



Deliberative processes exemption

Information Act Guideline

What information does the exemption relate to?

The exemption relates to:

- (a) **opinion, advice or recommendation** brought into existence by or on behalf of a public sector organisation,
- (b) **consultations** of a public sector organisation,
- (c) **deliberations** of a public sector organisation,

in the course of, or for the purposes of, the **deliberative processes** that are part of the functions of the organisation.

What are 'deliberative processes'?

Deliberative processes are the thinking processes of the organisation. They usually involve the process of weighing up options or competing arguments for the purpose of making a decision. This includes not only policy formation but also decision-making that forms a part of the operations of the organisation.

For example, the government may be considering developing a new strategy to address glue sniffing. The thinking processes it goes through in order to finalise the policy — the process of considering options and weighing up alternatives — are deliberative processes. Or, a Department may be going through a tender process to select a firm to provide computer services. The process of weighing up the different tenders in order to select the successful tenderer is a deliberative process.

However, deliberative processes do not extend to merely procedural or administrative processes of an organisation. They will not include information that merely discloses a step in the procedures by which an organisation handles an application.¹

What is 'opinion, advice or recommendation'?

Opinion, advice and recommendation can be distinguished from factual information or 'raw data' on which decisions may be based. They do not include a mere recitation of facts. A statement of fact does not become an opinion just because it is wrong.

The opinion, etc, must be brought into existence by or on behalf of the organisation. This part of the exemption will include information brought into existence by staff of the organisation, so long as the information was brought into existence for the purposes of the organisation and not for some private purpose.

It may also extend to opinion, etc, brought into existence by another agent of the organisation, like a consultant engaged by the organisation to provide opinions, etc, about a particular issue. It will probably not cover opinions, etc, given by other people outside the organisation, for example, a private citizen or an environmental organisation.

¹ See *Re Waterford and Department of Treasury (No. 2)* 5 ALD 588 at 606, 1 AAR 1 at 19-20 and *Re Eccleston and Department of Family Services and Aboriginal and Islander Affairs* (1993) 1 QAR 60; Austlii website [1993] QICmr 2; QIC website (30 June 1993), at paragraphs 27-30.

Deliberative processes exemption

What is ‘consultation’?

A consultation is a request or invitation for advice or input. The consultation must be by the public sector organisation. It will include individuals and organisations who are approached directly for input or advice. Advice or input that is volunteered without a request will probably not be included. It is open to argument whether a response to a general invitation for public comment would be included.

What is ‘deliberation’?

The meaning of ‘deliberative’ is discussed above. Information will disclose a record of a deliberation if it records the actual thinking processes of the organisation that went to the making of the decision. So, the notes that record the discussion at a meeting to decide the successful tenderer for a job or applicant for a position are likely to record a deliberation. (Although, even in that case, parts of the notes may be excluded from exemption because they are purely factual.)

Information that can’t be exempt

The exemption does not cover information that—

- is over 10 years old; or
- is purely factual, statistical, technical or scientific;
- records a final decision, order or ruling given in the exercise of an adjudicative function (or the reasons for it).

When is information purely factual, statistical, technical, or scientific?

Information that is purely factual, statistical, technical, or scientific is not exempt under the deliberative processes exemption. This may mean that even in a document that contains exempt opinion, etc, there are parts of the document that must be disclosed.

In some cases, factual, etc, information will be inextricably interwoven with opinion etc, so that it is impracticable to disclose the factual,

etc, information without also disclosing the opinion, etc. In those cases, the information is not purely factual, etc so the exception does not apply. However, even in those cases, it may be appropriate to consider whether the information (or similar information) can be disclosed in a different form in order to satisfy the needs of the applicant.

How is the public interest test applied?

Most of the exemptions in the *Information Act* that have a public interest balancing test require some **harm** to be established before the information fits into that exemption. They usually require something like a “prejudice” or a “substantial adverse effect”.

In those cases, showing that the elements of the exemption are satisfied usually points to an underlying public interest factor against disclosure. For example, the exemption for information that would “pose a serious threat to the life or health of a person” points to an obvious underlying public interest factor against disclosure.

The deliberative process exemption is not like that. It does not talk about some form of harm. It merely describes types of information. In many cases, there are likely to be no public interest factors weighing against disclosure. **The mere fact that information is deliberative process information does not raise a public interest factor against disclosure.**

For the deliberative processes exemption, the public interest test involves:

Stage 1 - Deciding whether there are any public interest factors against disclosure of the particular information (if not, the information is not exempt);

Stage 2 - If there are factors against disclosure of the particular information, identifying all the public interest factors for and against disclosure; and

Stage 3 - Assessing the weight of each factor and deciding whether the factors against disclosure outweigh the factors for disclosure.

Deliberative processes exemption

What public interest factors can favour disclosure?

Factors favouring disclosure are discussed in the guideline on the *Public Interest Test*. It is not possible to list all public interest factors that can favour disclosure.

