



# Exemptions

## Information Act Guideline

The *Information Act* allows organisations to refuse access to information if its disclosure would be contrary to the public interest. Access can only be refused if the information qualifies under one of a series of **exemptions** set out in sections 43-58 of the Act.

### Two types of exemption

Exemptions fit into one of two categories.

#### No public interest balancing test

- 45. *Executive Council, Cabinet, Territory economy*
- 46. *Security and law enforcement*
- 47. *Information exempt under corresponding FOI laws*
- 48. *Secrecy provisions*
- 49. *Preservation of system of justice*
- 49A *Information obtained or created because of investigation*

#### Public interest balancing test

- 51. *Inter-governmental relations*
- 52. *Deliberative processes*
- 53. *Effective operations of public sector organisations*
- 54. *Health, safety, environment*
- 55. *Confidentiality obligations, confidential sources*
- 56. *Privacy and cultural information*
- 57. *Commercial and business information, research, examination papers*
- 58. *Financial and property interests of Territory or public sector organisation*

The two types of exemption require different approaches.

**1. No public interest test.** If information satisfies the requirements of the exemption its disclosure is generally considered to be against the public interest. It will be exempt even if there are public interest considerations favouring disclosure.

**2. Public interest test.** Even if the information satisfies the requirements of an exemption, it will only be exempt if, in the particular case, the public interest considerations against disclosure outweigh the considerations favouring disclosure.

#### Example

The Cabinet exemption falls into the first category. A document that has been considered by Cabinet is exempt whether or not there are public interest considerations favouring disclosure.

On the other hand, the exemption about substantial adverse effect on staff management in s.53 falls into the second category. For that exemption, the first decision is whether disclosure of the information is reasonably likely to have a substantial adverse effect on staff management. If it is, the organisation would still have to decide whether the public interest considerations against disclosure outweigh any considerations favouring disclosure.

### What if only part of a document is exempt?

Even if some information in a document is exempt, access must still be granted to the rest of the document. But an edited copy need not be provided if the information that is not exempt would contain no information of substance.

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## Requirements for exemption

Each exemption has one or more **requirements** that must be satisfied before the information can be exempt. Unless each requirement is satisfied, the information is not exempt. Some exemptions also have **exceptions** that exclude types of information from exemption under that exemption.

### Example 1

Information is exempt if *“it was considered by an Executive body”*. The organisation must be satisfied that the information the applicant wants was “considered”, and that the consideration was undertaken by an Executive body.

The organisation must also be satisfied that none of the exceptions apply, for example, that it is not over 10 years old, and that none of the information is purely statistical, technical, scientific or factual material. If so, there being no public interest test, the information is exempt.

### Example 2

Information may be exempt if *“its disclosure would prejudice the administration, management or security of a prison”*. The organisation must be satisfied that there is the potential for prejudice to one of those 3 aspects of the operation of a prison, and that disclosure of the information in question would give rise to that prejudice.

There are no exceptions, so if those requirements are satisfied, the information may be exempt. But there is a public interest test so the factors for and against disclosure must be identified.

There is clearly a public interest in avoiding prejudice to these aspects of prison operations, so satisfying the requirements of the exemption gives rise to a factor against disclosure.

In some cases, the potential prejudice may be minor, in others it may go to the heart of prison security. The weight attributed to the factor will vary depending on the potential harm to

the public interest in the particular case. If the organisation is satisfied that the circumstances give rise to factors favouring disclosure of the information in question, all factors for and against disclosure must be identified and the strength of those factors considered. If the factors against disclosure outweigh the factors favouring disclosure, the information will be exempt.

## Does an organisation have to refuse access?

An organisation can refuse access to exempt information. But even if information is exempt the organisation does not have to refuse access. However, in most cases, the fact that information is exempt is a reflection of underlying factors that mean it is in the public interest not to disclose the information.

## Meaning of would, will, reasonably likely, likely, potential

Various exemptions use different terms to describe the **degree of expectation** that is needed to satisfy a requirement of the exemption. While each term must be considered in the context in which it appears, some general comments can be made.

Many exemptions require a finding that disclosure of the information “would prejudice” or “would disclose”. Others use the words “is reasonably likely to”. Within the deliberative process exemption, tests for establishing factors that may go against disclosure are expressed in terms of “will” and “has the potential to”.

The strength of the required expectation varies depending on the term used.

The words “will” and “would” connote a strong expectation, bordering on, if not requiring, certainty. For example, if the test is “would prejudice” you would need a strong expectation, if not a conviction, that the particular harm or event will follow if the information is disclosed.

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The words “reasonably likely” and “likely” do not require the same level of expectation but still require an expectation based on real and substantial grounds.

Mere speculation or conjecture would not be enough (*Re “B” and Brisbane North Regional Health Authority* (1994) 1 QAR 279, at 339-41, paragraphs 154-160). It is doubtful whether there is any significant difference in the test required by these two terms.

Words like “potential” and “might” require a lower level of expectation again. However, the expectation must still be rational and based on the available evidence

## Meaning of substantial adverse effect

Substantial means grave, weighty, significant or serious. The onus of establishing a substantial adverse effect is a heavy one (*Re Cairns Port Authority and Department of Lands* (1994) 1 QAR 663, at 724-725, paragraphs 148-150)

## Meaning of disclose

To disclose is to reveal something that is not already apparent. It would not include information that is already publicly available or generally known. It is arguable whether it would apply in situations where the applicant already knows.



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