

OFFICE OF THE INFORMATION COMMISSIONER (QLD)

Information Sheet - Breach of confidence exemption (s.46(1)(a) of the FOI Act)

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 46(1)(a) of the *Freedom of Information Act* (FOI Act) sets out this ground of exemption:

Matter is exempt if...its disclosure would found an action for breach of confidence;

When does the exemption apply?

- It protects information that a court would order the agency to keep confidential (because the agency was bound to comply with an equitable, or contractual, obligation of confidence).
- It can apply to the identity of the giver of the information as well as the information given.
- It will only apply if the information is both secret from the applicant for access and generally inaccessible to the public at large. The form in which information is given out does not matter. So, if a letter has been read out to the applicant, the exemption can't be used to refuse access to a copy of the letter. The information has been disclosed, so it is no longer confidential from the applicant.
- It won't apply if the giver doesn't object to disclosure.
- It may not apply if the information was given by an agency, or by a person acting in his or her capacity as a staff member of an agency: see s.46(2)

What is an equitable obligation of confidence?

It is a duty not to disclose information because the information was received in circumstances which would make it unconscionable (unacceptable) conduct for the receiver to disclose the information in a way the giver has not authorised. A court would make that judgment after considering all the circumstances surrounding the giving of the confidential information, which can include:

- any request by the giver, or assurance by the receiver, that the information be kept confidential.
- a justifiable need or desire on the part of the giver of the information to keep the information confidential, e.g., if disclosure of the confidential information might cause substantial detriment to the giver, or to the giver's commercial interests. (For example, people who inform police of the location of stolen goods are likely to have a desire to have their identities withheld from the alleged thief, even if they failed to ask the police to withhold their names.)
- whether the receiver of the information stood in a fiduciary relationship with the giver. It is a part of fiduciary relationships (eg. doctor-patient, solicitor-client, employee-employer) that the fiduciary must keep confidential any confidential information given or obtained, unless there is express or implied consent to disclosure.
- the use to which the agency could be expected to put the information. For example, if Joe complains to the police that he has been assaulted by Jack, it is only to be expected that the police will put the information supplied by Joe to Jack when they interview Jack.
- any legislative or other legal requirement (e.g., the common law duty to accord procedural fairness) which requires the agency to disclose the information. Conscionable conduct on the part of a government agency requires compliance with legislation and common law.

What about contractual obligations of confidence?

The exemption may apply if an agency has entered into a contract that includes a requirement not to disclose confidential information which is to be supplied by one party to the other in connection with the performance of the contract. For more information, see the Further Reading section below.

Examples

Matter in an applicant's psychiatric records that recorded information provided by other people to assist in the care of the applicant qualified for exemption. *Re "P" and Brisbane South Regional Health Authority* (94024)

Communications between a land developer and government agencies did not qualify, as disclosure by the agency would not be an unconscionable use of the information. The Commissioner referred to the "public interest exception" to obligations of confidence discussed by the High Court in *Esso Australia Resources v Plowman*. *Re Cardwell Properties and Department of the Premier, Economic and Trade Development* (95019)

Express assurances of confidentiality were given to people who supplied information to police about a potential police recruit. This clashed with the legislative obligation to afford procedural fairness to the recruit. The Commissioner found that the requirement to inform the recruit of the substance of the adverse allegations overrode any understanding of confidentiality with respect to a small amount of matter, but that the rest of the information qualified for exemption. *Re Hamilton and Queensland Police Service* (94021)

Evidence of an established international convention of confidentiality supported the Commissioner's finding that referee reports from outside a university qualified for exemption. However, reports from senior staff within the university did not qualify, because of s.46(2). *Re Pemberton and The University of Queensland* (94032)

A transcript of an interview given by a union official to grievance investigators in the course of a public service grievance investigation did not qualify for exemption, as any understanding of confidentiality must be subject to an exception that would allow the agency to comply with a regulation that required disclosure of the document to the applicant. *Re Chambers and Department of Families, Youth and Community Care* (99001)

The Commissioner decided that valuations made by a valuer for the agency did not qualify for exemption since, although a valuer may owe a duty to the client to keep information prepared for the client confidential, the client would not normally owe a similar duty to the valuer. *Re Hopkins and Department of Transport* (95028)

Further reading

If you want to read more about "breach of confidence" you can go to the Information Commissioner's website at www.infocomm.qld.gov.au. Some sections of the FOI Act and cases you might like to look at are:

- setting out the five cumulative requirements to establish the existence of an equitable obligation of confidence: *Re Spilsbury and Brisbane City Council* (99011), at paragraph 23;
- for a detailed analysis of those five cumulative requirements: *Re "B" and Brisbane North Regional Health Authority* (94001);
- about contractual obligations of confidence: *Re "B"* at paragraphs 43, 45-48, and *Re Spilsbury*, at paragraphs 19-22;
- about the exception in respect of certain kinds of information supplied by agencies and agency staff: s.46(2) of the FOI Act, and *Re "B"* at paragraphs 35-36;
- about the public interest exception which may apply in respect of confidential information given to a government agency: see *Re Cardwell Properties* (95019) at paragraphs 51-59, *Re Swickers and Department of Primary Industries* (98011) at paragraphs 29-31.

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 exemption provision is set out in the cases referred to in the Information Sheet. The Information Commissioner considers each case on its merits.