



Interpreting the Legislation – *Right to Information Act 2009* */ Information Privacy Act 2009*

Exempt Information - Breach of confidence

Schedule 3, section 8 of the RTI Act

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1.0 Overview

The *Right to Information Act 2009* Qld (**RTI Act**) and the *Information Privacy Act 2009* Qld (**IP Act**) recognise that information will be exempt information if its disclosure would found an action for breach of confidence.¹

Exempt information is information, the disclosure of which Parliament has decided would, on balance, be contrary to the public interest. Access to exempt information can be refused under section 47(3)(a) of the RTI Act.

The RTI Act is not intended to prevent or discourage agencies from giving access to exempt documents. It remains open to an agency² to make the decision to give access under the RTI Act to exempt documents sought in an access application after careful consideration³. The agency discretion to give access to exempt information supports the pro-disclosure bias of the RTI Act.

¹ Schedule 3, section 8(2) of the RTI Act.

² In this Guideline, references to an 'agency' include Ministers, unless otherwise specified.

³ Section 44(4) of the RTI Act.



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2.0 Will giving access to the information found an action for breach of confidence?

When deciding whether release of information to an applicant under the RTI Act or IP Act would be exempt information because it would constitute an equitable breach of confidence, the following five cumulative elements must be established:⁴

1. The information in issue must be capable of being specifically identifiable as information that is secret
2. The information must have the necessary quality of confidence
3. The information must have been communicated in such circumstances as to import an obligation of confidence
4. Disclosure to the applicant for access would constitute an unauthorised use of the confidential information
5. Disclosure would be likely to cause detriment to the confider of the confidential information.

Where a contractual term requires confidentiality to be maintained, disclosure of information may, in itself, only found an action for breach of contract, but would not be sufficient to establish a breach of confidence unless the five elements outlined above are also satisfied.⁵

3.0 The five cumulative elements

3.1 *Specifically identifiable information*

The information must be capable of being specifically identifiable as secret, rather than merely generally known or available⁶.

The more general the information, the more difficult it is to show that the information was imparted or received in confidential circumstances.⁷

Note

Decision-makers need to specifically identify particular pieces of information within documents that are considered to be confidential.

⁴ *Kalinga Woolloowin Residents Association Inc and Department of Employment, Economic Development and Innovation; City North Infrastructure Pty Ltd (third party)* (Unreported, Queensland Information Commissioner, 19 December 2011) at paragraph 28, following the decision in *B and Brisbane North Regional Health Authority (B and BNRHA)* (1994) 1 QAR 279 made under the repealed FOI Act.

⁵ *TSO08G and Department of Health* (Unreported, Queensland Information Commissioner, 13 December 2011) (**TSO08G**) at paragraph 12. See *Callejo and Department of Immigration and Citizenship* [2010] AATA 244 at paragraphs 163-166.

⁶ *TSO08G* at paragraph 18, adopting the reasoning of *B and BNRHA* at paragraphs 60-63.

⁷ *B and BNRHA* at paragraph 60, adopting *Independent Management Resources Pty Ltd v Brown* (1986) 9 IPR 1.



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For more information, please refer to the OIC Annotated legislation: *Application of Schedule 3, section 8(1) RTI Act*, in particular part 1: [The confidential information is specifically identified.](#)

3.2 Necessary quality of confidence

An equitable action for breach of confidence will only protect information that has the necessary quality of confidence.

Merely marking a document as “Secret” or “Confidential” does not automatically ensure that it will carry the requisite quality of confidence. Rather, agencies should look to the content and substance of the information to determine whether it does, in fact, meet the requirements for a confidential communication⁸.

The following types of information have been identified as **not** having the necessary quality of confidence:

- Generally available information in the public domain
- Common knowledge
- Useless or trivial information⁹
- Evidence of a crime, civil wrong or serious misdeed of public importance¹⁰
- Information which has previously been disclosed to the applicant¹¹

Note

Decision-makers need to consider whether parts of the document are already common knowledge or generally known, for example because the information has been mentioned in a media statement or in other publicly available information. The relevant business units or areas within the agency may be able to advise on this.