NB: Identifying public interest factors in a general way is not enough. It must be shown that the disclosure of the particular information would lead to some benefit to the particular public interest factor before it becomes relevant.

The extent of the benefit will influence the weight to be given to the factor, when factors against disclosure are weighed against factors favouring disclosure.

Some factors that may be relevant in relation to deliberative processes material are discussed below.

Accountability of government

The availability of information about the advice and opinions given by public servants and the advice and options considered in making agency decisions is significant in terms of understanding how government and agency staff have carried out their functions. The more information that can be disclosed about these processes, the better equipped the public will be to make judgements on the performance of government.

Information that shows the thinking processes behind government decisions is significant for the same reasons.

Democratic participation

Disclosure of advice and opinions (including advice and opinions that may not have been adopted) helps members of the community to understand what options have been considered and why they have been accepted or rejected. This allows for better informed debate about issues of current relevance. They are in a better position to consider whether options have been properly adopted or rejected, and to raise arguments that a rejected option should be further investigated or an entirely new option should be investigated.

What public interest factors can weigh against disclosure?

Factors that can weigh against disclosure are discussed in the guideline on the *Public Interest Test*. It is not possible to list all public interest factors that can weigh against disclosure.

NB: Identifying public interest factors in a general way is not enough. It must be shown that the disclosure of the particular information would lead to some harm to the particular public interest factor before it becomes relevant.

The extent of the harm will influence the weight to be given to the factor, when factors against disclosure are weighed against factors favouring disclosure.

In addition to other factors that may arise, the deliberative process exemption lists 7 factors that can be taken into account when considering this exemption (s.52(5)):

(a) the more senior the person who created, annotated or considered the information and the more sensitive the information, the more likely it will be that the information should not be disclosed (but the seniority of the person is not by itself a sufficient reason not to disclose the information);

This factor refers to the seniority of a person who has had particular involvement with the information but makes it clear that seniority alone is not a sufficient reason to withhold information.

It is largely a recognition that, the more senior the person involved, the higher the chance that sensitive information will be involved. That is not to say that most, or even a large number of, communications from senior officers will necessarily contain 'sensitive' information that provides an evidentiary basis for the operation of this factor. Nor does this provision preclude a factor against disclosure being raised in respect of information created by a relatively junior staff member. Each case must be decided on its merits.

Deliberative processes exemption

The question in each case is essentially linked to whether the information is actually “sensitive”, in the sense that its disclosure would give rise to an identifiable harm to the public interest.

If that is established, the weight of the factor must be assessed and it must be considered in the balancing process discussed above.

(b) the disclosure of information that was brought into existence in the course of the development and subsequent promulgation of policy tends not to be in the public interest;

The wording of this factor reflects the wording of a potential factor put forward in a decision of the Commonwealth Administrative Appeals Tribunal, not long after the start of the Commonwealth FOI legislation.² There has been considerable discussion in decided cases and academic circles about the validity of the factor.³

The use of the word “tends” is significant. The potential disclosure of policy information does not inexorably give rise to a factor favouring non-disclosure. There is merely a tendency or inclination.

In each case, it is necessary to decide whether that tendency is reflected in the particular circumstances. There must be a factual basis supporting the conclusion.

If that is established, the weight of the factor must be assessed and it must be considered in the balancing process discussed above. Relevant to consideration of that weight will be the seriousness of the damage to the public interest that would arise from disclosure of the particular information.

(c) the disclosure of information that will inhibit frankness and candour in future pre-decisional considerations is likely not to be in the public interest;

There is no presumption that disclosure of any information will inhibit frankness and candour. For this factor to arise, it is

necessary to establish a particular factual basis for a finding that disclosure of the information in question will inhibit frankness and candour.

In most cases, this will require evidence that a substantial number of public service officers would fail to carry out their duty to give full and frank advice and information, because of the disclosure of the information in issue.

If that is established, the weight of the factor in the circumstances of the particular case must be assessed. If that factor and any others against disclosure outweigh those favouring disclosure, the information will be exempt.

In that regard, it should be borne in mind that disclosure of information that is specious or framed in unnecessarily brusque, colourful or defamatory terms may act as an impetus to improved decision-making and recording, and therefore improve the efficiency and quality of government operations.⁴

(d) the disclosure of information that has the potential to inhibit the independence of the decision-maker because of the possibility that the disclosure could result in the decision-maker being unduly pressured or harassed is likely not to be in the public interest;

The scope of the provision is open to some question. In referring to independence of the decision maker, it is not clear whether the intention was to limit the factor to those decision makers who have some independence from government or simply to indicate a decision that should be made independent of pressure or harassment.

There are two key elements:

- disclosure could result in undue pressure or harassment;
- that the undue pressure or harassment has the potential to inhibit the independence of the decision-maker.

² *Re Howard and Treasurer of the Commonwealth of Australia* (1985) 3 AAR 169

³ See, for example, *Re Eccleston and Department of Family Services*, at paragraph 123.

