



## Applying the legislation

GUIDELINE *Right to Information Act 2009*

### How to balance the public interest

#### Overview

The *Right to Information Act 2009*<sup>1</sup> (Qld) (**RTI Act**) gives people the right to access documents in the possession or control of Queensland government agencies. This right of access is subject to some limitations. These limitations include when information is contrary to the public interest to release.<sup>2</sup>

This guideline explains how to apply the public interest balancing test as set out in the RTI Act.<sup>3</sup> The process for balancing the public interest is similar for all applications, however the outcome can vary greatly depending on the specifics of the application and the information in scope.

#### What steps must be taken?

Section 49 of the RTI Act sets out the steps that must be followed when applying the public interest factors. A decision maker is required to:

1. identify any irrelevant factors and disregard them
2. identify any factors favouring disclosure and nondisclosure
3. balance the relevant factors favouring disclosure and nondisclosure; and
4. decide whether, on balance, disclosure of the information would be contrary to the public interest.

#### Note

Consideration of each factor involves a two-step process:

- Firstly, does the factor arise? This requires a careful assessment of the wording of the factor and whether it applies to the information being considered; and
- Secondly, if the factor does arise, then the decision maker must determine the weight that factor should be given in the circumstances.

The decision maker then balances all the factors that have been identified to determine whether, on balance, it is contrary to the public interest to disclose the information.

<sup>1</sup> This Guideline also relates to access applications made under chapter 3 of the *Information Privacy Act 2009* (Qld).

<sup>2</sup> Section 49(1) of the RTI Act.

<sup>3</sup> For information about considering whether documents contain Exempt Information refer to the relevant Guideline: <https://www.oic.qld.gov.au/guidelines/for-government/access-and-amendment/decision-making/exempt-information-provisions>



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### Irrelevant factors

Decision makers must identify any irrelevant factors that apply, and then disregard them.

The RTI Act lists the factors which are irrelevant to deciding the public interest. They include a reasonable expectation that disclosing the information could:

- cause embarrassment to the Government or a loss of confidence in the Government
- result in the applicant misinterpreting or misunderstanding the document; or
- result in mischievous conduct by the applicant.

The RTI Act also identifies as an irrelevant factor that the person who created a document was or is of high seniority within the agency.

The irrelevant factors listed in the RTI Act are not exhaustive. Others could flow from the agency, applicant, or information in the documents being considered. If a decision maker becomes aware of any other irrelevant factors they must also be identified and disregarded.

#### Examples

##### *Irrelevant factors raised by agency*

In *Johnston and Brisbane City Council*<sup>4</sup>, the agency expressed concern that the applicant would publicise any documents released to her. This raised for consideration whether disclosure of the information could reasonably be expected to result in mischievous conduct by the applicant.<sup>5</sup>

The Right to Information Commissioner stated that it was an irrelevant factor and it was not taken into account in deciding whether disclosure of the information would, on balance, be contrary to the public interest.

##### *Irrelevant factors raised by applicant*

In *Williams and Queensland Police Service*<sup>6</sup> the applicant submitted that the information should not be withheld from him because he was a Member of Parliament and a public figure. He also asserted that because he was a public figure it was in the best interest of the public that all allegations be made available so he could defend himself.

The Assistant Information Commissioner decided that the IP Act applies equally to all individuals seeking access to information. The applicant did not have any additional access entitlement by reason of being a Member of Parliament or a public figure. The Assistant Information Commissioner did not take the applicant's submissions or any other irrelevant factor into account when making the decision.

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<sup>4</sup> *Johnston and Brisbane City Council* (Unreported, Office of the Information Commissioner, 6 December 2013).

<sup>5</sup> Schedule 4, part 1, item 3 of the RTI Act.

<sup>6</sup> *Williams and Queensland Police Service* [2017] QICmr 28 (4 August 2017), paragraphs 37-38.



## Public interest factors for and against disclosure

The RTI Act contains lists of public interest factors favouring disclosure<sup>7</sup> and public interest factors favouring nondisclosure.<sup>8</sup> The next step is to identify if there are any factors favouring disclosure and/or any factors favouring nondisclosure which apply to the information.

The factors listed in the RTI Act are not exhaustive.<sup>9</sup> In some circumstances a decision maker might identify other public interest factors which are not listed in the legislation and take these into account.

### **Public interest harm factors**

There are two lists of public interest factors against disclosure in schedule 4 of the RTI Act.<sup>10</sup> While both sets of factors favour nondisclosure, their application is slightly different.

