Confidential Communications

This is a plain English guide to the application of the exemption in clause 8(2) 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 can be a whole page or part of a page, or a single word or figure on a page. Parts of a page can be exempt when other parts are not. Exemptions are not mandatory; agencies have discretion to disclose documents that may be technically exempt where that may properly be done.

Clause 8(2)

Purpose

The exemption in clause 8(2) protects the free flow of confidential information so that individuals and organizations who provide information to government agencies on a genuinely confidential basis can be assured that the information will remain confidential.

Criteria

The exemption will only apply if **all** of the following requirements are met:

- the information is confidential in nature
- it was communicated in confidence to the agency
- its disclosure could reasonably be expected to prejudice the future supply of information of that particular kind to the government or to an agency
- the public interest considerations favouring non-disclosure outweigh any other public interest considerations favouring its disclosure

Information of a confidential nature

- It only includes information that is both secret from the applicant and generally inaccessible to the public at large.
- It can include the identity of the provider of the information as well as the information given.
- Information can be confidential in nature even if it is known by a small number or limited class of persons. The wider and more diverse is the group of people who know the information, the less likely it is that the information will be confidential.
- The confidential nature of information may change. Information that was confidential at one point, may not be confidential at the time that access to it is sought.
- Merely marking a document as "Confidential" or as "commercial in confidence" will not make it confidential for the purpose of the exemption. It may be a factor to be considered along with all the circumstances surrounding the giving of the information to decide if it is confidential in nature.

Clause 8(2)

Information communicated in confidence

◆ Information is communicated in confidence if, at the time the information is given, there is a shared understanding by the giver and the receiver that the receiver would keep the information confidential.

◆The shared understanding must be current at the time that access is sought. If the giver does not object, to disclosure, the information can't be confidential.

◆A shared understanding can be shown to exist if there is an express agreement (spoken or written) between the giver and receiver.

◆If there is no spoken or written agreement, a shared understanding may be implied if the relevant circumstances indicate that there was a common understanding between the giver and receiver that the information would be kept confidential.

◆An undertaking of confidentiality may be limited or conditional. For example, it is generally accepted that, if information is given to an agency, it is given so that its officers can take some action, and the information may be disclosed to other officers for that to occur.

◆If a complaint is made to an agency about one of its officers, information may be disclosed to the officer concerned so that he or she can explain what happened and why it happened.

" prejudice to the future supply of that kind of Information"

◆The third requirement is directed at the ability of the government or agencies to obtain the the same or similar kinds of information in the future from the sources generally available to it.

◆Even if the giver of the information says that he or she will not provide information in the future, that will not be enough to establish the exemption. The test is whether a substantial number of people who would normally provide that kind of information to the government or to agencies would fail to do so if disclosure were to occur.

◆If it is established that a substantial number of people would provide less detailed information in the future, that may be sufficient to establish the third criteria.

◆Prejudice means "harm" or "injury" resulting from disclosure. Ask whether the ability of the agency to obtain that kind of information in the future be impaired (ie. harmed or injured) by disclosure of the particular document? If so, how?

◆What material is there to support the view that disclosure would cause such harm? [Explain what it is and give your reasons].

Clause 8(2)

A reasonable expectation

◆A reasonable expectation is one for which real and substantial grounds exist, not merely a possibility or speculation. It is not enough to just assume that disclosure will result in some kind of adverse consequences.

◆If there exists a statutory duty or obligation to give information, it is unlikely that a reasonable expectation will exist.

◆If information must be provided in order to gain some benefit, licence or approval from a government agency, it is unlikely that a reasonable expectation will exist.

◆If the information was given voluntarily to a government agency; the giver received no benefit by giving it; and the information assisted the agency in some way in carrying out its public responsibilities, then some diminution in the quality or quantity of information that would be given in the future may be a result that could reasonably be expected to follow from disclosure.

Public interest balancing test

◆If each of the first three requirements are satisfied, then the initial claim for exemption will be established, and there will be a public interest against giving access to information communicated in confidence.

◆On external review, the Information Commissioner will weigh the public interest factors for and against disclosure and decide whether those favouring access outweigh the ones against giving access.

◆If the information has lost some of its confidentiality due to the passing of time, this factor will carry less weight.

◆If the information has found its way into the public domain through another source then it would no longer be confidential and this factor will carry less weight.

◆If other relevant information has been disclosed, then the public interest may have already been satisfied.

Further reading

Ryder v Booth [1985] VR 869—for a general discussion on the third requirement.

Searle Australia Pty Ltd v Public Interest Advocacy Centre (1992) 108 ALR 163—for a discussion about the effect of FOI on confidential information provided to government agencies.

Manly v Ministry of Premier and Cabinet (1995) 14 WAR 550—for the application of the third requirement in Western Australia.

Clause 8(2)

Clause 8(2) of Schedule 1 to the *Freedom of Information Act 1992*, is in the following terms:

"8. Confidential communications

Exemptions

(2) Matter is exempt matter if its disclosure -

(a) would reveal information of a confidential nature obtained in confidence; and

(b) could reasonably be expected to prejudice the future supply of information of that kind to the Government or to an agency.

Limits on exemption

(4) Matter is not exempt matter under subclause (2) if its disclosure would, on balance, be in the public interest."

Decisions of the Information Commissioner

The following decisions of the Information Commissioner are included as a further guide to the application of the exemption in clause 8(2). The full decision and reasons can be found on the Information Commissioner's web site at <http://www.foi.wa.gov.au>. All decisions of the Information Commissioner involving a consideration of the exemption in clause 8(2) can be found at that source.

Re Read and Public Service Commission (1994) WAICmr1– notes of discussions about an employee's grievance, including information voluntarily supplied by other employees were based on the confidential exchange of information about management practices, including those of senior managers were exempt.

Re Veale and Town of Bassendean [1994] WAICmr 4 - a confidential communication between a former Town Clerk and councillors that dealt with the concerns of ratepayers about local issues met the first 2 criteria but not the third because disclosure could not reasonably be expected to deter other ratepayers from voicing their concerns in the future.

Re Kobelke and Minister for Planning and Others [1994] 5— internal administrative documents relating to a planning appeal failed the test of confidentiality.

Re Morton and City of Stirling [1994] WAICmr 17— letters of complaint about a neighbour were confidential but failed the third criteria because it was not reasonable to expect that ratepayers would not complain to local authorities about alleged breaches of By-laws.

Re Ayton and Police Force of Western Australia [1999] WAICmr 8— a confidential report given to Commissioner of Police was not exempt 12 months after the first application for access was rejected. The circumstances had changed in the interim and the public interest no longer required that the document be kept confidential.