



Public Interest Test in Exemptions

Information Act Guideline

What is the public interest test?

Under the following exemptions, information is only exempt if, in the particular case, it is not in the public interest to disclose the information

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.*

For information to be exempt under those sections—

- (a) the information must satisfy each requirement of the exemption; and
- (b) the public interest factors against disclosure must outweigh the public interest factors for disclosure.

Applying the public interest test

For most exemptions, satisfying the requirements of the exemption raises a public interest factor against disclosure, because the exemption is based on an underlying harm to the public interest. In those cases, the public interest test involves:

- Stage 1** Identifying all the public interest factors for and against disclosure that apply in the particular case.
- Stage 2** Assessing the weight of those factors and deciding whether the factors against disclosure outweigh the factors for disclosure.

NB: In some cases, like the deliberative process exemption, meeting the requirements of the exemption does not give rise to a public interest factor against disclosure (see the *Deliberative Processes Exemption* guideline for more).

Identifying factors for or against disclosure

The underlying facts must support application of the factor in the particular case, and if it is applicable, the weight of the factor must be assessed according to the particular circumstances.

Identifying public interest factors in a general way is not enough. You must be satisfied that the disclosure of the particular information would lead to some harm or benefit to the particular public interest factor before it becomes relevant. The extent of the harm or benefit will influence the weight to be given to the factor.

What is the public interest?

The recognition that information received or created by government is held for the benefit of the public underpins the public interest balancing test. This has been described as government holding the information as the 'trustee' for the community.¹

¹ See Finn P D, "A Sovereign People, A Public Trust", *Essays on Law and Government: Vol 1*, P D Finn (ed) (Law Book Co, 1995) pages 1-32, and *Queensland Information Commissioner Annual Report 1995/96*, at paragraphs 3.10-3.12. See also *Re Eccleston and Department of Family Services and Aboriginal and Islander Affairs* (1993) 1 QAR 60 at paragraphs 35-75 for a general discussion of the public interest.

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Government information is not the property of the organisation that holds it. It is not 'owned' by any department or by the government of the day. It is held for the community.

This does not mean that all information must be made available to every member of the community. As the holder of the information, the government must balance community interests and individual interests to achieve a reasonable outcome in terms of disclosure.

Some community interests will favour disclosure while others go against disclosure. For example, there is a public interest in disclosing information that shows how government is using public resources to run correctional centres. But at the same time there is a public interest in not disclosing information that would help a prisoner to escape.

There is no complete list of public interest factors for or against disclosure. The public interest has been described as "*a term embracing matters, among others, of standards of human conduct and of the functioning of government and government instrumentalities tacitly accepted and acknowledged to be for the good order of society and the wellbeing of its members.*"²

Public interest factors are often factors that are common to all members of the community. For example, all members of the community have an interest in holding government accountable for its activities. However, the interests of a significant part of the community may give rise to a public interest factor.

There are also cases in which there is a public interest —

- in protecting the interests of individuals or private organisations (for example in protecting personal privacy or sensitive business information); or
- in a particular person or class of people getting access to information (for example, in complainants getting information that fairly explains the way their complaint was handled).

² *Director of Public Prosecutions v Smith* [1991] 1 VR 63 at 75

Simple curiosity does not give rise to a public interest factor favouring disclosure, even if a large segment of the community might be interested to know the information.

What public interest factors can favour disclosure?

Many public interest factors that favour disclosure can be grouped into one or more of the following categories.

Government accountability

At the heart of the access scheme is the idea that government should be accountable to the people for how it carries out its functions. This accountability extends not only to government ministers but to departments, statutory authorities and individual officers in the public sector. Some comments on government accountability are included at the end of this guideline.

Public participation in government

Allied to government accountability is the recognition that the process of government policy making and decision-making can often be improved by constructive contributions from members of the public. These contributions are enhanced by disclosure of information that better informs those people who choose to take part. Some comments on public participation are included at the end of this guideline.

