

OFFICE OF THE INFORMATION COMMISSIONER (QLD)

Information Sheet - Exemption for trade secrets and other information of commercial value (s.45(1)(a) and (b))

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 45(1) of the *Freedom of Information Act 1992* Qld (the FOI Act) sets out three separate grounds for exemption of business information of agencies and businesses. Any one piece of information can only be exempt under one of the three grounds. This Information Sheet deals with the first two grounds — trade secrets, and other information of commercial value. The third ground — the business, professional, commercial or financial affairs exemption — is discussed in a separate Information Sheet.

The main purpose of s.45(1) is to provide a means by which the general right of access conferred by the FOI Act to documents held by government agencies can be prevented from causing unwarranted commercial disadvantage to -

- individuals or organisations carrying on commercial activity who supply information to government, or about whom government collects information; or
- government agencies which carry on commercial activities.

Sections 45(1)(a) and (b) provide that matter is exempt if:

- (a) *its disclosure would disclose **trade secrets** of an agency or another person;*
- (b) *its disclosure—*
 - (i) *would disclose information (other than trade secrets) that has a **commercial value** to an agency or another person; and*
 - (ii) *could reasonably be expected to **destroy or diminish** the commercial value of the information; ...*

No public interest balancing test

Neither s.45(1)(a) or s.45(1)(b) includes a public interest balancing test. This means that, if the information in issue meets either test for exemption, it is exempt. It does not matter that an applicant can point to public interest considerations that favour disclosure of the information in issue.

Trade secrets - s.45(1)(a)

Trade secrets is a legal term. Its meaning is explained in *Re Cannon and Australian Quality Egg Farms Limited* (94009) at paragraphs 42-49. Information that constitutes a trade secret (for example, a secret formula used in the manufacture of a distinctive product) is exempt from disclosure.

Some factors to be considered in determining whether given information is one's trade secret are: (1) the extent to which the information is known outside of his business; (2) the extent to which it is known by employees and others involved in his business; (3) the extent of measures taken by him to guard the secrecy of the information; (4) the value of the information to him and to his competitors; (5) the amount of effort or money expended by him in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

[This passage from the American "Restatement of the Law of Torts" (1939; Volume 4, paragraph 757) has been endorsed by Australian courts and tribunals.]

Other information that has a commercial value - s.45(1)(b)

Commercial value

Information has commercial value for the purposes of s.45(1)(b) if -

- (a) it is valuable for the purposes of carrying on the commercial activity in which an agency or business is engaged, because it is important or essential to the profitability or viability of a continuing business operation, or a pending, "one-off" commercial transaction; or
- (b) there is a genuine market for the sale of the information, such that its market value would be destroyed or diminished if the information could be obtained from a government agency under the FOI Act.

The information must have a current commercial value at the time a decision is made as to whether s.45(1)(b) applies.

Examples of information that usually **has commercial value**:

- a method or procedure developed and employed in a business that enables it to provide a service more quickly than its competitors
- a list of customers with their specific requirements

Examples of information that usually **doesn't have commercial value**:

- information that is aged or out-of-date
- information that relates to a major or "one-off" commercial transaction which has been finalised
- information that is common knowledge within the relevant industry

Value of information diminished by disclosure

There must be a reasonable basis (not just speculation) for expecting the commercial value of the information to be diminished by its disclosure. This could not be shown if, for instance, the information was public knowledge, or common knowledge among competitors in the relevant industry.

Further reading

If you want to read more about this 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 these exemptions in detail: *Re Cannon and Australian Quality Egg Farms Limited* (94009)
- an example of claims concerning the trade secrets exemption: *Re GSA Industries and Brisbane City Council* (94020)
- examples of claims concerning the commercial value exemption: *Re Spilsbury and Brisbane City Council* (99011); *Re Webber and Toowoomba City Council* (99009); *Re Dalrymple Shire Council and Dept of Main Roads* (98010); *Re Bouilly and Department of Natural Resources* (98001); *Re Queensland Gridiron Football League Inc and Dept of Tourism, Sport and Racing* (94027)

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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 issues can be found in the cases referred to above. The Information Commissioner considers each case on its merits.