For more information, please refer to the OIC Annotated legislation: *Application of Schedule 3, section 8(1) RTI Act*, in particular part 2: [The information has the necessary quality of confidentiality.](#)

3.3 Communicated in confidence

All the relevant circumstances in which information is received must be considered to determine whether the party who received the

⁸ *B and BNRHA* at paragraph 71.

⁹ *TSO08G* at paragraph 20.

¹⁰ *TSO08G* at paragraph 21, adopting the reasoning in *B and BNRHA* at paragraphs 121-131 and following the comments of Gummow J in *Corrs Pavey Whiting & Byrne v Collector of Customs (Vic)* (1987) 14 FCR 434.

¹¹ *Shaw and the University of Queensland* (1995) 3 QAR 107 at paragraph 16-25; *Kupr and Department of Primary Industries* (1999) 5 QAR 140 at paragraph 24-25 and 42, decisions made under the repealed FOI Act.



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information is bound with an obligation of confidence.¹² Some of the relevant circumstances to consider include:

- the nature of the relationship between the parties
- the nature and sensitivity of the information
- the purpose for which the information was communicated to the relevant agency
- the nature and extent of any detriment to the interests of the information supplier that would follow from an unauthorised disclosure of the information
- the circumstances relating to the communication

There does not need to be any express promise of confidential treatment. An obligation of confidence can be inferred from the circumstances.¹³ For example, patients generally communicate sensitive health information to health care professionals on the understanding that it will be kept confidential and will not be communicated to another person for any other purpose.¹⁴

For more information, please refer to the OIC Annotated legislation: *Application of Schedule 3, section 8(1) RTI Act*, in particular part 3: [*There were circumstances imposing an obligation of confidence.*](#)

3.4 Unauthorised use

An agency's disclosure or use of confidential information inconsistent with the purpose for which it was received is a breach of confidence.¹⁵ A threatened breach of confidence is sufficient to institute proceedings.¹⁶

Whether a use or disclosure is authorised will depend upon the scope of the obligation of confidence that was understood at the time the confidential information was communicated. This can often be ascertained from the content and nature of the communication between the parties.

All the relevant circumstances around the provision and receipt of the information need to be examined in order to determine whether and, if so, to what extent, the information in question was provided under an express or implied pledge of confidentiality.¹⁷

¹² TSO08G at paragraph 23.

¹³ B and BNRHA at paragraph 90.

¹⁴ TSO08G at paragraph 25.

¹⁵ Seager v Copydex Ltd [1967] 1 WLR 923.

¹⁶ Corrs Pavey Whiting & Bryne v Collector of Customs (Vic) (1987) 14 FCR 434.

¹⁷ B and BNRHA at paragraph 103, adopting the reasoning in Joint Coal Board v Cameron (1989) 19 ALD 329.



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An obligation of confidence can be waived by express or implied consent of the confider.¹⁸ Agencies may need to consider contacting the confider to determine whether they still object to disclosure of the information. This is particularly the case where the information's age or character would indicate it may have "lost the sensitivity or value to the confider which made it worthy of protection as confidential information in the first place".¹⁹

For more information, please refer to the OIC Annotated legislation: *Application of Schedule 3, section 8(1) RTI Act*: [There is actual or threatened misuse of the information](#).

Note

Decision-makers should consider checking whether the person who provided the confidential information still objects to disclosure of the information before applying the exemption.

3.5 Detriment to the confider

Detriment is a necessary fifth requirement of the breach of confidence exemption that can be easily established by a non-government plaintiff.²⁰

The detriment suffered by the plaintiff need not be of a financial nature and may include embarrassment, loss of privacy, fear or an indirect detriment, for example, disclosure of the confidential information may injure some relation or friend.²¹

4.0 Exception - Deliberative process information

Schedule 3, section 8(2) states that **deliberative process information** is not exempt information unless it consists of information communicated by an entity other than the State, an agency or a person in the capacity of:

- a Minister

¹⁸ *B and BNRHA* at paragraph 105.

