

Information about legal proceedings exemption



Information Act Guideline

Information is exempt if disclosure would disclose information about a proceeding or other matter before a court or tribunal - s.49(c).

Interpreting FOI legislation

The exemption does not appear to have a counterpart in any other jurisdiction. Nor is there anything in the extrinsic materials relevant to the making of the *Information Act* that would significantly assist in interpreting the exemption.

FOI legislation has been recognised by the courts as beneficial or remedial legislation. If the legislation is ambiguous, it should be interpreted in a way that would further, rather than hinder, free access to information. However, it does not justify an interpretation leaning in favour of disclosure if the meaning of the legislation is clear. (See *Victorian Public Service Board v Wright* (1986) 160 CLR 145, 153; *Searle Australia Pty Ltd v Public Interest Advocacy Centre* (1992) 36 FCR 111, 115; *Queensland Law Society Inc v Albietz* (1996) 2 Qd R 580, 585.)

Does not apply to information in the public domain

The ordinary meaning of the word “disclose” is “to make known; reveal” (*Australian Concise Oxford Dictionary*). Information cannot be disclosed or revealed if it is already a matter of public knowledge. Much information about court and tribunal proceedings is aired publicly and is part of the public record. The exemption does not apply to information that is in the public domain.

Scope of exemption

The exemption appears in a section that protects against a variety of potential harms to civil law, criminal law and parliamentary processes. Each other subsection in s.49

either specifies a harm that justifies exemption, or recognises a harm in infringing a well-established right or privilege (see the comments of the then Attorney-General in his Second Reading speech; Hansard, 14 August 2002).

With regard to legal processes, s.49(a) protects against prejudice to prosecutions, while s.49(b) protects the right to a fair trial and impartial adjudication. Section 49(d) protects against disclosures that would breach legal professional privilege, and s.49(f) exempts disclosures that would be in contempt of a court or tribunal.

By contrast, s.49(c) does not, on its face, require evidence of potential harm to establish exemption. The information protected must simply be “about” a court or tribunal proceeding. There is no inherent harm in disclosing information of this type. As noted above, a great deal of information about court and tribunal proceedings is published on a daily basis.

Giving “about” its ordinary meaning, s.49(c) will exempt information regarding or concerning the relevant proceedings. This will include information about the status or progress of the proceedings or about a step in the proceedings. For example, a report on closed or private proceedings by a public sector employee to a departmental CEO would appear to fall within the exemption.

There is no apparent basis for extending the exemption to information that is not “about” the proceedings merely because the information may be of some relevance in the proceedings. So, the exemption would not necessarily extend to a document merely because it is discoverable in the course of proceedings or may be used in evidence in the proceedings.

Information about legal proceedings exemption

However, information that describes how a document was used in particular proceedings may qualify for exemption because it is about an aspect of the proceedings.

The words “or other matter” make it clear that the exemption will extend to information about other legal processes even if they do not constitute a “proceeding”. They do not extend the range of information about a proceeding or matter that is covered by the exemption.

Proceedings must be current

It appears that proceedings must have commenced and not just be anticipated. It is also arguable that the word “before” requires a proceeding or other matter to be on foot for the exemption to apply.

This interpretation appears reasonably open and would favour the pro-disclosure objects of the FOI provisions. This would have the effect of providing protection until the conclusion of proceedings, while allowing scrutiny following the finalisation of the case.

A court or tribunal

Tribunal is defined as “a body (other than a court) established by or under an act that has judicial or quasi-judicial functions”. Four factors that have been identified as potentially

relevant to the question of whether functions are quasi-judicial are, “first, under what authority the tribunal acts, secondly the nature of the question into which it is its duty to inquire; thirdly the procedure adopted by it in carrying out the inquiry; and fourthly the legal consequences of the conclusion reached by the tribunal as a result of the inquiry.” (Lord Diplock in *Trapp v Mackie* [1979] 1 WLR 377)

No public interest test

If information satisfies s.49(c), it will be exempt information even if there are public interest factors that favour disclosure.

Discretion to grant access

An organisation may disclose information even if it is exempt.

Given that information about legal proceedings will qualify for exemption even in the absence of demonstrable harm, it is appropriate for decision-makers considering the potential application of this exemption to carefully assess whether there is real potential for harm before relying on it to refuse access.



1800 005 610 — infocomm.nt.gov.au — 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.