If a part 3 factor applies it is up to the decision maker to decide if a harm will be caused by disclosing the information. For the part 4 factors (called the public interest harm factors) Parliament has decided that if they apply they *will* cause a harm, however the decision maker will still have to decide how much weight should be given to the factor.

### **Does the factor apply?**

After identifying a public interest factor which may be relevant, carefully consider the wording of each factor.

- Does the factor incorporate defined terms, eg 'eligible family member', 'individual', or 'government', which are relevant to the application?
- Is there a specific threshold required by the factor, eg 'prejudice', 'reveal', or 'ensure effective oversight'?
- Does the factor specify criteria to be satisfied, eg:
  - prejudice to achieving the objects of a test
  - a substantial adverse effect on financial or property interests
  - a reasonable expectation that disclosure would destroy or diminish the commercial value of information?
- Does the factor apply to a specific type of information, eg a trade secret, personal information, or deliberative process information?

It is important to identify which parts of the information, in the context of the application, raise the factor and to address any threshold requirements within the factor to determine whether it applies.<sup>11</sup>

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<sup>7</sup> Schedule 4, part 2 of the RTI Act.

<sup>8</sup> Schedule 4, part 3 of the RTI Act.

<sup>9</sup> With the exception of the public interest factors against disclosure in schedule 4, part 4, referred to as the public interest harm factors.

<sup>10</sup> Schedule 4, part 3 and schedule 4, part 4.

<sup>11</sup> For example, consider whether the factor requires that disclosure 'could' or 'would' have the effect stated in the factor, the threshold for the former being significantly lower than the latter.



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All relevant factors, both for and against disclosure, must be identified. Explaining why and how the factor applies will assist the applicant to understand what has been taken into account in making the decision.

### Developing a new public interest factor

As stated earlier, the public interest factors listed in schedule 4, parts 2 and 3 of the RTI Act are not exhaustive.

In some situations, a decision maker might identify that public interest considerations not reflected in the factors listed in the RTI Act are relevant to the application. This may be an entirely unique consideration or one which is similar to a listed factor.

#### Examples

In [Seven Network Operations and Redland City Council; Third party](#)<sup>12</sup> the Assistant Information Commissioner created and considered an unlisted public interest factor favouring disclosure in relation to safe, informed and competitive markets.<sup>13</sup>

In [6ZJ3HG and Department of Environment and Heritage Protection; OY76VY \(Third Party\)](#)<sup>14</sup> the Acting Assistant Information Commissioner considered an unlisted public interest factor where disclosure could reasonably be expected to result in a person being subjected to lower level (that is, less than 'serious') harassment and intimidation.<sup>15</sup>

### Group similar factors for easier decision making

A number of public interest factors deal with similar topics. Where an application raises these overlapping factors, categorise and discuss similar factors together.

Each factor that is relevant still needs to be identified, along with the amount of harm and weight given to each one, but discussing them together can simplify the decision and reduce duplication. This can be done by:

- grouping those factors together to avoid inadvertently giving them extra importance just because there is more than one
- identifying each of the public interest considerations commonly raised by the different factors
- if a part 4 factor is raised, note that it causes a public interest harm and identify how much
- consider how important the effect of disclosure will be on the public interest consideration that is common to the grouped factors and why; and
- if a factor in the group covers a different public interest concern, deal with it separately.

<sup>12</sup> (Unreported, Queensland Information Commissioner, 30 June 2011).

<sup>13</sup> Paragraphs 33-45.

<sup>14</sup> [2016] QICmr 8 (24 February 2016).

<sup>15</sup> Paragraphs 69-71.



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Some examples of public interest considerations that overlap include:

- government accountability and transparency<sup>16</sup>
- personal information and privacy<sup>17</sup>
- interactions between persons (including businesses) and government that raise broader community concerns regarding the rights of persons<sup>18</sup>; and
- specific concerns regarding the community as a whole, or sections of the community<sup>19</sup>.

**Example**

Some examples of OIC decisions where common public interest considerations which involve an overlap of public interest factors have been discussed include:

[R59NHS and Department of Transport and Main Roads](#)<sup>20</sup>

[West Moreton Hospital and Health Service and Department of Education: 7O9KUI \(Third Party\)](#)<sup>21</sup>

[J6Q8CH and Office of the Health Ombudsman](#)<sup>22</sup>

**How do you balance the public interest?**

Once all relevant factors favouring disclosure and nondisclosure have been identified, the decision maker must balance the public interest considerations to determine whether releasing the information would be contrary to the public interest.