Almost any information created or received by government may enhance government accountability and public participation in a particular case. This may include:

- information that records reasons for decisions made;
- information that was considered in the course of making a decision, for example, advice and recommendations, background papers, witness statements, policy options papers;
- reports on performance of functions.

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The availability of information about the advice and opinions given by public servants and considered in making agency decisions can be significant in terms of understanding how government and agencies 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 evidences the thinking processes behind government decisions is significant for the same reasons.

Disclosure of advice and opinions (including advice and opinions that may not have been adopted) can help 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. Community members are put 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.

Public awareness

Government acts as a repository of large amounts of information. There may be a public interest in disclosing information simply because it will inform the community about matters of general concern.

For example, there may be a public interest in disclosing information:

- that will inform **consumers** about their choices in a particular market;
- that will inform people about general issues like **public health and safety**;
- for the purpose of **research** that may ultimately add to public awareness about issues of general concern.

Special interest of class (Justice to an individual)

While any person may apply for information, there can be a public interest in applicants from a particular class having access to information in which they have a special

interest. For example, there may be a public interest in complainants getting information about how their complaint was handled. Or there may be a public interest in unsuccessful promotion applicants getting access to information that points to what changes they may have to make to improve their performance and their prospects for success in the future.

In some cases, a factor of this type may mean that the balance of the public interest favours disclosure of information to one person when it might not be in the public interest to disclose it to a member of the general public.

What public interest factors can go against disclosure?

Many public interest factors that go against disclosure can be grouped into one of the following categories.

Factors underlying exemptions that contain a harm test

Most of the exemptions that have a public interest balancing test require some harm to be shown before the information fits into that exemption. They may require something like a “prejudice” or a “substantial adverse effect”. Or they may protect some right that is already recognised by the law, like legal professional privilege or legal obligations of confidence.

In those cases, showing that the requirements of the exemption are satisfied points to a 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.

Efficient and effective conduct of government operations

If disclosure of particular information would prejudice the ability of government to carry out its functions on behalf of the community in an efficient and effective way, this will give rise to a public interest factor against disclosure.

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However, care must be taken to ensure that there is sufficient evidence to establish the prejudice. Mere reluctance to release information on the part of some officers is not a sound basis for such a finding.

Nor will the fact that information has not previously been disclosed, or even that some alteration to existing procedures may be required if information is to be subject to disclosure, necessarily give rise to this factor. In some cases, the potential for disclosure may actually give rise to improvements in the functioning of the agency, representing a public interest factor favouring disclosure.

Most valid reasons that give rise to this factor are reflected in existing exemptions.

NB: The need to maintain efficient and effective conduct of government operations is not an exemption in itself. It is one factor to be taken into account in a public interest balancing test. It can only arise for consideration if the elements of an exemption have been satisfied.

Private interests (Fairness to an individual)

The Privacy exemption and the Privacy scheme included in the *Information Act* reflect the underlying public interest in protecting **personal privacy**.

A public interest factor may also arise in terms of ensuring **fairness to an individual** or private sector organisation, if, for example, there are allegations of wrongdoing in a document that are untested, or in relation to which there has been no chance for response.

Factors that can't be raised

The *Information Act* excludes 3 matters from consideration:

- (a) the reasons that access is being sought (s.17);
- (b) the possibility that disclosure may result in embarrassment to, or a lack of confidence in, the Territory Government or a public sector organisation (s.50);

- (c) the possibility that the applicant may misunderstand the information disclosed (s.50).

A person may or may not choose to explain the particular reason or reasons why they are seeking information. If they do explain, those reasons may suggest public interest factors that favour disclosure. But any stated reason does not affect the public interest factors that are relevant.

Cases from other jurisdictions

General discussions of the public interest

- Exemptions Memorandum Cth A-G No.98 [<http://www.ag.gov.au/www/securitylawhome.nsf/Web+Pages/178EFE0E2AC838ACCA256D3B001430E3>]
- *Information Sheet - Public Interest Balancing Tests* QIC website
- *FOI Policy and Practice Manual* WAIC website
- *Eccleston and Dept of Family Services and Aboriginal and Islander Affairs* (1993) 1 QAR 60; Austlii website [1993] QICmr 2; QIC website (30 Jun 1993), paras 35-75.

