

## OFFICE OF THE INFORMATION COMMISSIONER (QLD)

### Information Sheet

#### Exempting identities of complainants and information-providers

Agencies like the police, local councils and other regulatory bodies frequently depend on members of the public to inform them about possible breaches of the law, or give information that might help an agency investigation. If it is practicable for the agency to investigate without revealing the identity of the information-provider, Australian law often protects the identity of the information-provider. The *Freedom of Information Act 1992* Qld (the FOI Act) contains exemption provisions that reflect and support that general approach of Australian law.

#### **When is identifying information exempt?**

Identifying information can qualify for exemption, if:

- there was a shared understanding (by the agency and the information-provider) that the identity of the information-provider could, and would, be kept **confidential** - s.42(1)(b) or s.46(1); or
- the fact of providing the information was part of the personal affairs of the information-provider (s.44(1)); or
- disclosure could reasonably be expected to-
  - endanger a person's life or physical safety - s.42(1)(c); or
  - prejudice a system or procedure for the protection of persons - s.42(1)(h).

This Information Sheet concentrates on the confidentiality and personal affairs exemptions.

#### **What is identifying information?**

Identifying information includes not only obvious identifiers like a name, address or telephone number, but also any other information that could reasonably be expected to enable identification of the information-provider. For example, the location, date or time a complaint was made may show that there is only one possible provider of the information.

With many (but not all) types of complaints made to law enforcement and other agencies, Australian law favours disclosure of the substance of the complaint to the subject of the complaint, to the extent that that can be done without disclosing identifying information. The Information Commissioner applies the FOI Act in a way that facilitates this guiding principle when it properly applies. However, each case must be judged on its own merits.

#### **What if I know who the information-provider is?**

Sometimes, FOI applicants think they already know the identity of a complainant or information-provider (perhaps by making an "educated guess", or by a process of elimination) and are seeking official confirmation. Exemptions like s.42(1)(b) and s.46(1) cannot apply where the identity of an information-provider is known, or can be easily discovered in some other way. However, if the identity of the information-provider otherwise qualifies for confidential treatment, the Information Commissioner will not allow the FOI Act to be used to confirm or deny an applicant's suspicions or an educated guess, where there has been no confirmation of identity from the information-provider or an official source.

### **What if the information was false and was supplied maliciously?**

This won't affect the outcome. There is no public interest balancing test attached to s.42(1)(b) or s.46(1)(a). In general, Australian law places more importance on encouraging the flow of information to law enforcement and regulatory agencies, even though some people may have to endure an agency investigation of false and malicious allegations. Some agencies, e.g., the police, have been given power to take action against people who make false and malicious allegations, as distinct from a mistaken allegation made in good faith. But the policy of the law favours the agency, rather than the affected person, taking appropriate action in these cases.

### **Confidential source of information exemption - s.42(1)(b)**

This is the simplest exemption. It is not subject to a public interest balancing test. This means that it doesn't matter if there are other arguments in favour of disclosing the identifying information. Provided the following three requirements are satisfied, the identifying information will be exempt from disclosure:

- (1) a person has supplied information to an agency, in circumstances where there has been an express or implicit mutual understanding that the person's identity as a source of information would be treated in confidence;
- (2) the information supplied by the confidential source must relate to the enforcement or administration of the law (this is not limited to law enforcement bodies like the police and the Criminal Justice Commission, but extends to other agencies that administer laws like local governments, Boards responsible for licensing and discipline of professional/occupational groups, government departments responsible for administering laws such as child protection laws, fair trading laws, *et cetera*); and
- (3) disclosure of the matter in issue could reasonably be expected to enable the existence or identity of a confidential source of information to be ascertained.