¹⁹ *B and BNRHA* at paragraph 106.

²⁰ *TSO08G* at paragraph 14, adopting the reasoning in *B and BNRHA* (1994) 1 QAR 279 at paragraph 111, a decision made under the repealed FOI Act. The Information Commissioner has recognised that where the confider or hypothetical plaintiff comprises a 'public sector body' not itself a government agency (and thus subject to the exception in schedule 3, section 8(2) of the RTI Act), satisfying this fifth requirement will require demonstration that disclosing the relevant information would be detrimental to the public, rather than the plaintiff's, interest: *Kalinga Wooloowin Residents Association Inc and Department of Employment, Economic Development and Innovation; City North Infrastructure Pty Ltd (Third party)* (Unreported, Queensland Information Commissioner, 19 December 2011) and *Kalinga Wooloowin Residents Association Inc and Brisbane City Council; City North Infrastructure Pty Ltd (Third Party); Department of Treasury(Fourth Party)* (Unreported, Queensland Information Commissioner, 9 May 2012) applying principles enunciated by Mason J in *Commonwealth of Australia v John Fairfax & Sons Limited and Others* (1981) 55 ALJR 45. See also *Sullivan v Department of Industry, Science and Technology and Australian Technology Group Pty Ltd* [1997] AATA 192.

²¹ *TSO08G* at paragraph 14.



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- a member of the staff, or a consultant to, a Minister
- an officer of an agency.

4.1 *What is deliberative process information?*

Deliberative process information is information disclosing:

- an opinion, advice or recommendation that has been obtained, prepared or recorded; or
- a consultation or deliberation that has taken place

in the course of, or for the purposes of, the deliberative processes involved in the functions of government.²²

The term refers to the processes of evaluating relevant evidence, expert opinion, and arguments about the merits of competing opinions for the purpose of making a decision related to the performance of the agency's functions. It includes contributions to the formulation of policy, as well as the making of decisions under statutory powers.

Normally, deliberative processes occur towards the end stage of a large process. They often take place following the 'evidence gathering' stage which could include investigations, establishing facts, getting input from relevant sources and perhaps obtaining expert opinion or analysis. Officers of agencies then evaluate all these inputs to make a decision or make recommendations to the decision-maker.

Administrative processes of an agency are **not** part of its deliberative processes. For example, paying accounts, processing forms, publishing information and carrying out inspections do not form part of the deliberative processes of government.²³ Rather, in order to be deliberative process information, it must be connected with the making of a decision related to the performance of the agency's functions.

Information can be deliberative process matter even though it originated outside government, provided it was obtained in the course of, or for the purposes of, the deliberative processes of government.

5.0 **Applying the law**

Parliament has decided that it is, on balance, contrary to the public interest to disclose information if to do so would found an action for breach of confidence and it is not deliberative process information.²⁴

²² Schedule 3, section 8(3) of the RTI Act.

²³ *Eccleston and Department of Family Services and Aboriginal and Islander Affairs* (1993) 1 QAR 60 at paragraphs 28-29.

²⁴ Section 48(2) of the RTI Act.



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This means that the logical approach to deciding whether documents should be disclosed to an applicant is to:

- first consider whether the information contained in those documents is exempt information and access can therefore be legitimately refused; and
- if the information is **not** exempt information, then proceed to consider whether disclosure would on balance be contrary to the public interest.²⁵

In order to do this, the agency must establish that disclosing the information in issue would found an action for breach of confidence in accordance with the principles set out above by satisfying the five elements, and is therefore exempt information.

6.0 Disclaimer

This guide is introductory only, and deals with issues in a general way. It is not legal advice. Additional factors may be relevant in specific circumstances. For detailed guidance, legal advice should be sought.

If you have any comments or suggestions on the content of this document, please submit them to feedback@oic.qld.gov.au.

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²⁵ *BL v Office of the Information Commissioner, Department of Communities* [2012] QCATA 149 at paragraph 15. Note, the decision-maker is not constrained to deal with the matter in this way, however this is considered the logical approach.