Discussion of public interest favouring access to a particular person

- *Pemberton and The University of Queensland* (1994) 2 QAR 293; Austlii website [1994] QICmr 32; QIC website (5 December 1994), at paragraphs 164-196
- *Willsford and Brisbane City Council* (1996) 3 QAR 368; Austlii website [1996] QICmr 17; QIC website (27 August 1996), at paragraphs 15-18.

Examples of application of the public interest test

- *KBN and Department of Families, Youth & Community Care* (1998) 4 QAR 422; Austlii website [1998] QICmr 8; QIC website (30 June 1998)
- *Richardson and Queensland Corrective Services Commission* (1996) 3 QAR 338; Austlii website [1996] QICmr 15; QIC website (16 August 1996)
- *Coulthart and Princess Alexandra Hospital and HSD* (2001) 6 QAR 94; QIC website (10 August 2001)
- *Fotheringham and Queensland Health* (1995) 2 QAR 799; Austlii website [1995] QICmr 24; QIC website (19 October 1995)

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- *Cardwell Properties P/L & Williams and Department of the Premier, Economic & Trade Development* (1995) 2 QAR 671; Austlii website [1995] QICmr 19; QIC website (29 June 1995)
- *Queensland Community Newspapers Pty Ltd and Redland Shire Council* (1998) 4 QAR 262; Austlii website [1998] QICmr 2; QIC website (25 March 1998)
- *Australian Rainforest Conservation Society Inc and Queensland Treasury* (1996) 3 QAR 221; Austlii website [1996] QICmr 5; QIC website (9 April 1996)

Examples of public interest favouring access to a particular person

- *Bultitude and Princess Alexandra Hospital and District Health Service* (2000) 5 QAR 335; Austlii website [2000] QICmr 1; QIC website (20 April 2000)
- *BKR and Queensland University of Technology; Queensland Nursing Council* (1999) 5 QAR 70; Austlii website [1999] QICmr 4; QIC website (30 June 1999).

Comments on accountability and public participation

Australia is a representative democracy. The Constitution gives the people ultimate control over the government, exercised through the election of the members of Parliament. The effective operation of representative democracy depends on the people being able to scrutinise, discuss and contribute to government decision making.

To do this, they need information. ... the FOI Act has an important role to play in enhancing the proper working of our representative democracy by giving individuals the right to demand that specific documents be disclosed. Such access to information permits the government to be assessed and enables people to participate more effectively in the policy and decision making processes of the government.

ALRC/ARC Report on Open Government (Review of the FOI Act) 1996

Information is the lynch-pin of the political process. Knowledge is, quite literally, power. If the public is not informed, it cannot take part in the political process with any real effect.

Fitzgerald Report 1989

Accordingly, this Court should now declare that each member of the Australian community has an interest in disseminating and receiving information, opinions and arguments concerning government and political matters that affect the people of Australia. The duty to disseminate such information is simply the correlative of the interest in receiving it. The common convenience and welfare of Australian society are advanced by discussion — the giving and receiving of information — about government and political matters.

High Court of Australia *Lange v ABC* 1997

The primary foundation for insisting upon openness in government rests upon the sovereignty of the people. Under a democracy, parliament is “supreme”, in the sense that term is used in the phrase “parliamentary supremacy”, but the people remain sovereign. They enjoy the ultimate power which their sovereignty confers. But the people cannot undertake the machinery of government. That task is delegated to their elected representatives ...

... the government can be perceived as the agent or fiduciary of the people, performing the task and exercising the powers of government which have been devolved to it in trust for the people.

... the information held by government is essentially the people’s information being held on their behalf pursuant to this devolution of authority. ... The people’s sovereignty ultimately determines their right to insist upon openness in government [emphasis added].

Thomas J of the High Court of New Zealand 1995

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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.