

OFFICE OF THE INFORMATION COMMISSIONER (QLD)

Information Sheet - 'Communicated in confidence' exemption (s.46(1)(b) 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)(b) of the *Freedom of Information Act 1992* (FOI Act) sets out this ground of exemption:

*Matter is exempt if ... it consists of information of a **confidential nature** that was **communicated in confidence**, the disclosure of which could reasonably be expected to **prejudice the future supply** of such information, unless its disclosure would, on balance, be in the public interest.*

When does the exemption apply?

It will apply only if all four of the following requirements are met:

- the information in issue is confidential
- it was communicated in confidence
- its disclosure could reasonably be expected to prejudice the future supply of such information
- the public interest considerations favouring non-disclosure outweigh or equal any public interest considerations favouring 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 information of a confidential nature?

- It can include the identity of the giver of the information as well as the information given.
- It only includes information that 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 an 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.

When is information communicated in confidence?

Firstly, at the time the information was given there must have been a shared understanding by both the giver and the receiver that the receiver would keep the information secret. Secondly, that understanding must be continuing, so if the giver doesn't object to disclosure now, the information won't be exempt.

A shared understanding can be shown by an **express** (spoken or written) agreement between the giver and receiver. But even an express agreement may not be enough if the circumstances show that one or both could not reasonably have believed that the information could be kept confidential. Even if there is no express agreement, an understanding may be **implied** if all the relevant circumstances show there was a common understanding that the information would be kept secret.

Almost all understandings of confidentiality are limited or conditional in some way. If you give information to an agency in confidence, you will usually accept that it must be given to other officers of the agency for them to take any necessary action in respect of the information. Likewise, if you complain about how you were treated by an officer of the agency in a particular case, it is likely that the department will have to put your complaint to the officer so that he or she can correct their behaviour or explain what they did. These

exceptions are part of the scope of the understanding of confidentiality. If disclosure to the applicant under the FOI Act would fall within an express or implied exception, then it will not breach the understanding of confidentiality, and the matter will not be exempt from disclosure to the applicant.

When is there a reasonable expectation of prejudice to future supply of information?

It is not enough that the giver says they will not provide information in the future. It is a question of whether a substantial number of people could reasonably be expected not to provide such information (or to provide less detailed information) in the future. A reasonable expectation is one for which real and substantial grounds exist, not merely a possibility or speculation.

Things that tell against the existence of such a reasonable expectation can include:

- the existence of a statutory or other legal power to require disclosure of information of the kind in question;
- if the information is given in order to obtain some benefit, licence or approval from the government, e.g., the information must be supplied in order to obtain a building permit;
- if the supplier would be disadvantaged if they failed to supply the information, e.g., a public servant required to answer a complaint about their work performance supplying information in order to explain and justify what they did.

Public interest balancing test

If the information meets the first three requirements, there is a public interest against giving access to it. The Commissioner must then weigh up all the public interest considerations in favour of giving access, and the ones against giving access. Unless the ones in favour of access outweigh the ones against access, the matter will be exempt matter.

For more detail about the public interest balancing test, you can read the Information Sheet on *Public Interest Balancing Tests*.

Further reading

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

- about the requirements to establish the exemption, in detail: *Re "B" and Brisbane North Regional Health Authority* (94001) at paragraphs 144-161, *Re McCann and Queensland Police Service* (97010) at paragraphs 21-23, 33-34;
- 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 information supplied to medical practitioners by third parties concerning patients: *Re "P" and Brisbane South Regional Health Authority* (94024)
- about information relating to grievance/disciplinary investigations involving public servants: *Re Chambers and Department of Families, Youth and Community Care* (99001)
- about information concerning police investigations: *Re Godwin and Queensland Police Service* (97011)
- about information concerning investigations of police officers: *Re McCann*
- about information concerning investigations of medical professionals: *Re Villaneuva and Queensland Nursing Council* (02/2000)

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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.