notice issued by the IA under the Ordinance requesting my attendance at an interview in the IA’s office during working hours. Can I inform my employer/supervisor about the interview without breaching the statutory non-disclosure obligation under section 121 of the Ordinance?

A4: Unless you have been required by the IA to keep information completely secret (or secret from a particular person named by the IA), pursuant to the IA’s Assumed Consent, you may make the following notifications (and only these) to your employer or, if you are a regulated person, to your firm’s responsible officers/compliance officers/chief executive/key persons in control functions:

- The fact that you are bound by the non-disclosure obligation;
- The general nature of the matter (but without revealing anything specific about it), which has given rise to the non-disclosure obligation (e.g. disclosing only that you are subject to a requirement imposed by an investigator appointed by the IA to attend an interview);
- The means by which you came to be bound by the non-disclosure obligation (e.g. you have received a statutory notice imposing on you a requirement under section 64ZZH of the Ordinance); and
- The date, time and place at which you are required to attend the interview.

(See also the body of the Explanatory Note under the heading “Assumed consent to disclosure of limited information” for further details)

Q5: I am the Director/Chief Executive Officer/Compliance Officer/Responsible Officer of an insurer/insurance broker company/insurance agency. My company has received a notice issued by the IA under the Ordinance requesting written answers to the questions listed in the notice and production of certain records and documents. The notice imposes the requirement on my company but is addressed for my attention. As it concerns the insurance business/regulated activities conducted by my company, I would need to report this matter to the board of directors and senior management of my company as well as our parent company located overseas. Besides, I would also need to involve other colleagues in preparing for the reply. To what extent can I disclose the notice or any information contained in the notice within my company and to our parent company?

A5: A person on whom a requirement under section 41D or 64ZZH is imposed is subject to the non-disclosure obligation under section 121(2) of the Ordinance. Where the requirement under section 41D or 64ZZH is imposed on a corporation, internal disclosure amongst the officers and employees within that corporation is not prohibited by section 121. Nevertheless, it is

advisable that internal disclosure within the company be exercised with caution on a need-to-know basis (e.g. the board of directors). In most circumstances relevant information could be obtained from internal parties by stating the general nature of the matter without the need to disclose the investigation notice or any specific information relating to the IA's investigation.

On the other hand, unless your company relies on a statutory exemption under section 121(4) of the Ordinance or unless the IA consents, your company cannot disclose the notice or any information contained in the notice to anyone outside of your company, including your parent company.

Q6: My company is required to report the fact that it is being investigated to our indemnity insurer. How much information can we disclose to the indemnity insurer?

A6: Unless you have been required by the IA to keep information completely secret (or secret from a particular person named by the IA), pursuant to the IA's Assumed Consent, your company may disclose the following information (and only these) to an indemnity insurer providing insurance coverage to the person in relation to the matter which is the subject of the requirement, in order to preserve the right to make a claim under such insurance, provided that the disclosure is made only to the staff of the indemnity insurer handling the relevant insurance notification:

- The fact that your company is bound by the non-disclosure obligation;
- The general nature of the matter (but without revealing anything specific about it), which has given rise to the non-disclosure obligation (e.g. disclosing only that your company is subject to a requirement imposed by an investigator appointed by the IA to produce information);
- The means by which your company came to be bound by the non-disclosure obligation; and
- The date, time and place at which your company's personnel are required to provide information/records/documents or attend an interview.

(See also the body of the Explanatory Note under the heading "Assumed consent to disclosure of limited information" for further details)

Q7: In complying with the investigation notice issued by the IA under the Ordinance, I have supplied the IA with the information that was already within my knowledge. Am I restricted from disclosing such information to any other person under section 121 of the Ordinance?

A7: You may disclose information which is already within your knowledge, i.e. you did not first learn of the information in the course of assisting in the IA's investigation; and this was not information you first learned by it being disclosed to you by the IA. However, the fact that the

IA has requested the information and the fact that the information has been provided to the IA cannot be disclosed.

Q8: How do I obtain consent from the IA for disclosing information that is subject to the non-disclosure provisions under section 121 of the Ordinance?

A8: You may make an application in writing to the IA for consent.

To facilitate the IA in considering your application, you should clearly state the full extent of the information sought to be disclosed, the persons to whom it is proposed to be disclosed, the reasons for the proposed disclosure and other information you think would be useful.

Pursuant to section 121(5) of the Ordinance, the IA may consider imposing conditions on a consent given with a view to continuing to preserve the non-disclosure of the information. It should be noted that both the applicant and intended recipient have the duty to preserve the confidentiality of the information.

Q9: What should I do if I still have doubt as to whether or not any intended disclosure falls within the Assumed Consent referred to in the Explanatory Note in relation to section 121 of the Insurance Ordinance (Cap. 41)?

A9: You should err on the side of caution by contacting the IA or by making an application in writing to the IA for consent.

The information provided in the FAQs is general in nature, is not exhaustive and does not take into account any specific circumstances. You should seek independent legal advice if you are unsure about how section 121 of the Ordinance applies to you.