

OFFICE OF THE INFORMATION COMMISSIONER (QLD)

Information Sheet - Public Interest Balancing Tests in the Freedom of Information Act

The basic structural principle of the *Freedom of Information Act 1992* Qld (the FOI Act) is that, in a democratic society, interested citizens should have the right to examine the operations of their government through access to documents held by government agencies and Ministers, except to the extent that disclosure of certain documents or information would be harmful to the wider public interest (or to certain private interests which Parliament considers worthy of protection). The notion of the 'public interest' is a unifying principle in the scheme of the FOI Act.

The exemption provisions in sections 36-50 of the FOI Act reflect Parliament's assessment of the public interest considerations which may warrant information being withheld from access. In some cases, Parliament decided that the public interest considerations favouring non-disclosure were so strong that matter should be exempt, whether or not there were also strong public interest considerations favouring disclosure. One example is the exemption for Cabinet matter (s.36). Others are in ss.37, 42, 43, 45(1)(a) and (b) and 50. (The following discussion is not relevant to those exemption provisions.)

However, Parliament included in most exemption provisions a public interest balancing test, which requires disclosure **if the public interest considerations favouring disclosure outweigh those favouring non-disclosure**. (There are variations on this test for the 'deliberative process' (s.41), 'audit information' (s.39(2)) and 'secrecy provisions' (s.48) exemptions: see below.)

What is the 'public interest'?

The 'public interest' refers to considerations affecting the good order and functioning of community and governmental affairs, for the well-being of citizens. In general, a public interest consideration is one which is common to all members of the community (or a substantial segment of them), and for their benefit.

The public interest is usually treated as distinct from matters of purely private or personal interest. However, some recognised public interest considerations may apply for the benefit of individuals in particular cases, for example:

- the public interest in government agencies respecting privacy principles in their handling of information about the personal affairs of citizens;
- the public interest in individuals receiving fair treatment in accordance with the law in their dealings with government.

The 'public interest' does not refer to matters which are merely of interest to the public to know, in the sense of gratifying curiosity or providing amusement.

How the public interest balancing test works

If the basic elements of an exemption provision are satisfied, there will be a public interest consideration favouring non-disclosure (however, the 'deliberative process' exemption, s.41, is different: see below). Take, for example, s.44(1): if information concerns the personal affairs of a person other than the access applicant, there will be a public interest consideration favouring non-disclosure of that personal affairs information. That information will be exempt unless there are public interest considerations favouring its disclosure that outweigh the primary consideration, and any other public interest considerations, favouring non-disclosure.

All public interest considerations favouring disclosure or non-disclosure of the particular matter in issue must be identified, and their comparative strengths/importance must be weighed against each other to decide whether or not those favouring disclosure outweigh those favouring non-disclosure. (This is the usual kind of public interest balancing test – it qualifies s.44(1), s.45(1)(c), s.40, s.46(1)(b), s.38, s.39(1), s.47 and s.49 of the FOI Act.)

It is not enough that the matter in issue relates in some way to an issue which gives rise to a public interest consideration. For a public interest consideration to be relevant in the application of a public interest balancing test, there must be a direct link between disclosure of the particular matter in issue, and the advancement of, or prejudice to, the public interest.

'Deliberative process' exemption is different

A significant **variation** to the usual public interest balancing test appears in s.41(1) of the FOI Act, which first requires that information answer the description in s.41(1)(a) (deliberative process matter), but then provides that information answering that description will be exempt only if its disclosure would, on balance, be contrary to the public interest. Establishing that matter is 'deliberative process' matter does not raise a public interest consideration favouring non-disclosure. If there are no public interest considerations favouring non-disclosure, the matter is not exempt. If it can be shown that there are public interest considerations favouring non-disclosure, the matter will be exempt only if those considerations outweigh any public interest considerations favouring disclosure.

'Audit information' (s.39(2)) and 'secrecy provision' (s.48) exemptions are different

Another **variation** to the usual public interest balancing test appears in s.39(2) (documents relating to audits by the Auditor-General), and in s.48(1) (documents to which secrecy provisions apply). In both provisions, if the other elements of the test for exemption are satisfied, the matter in issue will be exempt unless disclosure "**is required by a compelling reason in the public interest**". This imposes a more demanding test for disclosure - the public interest considerations favouring disclosure must be so forceful or overpowering as to demand or necessitate disclosure of the information in issue.

What public interest considerations favour disclosure?

Remembering that there is no fixed list of relevant public interest considerations, the following considerations can be relied on in favour of disclosure (provided they would be advanced by disclosure of the particular information in issue):

- **Accountability** - disclosure of information about how government functions were conducted can enhance the accountability of agencies and individual officers for the performance of their official functions:
 - e.g., information about the administration of government grants schemes: *Re Pearce and QRAA* (99008).
- **Public participation** - disclosure of information about issues currently being considered by government can lead to more informed debate about the issues:
 - e.g., a report on options for future waste water disposal: *Re Spilsbury and BCC* (99011).
 - e.g., informing an affected community about planning and other aspects of a major development proposal: *Re Cardwell Properties Pty Ltd and Department of the Premier, Economic and Trade Development* (95019), *Re Bouilly and Department of Natural Resources* (98001) at paragraphs 37-43.