⁴ See *Re Eccleston and Department of Family Services*, at paragraphs 124-135.

Deliberative processes exemption

The use of the word “unduly” would appear to be a recognition that it is accepted that various interest groups and interested citizens will seek to have input into decision-making by government. Many will no doubt advocate their point of view in a forceful and even strident manner. In most cases, this will amount to nothing more than members of the community playing an appropriate role as participants in the democratic process. Decision-makers in positions of significant authority must accept this type of input from the community.

To establish this factor, it would be necessary to show that the level of pressure placed on the decision-maker would go beyond what would be accepted by the community as part an appropriate level of community participation.

If that could be established, it would then be necessary to show that that pressure or harassment had the potential to inhibit the decision-maker. This would need clear evidence of the potential for the government decision-maker to shy away from his or her responsibilities to the community, in the face of the pressure or harassment, so that he or she would no longer act independently in making the decision.

If those requirements are satisfied, it would then be necessary to assess the weight of that factor in the particular case, and conduct the public interest balancing exercise.

(e) the disclosure of information where there is a risk that the disclosure will result in a mischievous interpretation of the information is likely not to be in the public interest;

The word ‘mischievous’ suggests that the person making the interpretation must do so deliberately (or perhaps recklessly). In one sense, every piece of information can be mischievously interpreted. Given the context in which the paragraph appears, it is likely that the intention was that the paragraph be limited to information which lends itself to mischievous interpretation: that allows some colour and credibility to be given to the misinterpretation.

If the requirements are satisfied, it would then be necessary to assess the weight of that factor in the particular case, and conduct the public interest balancing exercise. In that regard, it must be appreciated that the potential for mischievous interpretation to have any significant impact can often be countered by providing additional information that clarifies the position.

(f) the disclosure of information that will lead to confusion and unnecessary debate resulting from disclosure of possibilities considered tends not to be in the public interest (but a tentative or optional quality of the information is not by itself a sufficient reason not to disclose the information);

This factor should be considered in light of the requirement that “the possibility that the applicant may misunderstand the information disclosed” is irrelevant.

This is another factor that has been subject to considerable adverse comment.⁵ In order for it to have any application, there would have to be a factual basis for deciding that disclosure will lead to confusion or unnecessary debate. Some level of debate is obviously contemplated as appropriate. There would again have to be an underlying factual foundation to support a finding that debate was “unnecessary”. Given the significance which the courts have ascribed to public participation in debate as part of the democratic process, this is likely to be a significant hurdle to overcome.

The qualification that appears in brackets leaves the scope of the factor open to question. There is certainly no automatic assumption that disclosure of draft documents or options papers would be contrary to the public interest. Indeed, there may be public interest factors favouring disclosure of such documents in terms of accountability and public participation.

⁵ See *Re Eccleston and Department of Family Services*, at paragraphs 136-137.

Deliberative processes exemption

(g) the disclosure of information that does not fairly disclose the reasons for a decision subsequently taken may be unfair to a decision-maker and may prejudice the integrity of the decision-making process.

This factor can only apply if:

- there has been a decision; and
- the information in question does not fairly disclose the reasons for that decision.

The factor simply recognises that disclosure of this type of information:

- may be unfair to a decision-maker;
- may prejudice the integrity of the decision-making process.

In each case, the facts must be considered to establish whether the relevant requirements are satisfied. Unfairness or prejudice must be shown in the particular case.

The "unfairness" must be "to the decision-maker", not another person. If the requirements are satisfied, the weight of the public interest must be assessed, and the public interest balancing exercise conducted.

Again, it must be appreciated that the potential for this type of unfairness or prejudice to have any significant impact can often be countered by providing additional information that clarifies the position.

Cases from other jurisdictions

General discussions of the deliberative process exemption

- Exemptions Memorandum Cth A-G No.98 [<http://www.ag.gov.au/www/securitylawhome.nsf/Web+Pages/178EFE0E2AC838ACCA256D3B001430E3>]
- *FOI Guide on Clause 6 – Deliberative process* WAIC website
- *Eccleston and Department of Family Services and Aboriginal and Islander Affairs* (1993) 1 QAR 60; Austlii website [1993] QICmr 2; QIC website (30 June 1993)

Examples of application of the deliberative processes exemption

- *Australian Rainforest Conservation Society Inc and Queensland Treasury* (1996) 3 QAR 221; Austlii website [1996] QICmr 5; QIC website (9 April 1996)
- *Criminal Justice Commission and Director of Public Prosecutions* (1996) 3 QAR 299; Austlii website [1996] QICmr 12; QIC website (28 June 1996)
- *Little and Department of Natural Resources* (1996) 3 QAR 170; Austlii website [1996] QICmr 2; QIC website (22 March 1996)
- *Prisoners' Legal Service Inc and Queensland Corrective Services Commission* (1997) 3 QAR 503; Austlii website [1997] QICmr 4; QIC website (27 March 1997)



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