### **When is an information-provider a confidential source of information?**

There may have been an **express** assurance given to an information-provider that his or her identity would be kept confidential, or the circumstances in which the information was given may show that there was an **implicit** mutual understanding to that effect. The following may be relevant in deciding whether there was an implicit mutual understanding -

- the nature and sensitivity of the information given
- the relationship of the information-provider to the person(s) about whom information was given
- whether the information-provider is comparable to an "informer" ("whistleblower" or "dobber"), as compared to a mere witness
- whether it could have been reasonably understood by both the information-provider and the agency that the agency could take action on the information provided, without identifying the information-provider. For example, it is unlikely that the identity of a patient complaining to a medical board about treatment by a health professional could remain confidential, as once the facts were put to the health professional, it would be obvious who had made the complaint.

- whether there is any real (as opposed to fanciful) risk of harassment or other detriment to the information-provider
- any indications of the information-provider's desire at the time to keep his/her identity confidential.

### **Confidential information exemption - s.46(1)**

The requirements for exemption under s.46(1) are similar to those of s.42(1)(b) but:

- there is no requirement that the information provided must relate to the enforcement or administration of the law
- s.46(1)(a) is tied to the requirements of a legal action for breach of confidence
- s.46(1)(b) includes a public interest balancing test as a final factor to determine if matter should be disclosed.

### **Conditions on understanding of confidentiality**

Even if there is an understanding of confidentiality, it may be subject to implicit conditions or exceptions. For example, any understanding that the identity of a police witness will be kept confidential would usually be subject to an exception that it may be disclosed if disclosure is considered necessary for the purposes of the investigation, or is required in order to give the accused a fair chance to answer the case against him or her in court proceedings: see *Re Godwin and Queensland Police Service* (97011) at paragraphs 48-53.

### **Personal affairs exemption - s.44(1)**

The fact that a person has provided information to the police or another agency can be information concerning his or her personal affairs, if the information was not provided in an official capacity or as part of his or her job. In some cases, a person's name or other identifying information can be exempt under s.44(1), even if the person's identity is known to the access applicant. However, s.44(1) is subject to a public interest balancing test. The Commissioner must weigh up all the public interest considerations for and against giving access. Unless the ones in favour of access outweigh the ones against access, the matter will be exempt.

### **Further Reading**

If you want to read more about exemption of identities of complainants and information-providers, you can go to the Information Commissioner's website at [www.infocomm.qld.gov.au](http://www.infocomm.qld.gov.au). Some cases and materials you might like to look at are:

- about s.42(1)(b) generally: *Re McEniery and Medical Board of Queensland* (94002)
- about false information maliciously supplied: paragraphs 56-64 of *Re McEniery*
- about s.46(1) generally: see *Re "B" and Brisbane North Regional Health Authority* (94001) and the Information Sheets on the ***Breach of confidence exemption*** and the ***Communicated in confidence exemption***.
- on the connection between a person's identity and confidential information supplied by them: *Re Pemberton and The University of Queensland* (94032) at paragraphs 108-110
- about why the identities of notifiers in cases of alleged child abuse or neglect ordinarily qualify for exemption: *Re 'EST' and Department of Family Services* (95020) at paragraphs 40-49
- for cases where the identities of complainants to a local council about barking dogs, health hazards, or other alleged breaches of local laws, were found to be exempt from disclosure: see *Re Bussey and Council of the Shire of Bowen* (94010); *Re Byrne and Gold Coast City Council* (94008)

- for a case where the nature of the complaint meant that the identity of the complainant could not be kept confidential from the subject of the complaint: *Re McMahon and Department of Consumer Affairs* (94003)
- for cases where the identities of people who supplied information to assist a police investigation did or did not qualify for exemption from disclosure to the subject of a complaint, or from a complainant: *Re McCann and QPS* (97010); *Re Godwin and QPS* (97011)
- about implied exceptions to an understanding that information will be kept confidential: *Re McCann* at paragraphs 56-58 and *Re Godwin* at paragraph 29, and paragraphs 48-53
- about s.44(1) generally: Information Sheet on *Personal affairs exemption*

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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.**