

OFFICE OF THE INFORMATION COMMISSIONER (QLD)

Information Sheet – the "deliberative process" exemption: s.41(1)

An agency can refuse access to exempt matter or an exempt document. The word "matter" refers to a piece of information. It could be a whole page or part of a page, right down to a single word or figure. Parts of a page can be exempt matter when other parts are not.

Section 41(1) of the *Freedom of Information Act 1992* Qld (the FOI Act) sets out the ground of exemption for matter relating to the "deliberative processes" of government:

41.(1) Matter is exempt matter if its disclosure—

(a) would disclose—

(i) an *opinion, advice or recommendation* that has been obtained, prepared or recorded; or

(ii) a *consultation or deliberation* that has taken place;

in the course of, or for the purposes of, the deliberative processes involved in the functions of government; and

(b) would, on balance, be *contrary to the public interest.*

(emphasis added)

What is "deliberative process" matter ?

- The critical words in s.41(1)(a) are "*deliberative processes involved in the functions of government*" (the word "government" includes State government departments and Ministers, local governments, and public authorities as defined in s.9 of the FOI Act).
- The term "deliberative processes" is sometimes explained as the pre-decisional thinking processes of an agency. The term refers to the processes of evaluating relevant evidence, arguments and options, for the purpose of making a decision related to the performance of an agency's functions. It includes contributions to the formulation of policy, or to the making of decisions under statutory powers.
- Normally, deliberative processes occur toward the end stage of a larger process; once investigations have been carried out, facts established and information obtained from different sources. An agency then weighs all these inputs to make a decision.
- The purely procedural or administrative processes of an agency are not part of its deliberative processes (e.g., processing forms, paying accounts, publishing information, carrying out inspections).
- The following are examples of "deliberative process" matter:
 - opinions expressed in referee reports given to an agency for use in selection processes to appoint or promote staff: see *Re Pemberton and The University of Queensland* (1994) 2 QAR 293 at paragraph 70 (94032);

- the opinions and recommendations of an investigator, prepared to assist senior management of the Queensland Corrective Services Commission in considering measures to be taken in response to the death of a prisoner: see *Re Prisoners' Legal Service Inc and Queensland Corrective Services Commission* (1997) 3 QAR 503, at paragraph 71 (97004);
- opinions expressed by members of a committee appointed to develop a charter for the corporatisation of the Queensland Forest Service: see *Re Australian Rainforest Conservation Society Inc and Queensland Treasury* (1996) 3 QAR 221 at paragraph 17 (96005)
- opinions and recommendations expressed by an investigating officer as to whether or not a person should be charged with an offence: see *Re McCann and Queensland Police Service* (1997) 4 QAR 30 at paragraph 102 (97010)

s.41(2) exclusions

Matter cannot qualify for exemption under s.41(1), if it merely consists of:

- factual or statistical matter;
- expert opinion or analysis;
- matter that appears in an agency's policy document ("policy document" is defined in s.7 and refers to documents which an agency must make available for inspection or purchase, under s.19 of the FOI Act).

Matter of the kind specified above must be disclosed, even if contained in a deliberative process document. The only exception would be where the factual or statistical matter, or expert opinion, is inextricably interwoven with the deliberative process opinion *et cetera*, such that it does not merely consist of factual or statistical matter, or expert opinion. The word "merely" used in s.41(2) means "purely", "solely" or "no more than".

Also, under s.41(3), matter cannot qualify for exemption under s.41(1) if it consists of a formal statement of the reasons for a final decision, order or ruling.

The "public interest" test

If matter in a document is found to qualify as "deliberative process" matter, the next question to ask is "would disclosure of that matter, on balance, be contrary to the public interest?"

Just because requested information is deliberative process matter does not necessarily mean that its disclosure would be contrary to the public interest. If no public interest considerations weighing against disclosure of particular deliberative process matter can be identified, then the matter is not exempt under s.41(1).

An access applicant does not have to show that disclosure of the deliberative process matter would be in the public interest. The applicant is entitled to access unless the agency which holds the information can show that its disclosure would result in specific and tangible harm to an identifiable public interest, and that the anticipated harm is serious enough to outweigh any public interest considerations favouring disclosure.

This Information Sheet should be read together with the Information Sheet on "Public Interest Balancing Tests in the Freedom of Information Act", which identifies recognised public interest considerations that tell for or against disclosure.

Where deliberative process matter is concerned, two significant public interest considerations favouring disclosure will frequently be relevant:

- (a) enhancing the accountability of agencies and individual officers for the performance of their official functions; and
- (b) promoting informed public participation in the processes of government.

Disclosure of information about the advice, recommendations and options considered in making agency decisions:

- (a) enables informed judgment on the performance of government (enhancing accountability); and
- (b) can facilitate better informed public contributions to government policy forming processes, and better informed public debate about the range of workable policy options on a particular issue (promoting informed public participation).

Other public interest considerations must be identified on a case by case basis, having regard to the nature of the particular information in issue.

Public interest considerations telling against disclosure will usually involve some anticipated detriment to the public interest in the efficient and effective conduct of government functions. Sometimes, a public interest in fair treatment of individuals can be relevant.

Application of s.41(1) is a 5 step process

- Step 1. Does the matter in issue answer the description in s.41(1)(a)? If not (e.g., because it cannot be characterised as opinion, advice or recommendation, or as a consultation or deliberation, or because it relates to a purely procedural or administrative process rather than a deliberative process), it cannot be exempt under s.41(1).
- Step 2. If it does answer the description in s.41(1)(a), is any of the matter excluded by s.41(2) or s.41(3) because it merely consists of factual or statistical matter, expert opinion *et cetera*?
- Step 3. Are there any public interest considerations which tell against disclosure of the remaining deliberative process matter? If not, the matter cannot be exempt under s.41(1).
- Step 4. If there are public interest considerations which tell against disclosure, all public interest considerations which tell for or against disclosure must be identified. This is not to be done in a general way. There must be some identifiable benefit or detriment to the public interest from disclosure of the **particular matter in issue**. The significance/extent of the relevant benefit or detriment affects the weight to be accorded to the respective public interest considerations.
- Step 5. Assess the relative weight of the competing public interest considerations telling for and against disclosure, and decide whether, on balance, disclosure would be contrary to the public interest.

Further reading

If you want to read more about the s.41(1) exemption you can go to the Information Commissioner's website at www.infocomm.qld.gov.au. Some cases you might like to look at are:

- about this exemption in detail – *Re Eccleston and Department of Family Services and Aboriginal and Islander Affairs* (1993) 1 QAR 60 (93002)
- the meaning of "merely factual matter" – *Re Hudson as agent for Fencray Pty Ltd and Department of the Premier, Economic and Trade Development* (1993) 1 QAR 123 at paragraphs 48-61 (93004)

Most of the cases listed under s.41(1) in the "Section index" of decisions published on the website provide useful illustrations of the process of weighing competing public interest considerations, for and against disclosure, with respect to the specific deliberative process matter in issue in each case.

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<p>Information Sheets are introductory only. They deal with issues in a general way. Additional factors may be relevant in particular cases. Detailed consideration of the issues can be found in the cases referred to above. The Information Commissioner considers each case on its merits.</p>
