



## Exemptions with a 5 year limit – Extension

### Information Act Guideline

Three exemptions from FOI disclosure have a 5 year limit. They do not apply to information more than 5 years old. However, the Information Commissioner can decide that it is in the public interest to extend that limit in a particular case. This guideline discusses the extension of the 5 year limit.

Exemption subject to 5 year limit	5 years starts from
<b>Communicated in confidence – s.55(3)</b> (Note: Limit does not apply to a breach of confidence for which legal remedy could be obtained – s.55(1))	Time information communicated to the organisation
<b>Business, commercial or financial undertaking – s.57(1)</b>	Time information obtained by the organisation
<b>Public sector organisation engaged in trade or commerce, research, and examination papers – s.57(3)</b>	Time information came into existence

### Who can ask for an extension?

Public sector organisations do not have the power to extend time. The power is limited to the Information Commissioner.

An application to the Commissioner to extend the exemption beyond the 5 year limit can be made by a **public sector organisation** or by a **third party** who objects to disclosure of the information.

### When should a third party seek an extension?

Third parties should normally delay making an application to extend time until **after they receive notice of a decision to grant access** to the information. An application made before then may be premature because the organisation could decide that the information is exempt under another provision, or the applicant could indicate that they do not want to pursue access to the information, or the organisation itself could make an application to extend time.

Once a third party receives notice of a decision to grant access, they can make a complaint to the Commissioner under s.30(6), and at the same time apply for an extension. An application should, as far as possible, contain the information described below under “*Making an application for extension*”.

### When should an organisation seek an extension?

The statutory prescription of a 5 year limit sets a norm which the Legislative Assembly considered would be appropriate in the bulk of cases. The provision for extension of time is clearly not intended to operate as a routine part of FOI decision-making processes. It should only be invoked if the particular circumstances establish that it is in the public interest to depart from the usual position.

In practical terms, the need to apply for an extension is likely to arise infrequently. The inclusion of the limits is a recognition that most information that is likely to qualify for

## Exemptions with a 5 year limit – Extension

protection under these provisions has a sensitivity that is limited in time. For example, business information which may be of high sensitivity prior to the finalisation of negotiations, or for a period prior to introduction of strategies in the marketplace, will often lose its sensitivity once a contract has been signed or the business strategy has been implemented in the marketplace.

Some types of information may well have ongoing sensitivity. One example is trade secrets which may continue to have value for a considerable period. Another is identifying information about confidential sources of information. It may deserve protection for an indefinite period.

However, in most such cases, organisations will have alternative exemptions available that are not limited in time. For example, trade secrets of a private firm may be exempt because there is an obligation of confidence for which a legal remedy could be obtained - s.55(1). Likewise, information that would identify a confidential source may be exempt under s.46(2)(b), s.55(1) or s.56(1)(a).

If an alternative exemption is applicable, the organisation should rely on that alternative in the initial decision — and not seek an extension at that time. If the matter then proceeds to a complaint before the Commissioner, an application for an extension could be made in the course of that complaint if it is considered necessary, in addition to reliance on the alternative exemption. The initial decision could foreshadow that an application for extension would be made to the Commissioner if the matter were to proceed to a complaint.

Before making an application for extension, an organisation should carefully consider whether there is any real prospect of prejudice to the public interest or private interests in disclosure at this time, AND whether there are alternative exemptions available that do not have a 5 year limit.

If the organisation is seriously considering making an application, it should also consult any third party provider or subject of the information to establish whether they have an

objection to disclosure, and contact the FOI applicant to establish whether they wish to pursue access.

If there is no applicable alternative exemption AND the information is sufficiently sensitive to warrant it, application should be made to the Commissioner as soon as possible.

(**Note:** An application of this type should not delay processing of other aspects of an FOI application.)

### What should an organisation do before seeking an extension?

Before applying for an extension, the organisation may wish to consult the Office of the Information Commissioner about possible alternative approaches.

Steps recommended before applying for extension would usually include:

- Identify precisely the information that is over 5 years old but which is of concern.
- Consider whether the information qualifies for exemption under another provision that does not have a time limit. (If so, rely on that exemption in any decision.)
- Consult any third parties to establish whether they have any objection to disclosure.
- Decide if the information would be exempt if the time limit was not in place.
- If it would qualify AND there is no alternative exemption, decide whether the public interest warrants departure from the usual 5 year limit.
- If it does warrant departure, consult the applicant, explain the situation, and confirm whether they wish to pursue access to that information.
- Finalise all other aspects of the application, including giving notice of the decision, and providing access to information that is not exempt.
- Inform the applicant that the organisation intends to apply to the Commissioner for an extension, and about their right to seek internal review if a decision is not notified within 30 days.

## Exemptions with a 5 year limit – Extension

### Making an application for extension

An application to extend time should be made in writing. It should include:

- submissions that establish how the information would qualify for exemption if the time limit was not in place;
- submissions that identify the public interest factors that weigh for and against an extension, and demonstrate why an extension would be in the public interest;
- submissions on the time period for which the exemption should be extended;
- evidence in the form of sworn affidavits or statutory declarations that establish the facts relied on in the submissions; and
- copies of documents containing the information in respect of which the extension is sought, with the relevant information clearly marked.

**Note:** The application and supporting materials are likely to be exchanged with other parties. See below for more detail.

### Procedures on application

The Act does not specify procedures for dealing with an application to extend time. However, a decision on extension of time will essentially be determinative of the question of exemption of the particular information concerned. It will therefore be necessary, prior to making any decision, to give interested parties a full opportunity to put forward their respective cases in relation to any issues that may be decided against them.

Any information, submissions and evidence lodged by a party may be exchanged with other interested parties, unless we accept that there are good reasons why parts should be withheld.

One good reason for not disclosing information would be if it would disclose information that is claimed to be exempt. There may also be other reasons why disclosure of information would not be appropriate. However, even in such cases, we will consider options for disclosure in some other way, eg, in summary form, if disclosure is required to explain the substance of the arguments of a party or is otherwise likely to advance the prospects of resolution.

If you object to disclosure of any information you provide, you should make that clear to us at or before the time you provide the information.

The Office may also need to consult, or obtain information from, staff of the organisation or other people who may be affected in some way by the application, or who can provide information relevant to the application.

**Note:** It is likely that information that is the subject of an application for extension of time made before an initial decision will become the subject of a complaint based on a failure by the organisation to make a decision. If a formal complaint is made, the application for extension will usually be dealt with in a similar way to, and in parallel with, the formal complaint process (although it may be dealt with separately if the circumstances warrant).

### Extension will only be considered for particular information sought

The Commissioner will only consider an application for extension in relation to particular information sought by an FOI applicant. The Commissioner will not consider hypothetical situations, or categories or types of information in abstract.

1800 005 610 — [infocomm.nt.gov.au](http://infocomm.nt.gov.au) — [infocomm@nt.gov.au](mailto:infocomm@nt.gov.au)

This guideline is produced by the Information Commissioner to promote awareness and understanding about the *Information Act*. It is **not a substitute for the Act**. You should read the relevant provisions of the Act to see how it applies in any particular case. Any views expressed in this guideline about how the Act works are **preliminary only**. In every case, the Commissioner is open to argument by a member of the public or a public sector organisation that a different view should be taken.