- **Public awareness** - disclosure of information about issues of general concern can assist individuals to make decisions about their own activities, e.g., information about public health and safety, or issues of relevance to consumers:
 - e.g., information about complaints against a home builder: *Re Kenmatt Projects Pty Ltd and Qld Building Services Authority* (99007);
 - information about performance of government employed medical specialists: *Re Coulthart and Princess Alexandra Hospital and HSD* (06/2001).
- **Justice to an individual** - in an appropriate case, there can be a public interest in individuals in a particular situation obtaining information of particular relevance to them, e.g., information that can be used for the purposes of some process that may affect, or has affected, them or information that may assist them to pursue a remedy:
 - e.g., information that would assist a complainant to understand the steps taken by an agency in dealing with his/her complaint: *Re Villanueva and Queensland Nursing Council* (02/2000);
 - adverse references to an applicant in government records;
 - information that would assist a person to pursue, or assess whether to pursue, a legal remedy: *Re Willsford and Brisbane City Council* (96017), *Re Bultitude and Princess Alexandra Hospital and HSD* (01/2000)
 - for a detailed analysis of cases in which it has been held that there may be a public interest in a particular applicant having access to information which affects or concerns that applicant to such a degree as to give rise to a justifiable "need to know", see *Re Pemberton and The University of Qld* (94032) at paragraphs 164-193.
- **Facilitation of historical and cultural research, or other kinds of research which benefit the community:** *Re Fotheringham and Qld Health* (95024) at paragraph 23.

What public interest considerations favour non-disclosure?

Public interest considerations that can be relied on in favour of non-disclosure (provided disclosure of the particular information in issue would cause relevant prejudice) include:

- **Exemption provisions** - satisfaction of the elements of one of the exemption provisions gives rise to a public interest consideration favouring non-disclosure (except in the case of the s.41 'deliberative process' exemption: see above).
- **Interests of third parties** - the public interest in maintaining the privacy of information held by government that is about the personal affairs of members of the public, and maintaining the secrecy of sensitive commercial information held by government about business operators.
- **Efficient and effective conduct of government functions**
- **Flow of information to law enforcement and regulatory agencies** - it is in the public interest that citizens not be unduly inhibited from providing information that law enforcement and regulatory agencies need to perform their functions: see *Re Byrnes and The Public Trustee of Qld* (96001) at paragraph 23.
- **Fair treatment of individuals** - if an individual has been subject to unsubstantiated allegations of wrongdoing, there can be a public interest in non-disclosure of information which would adversely affect his or her reputation: see *Re Pope and Qld Health* (94016) at paragraphs 96 and 100.

Other considerations that are not valid or can be relied on only in limited circumstances are:

- **Embarrassment** - embarrassment to the government, an agency or individual officers is not a valid public interest consideration favouring non-disclosure.

- **High office** - the fact that the person giving or receiving advice holds high office is not, of itself, sufficient to weigh against disclosure; an assessment of the consequences of disclosure of the particular matter in issue is required.
- **Policy development** - the fact that documents may relate to policy development does not, of itself, establish a public interest consideration favouring non-disclosure.
- **Candour & frankness** - Claims that disclosure would prejudice the supply of frank and candid information or advice in the future must be scrutinised carefully, particularly in the case of advice by government employees. Such claims will only be accepted when a very particular factual basis supporting a tangible prospect of harm to the public interest is shown. The possibility of future publicity acts as a deterrent against advice which is specious or expedient or otherwise inappropriate; therefore the prospect of disclosure would likely act as an incentive to improve the quality of advice, and that would be in the public interest.
- **Disclosure of confusing or misleading information** - In most cases, an agency will have the means to avoid any possibility of such a prejudicial effect by clarifying the status of the matter concerned and disclosing additional information which accurately explains the situation (provided that would not otherwise be contrary to the public interest): see *Re Coulthart and Princess Alexandra Hospital and HSD* (06/2001) at paragraphs 73-77.
- **Not fairly disclose reasons for a decision** - Again, in most cases, an agency will have the means to avoid such a prejudicial effect by providing additional information which accurately explains the reasons for decision.
- **Draft documents** - There is no presumption that disclosure of a draft document will be contrary to the public interest. There may be significant benefits to the public in obtaining access to draft material, to further the accountability, and public understanding of, the operations of government organisations. Disclosure of this type of material allows members of the public to examine the processes by which an agency has come to a final conclusion.

Further Reading

If you want to read more about the 'public interest', the cases referred to in this Information Sheet are on the Information Commissioner's website at www.infocomm.qld.gov.au. Indeed, most of the cases on the website contain practical illustrations of the application of public interest balancing tests. Some additional cases you might like to look at are:

- about the public interest generally, and the application of s.41 in particular: *Re Eccleston and Department of Family Services and Aboriginal and Islander Affairs* (93002) at paragraphs 35-57, and paragraphs 20-33, respectively;
- about draft documents: *Re DPP and CJC* (96012);
- about the test imposed by the phrase "is required by a compelling reason in the public interest": *Re Whittaker and Queensland Audit Office* (05/2001).

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