**Note**

Balancing the public interest is not a simple mathematical process. Having more factors favouring nondisclosure than disclosure does not automatically mean access is refused or vice versa.

To balance the public interest factors the decision maker needs to consider the relative importance of the applicable public interest factors for and against

<sup>16</sup> See items 1 to 6, 11 and 12 of schedule 4, part 2 of the RTI Act.

<sup>17</sup> See items 7 to 9 of schedule 4, part 2 of the RTI Act.

<sup>18</sup> See items 10 to 12, 16 and 17 of schedule 4, part 2 of the RTI Act.

<sup>19</sup> See items 13 to 16, 18 and 19 of schedule 4, part 2 of the RTI Act.

<sup>20</sup> [2019] QICmr 17 (14 May 2019).

<sup>21</sup> [2019] QICmr 16 (9 May 2019).

<sup>22</sup> [2019] QICmr 11 (9 April 2019).



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disclosure, taking into account the extent of any public interest harm flowing from part 4 factors.

The object of this balancing test is to:

- work through the competing tensions between the relevant factors favouring disclosure and nondisclosure; and
- come to a conclusion about whether the factors favouring nondisclosure are strong enough to establish that it would be contrary to the public interest to disclose the information.

### Deciding the weight of competing factors

The degree of weight given to a relevant public interest factor will depend on the effect that disclosing the information would have on the public interest consideration addressed by the factor, including whether any public interest harm would be caused. If one of the relevant factors is a part 4 factor, harm will be caused, but the decision maker will need to identify how much.

The following considerations may also affect how much weight to give a public interest factor in the context of an application:

- the degree of certainty that a factor will advance or detract from the public interest
- the size of the section of the community for whom the factor is a concern<sup>23</sup>
- lapse of time<sup>24</sup>
- changes in circumstances<sup>25</sup>; or
- other information that has already been released<sup>26</sup>.

### If the factors are evenly balanced

Decision making under the RTI Act must be underpinned by a pro-disclosure bias<sup>27</sup> and the agency must decide to give access to a document unless giving access would, on balance, be contrary to the public interest. Therefore, when the decision maker considers that the public interest factors for and against disclosure are evenly balanced then they are required to give access to the information in question.<sup>28</sup>

### Notice of decision

<sup>23</sup> *Sinclair v Mining Warden at Maryborough* (1975) 132 CLR 473 at 487 per Jacobs J.

<sup>24</sup> *Lianos and Secretary, Department of Social Security* [1984] AATA 38 at [99] per Deputy President Hall; and *Chandra and Department of Immigration and Ethnic Affairs* [1984] AATA 437 at [18]-[19] and [53] per Deputy President Hall.

<sup>25</sup> *Chandra and Department of Immigration and Ethnic Affairs* [1984] AATA 437 at [78] per Deputy President Hall.

<sup>26</sup> *Sankey v Whitlam and Others* (1978) 142 CLR 1 at 45 per Gibbs ACJ; *Chandra and Department of Immigration and Ethnic Affairs* [1984] AATA 437 at [46] per Deputy President Hall; and *Downie and Department of Territories* [1985] AATA 313 at [33(ii)] and [40] per Deputy President Todd and Members Stevens and Taylor.

<sup>27</sup> As per section 44 of the RTI Act.

<sup>28</sup> Access must be deferred if the decision to give access is contrary to a consulted third party's views.



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Decision makers should refer to the OIC Guideline '[Decision writing and statement of reasons](#)' for guidance on preparing a notice of decision.

The Annotated Legislation is also a useful tool for decision makers when processing applications and balancing the public interest:

- [Application of section 47\(3\)\(b\) of the RTI Act](#)
- [Public interest test applied – contexts](#)
- [Public interest text applied – factors](#)

**Note**

Published OIC decisions demonstrate how the public interest test is applied in practice to real applications. The decisions can be searched with a variety of filters through this link: <https://www.oic.qld.gov.au/decisions>

## Human Rights Act

For information about how the *Human Rights Act 2019* (Qld) interacts with the RTI Act refer to the OIC Guideline '[Access and Amendment Applications and the Human Rights Act](#)'.

For additional information and assistance please refer to the OIC's guidelines, or contact the Enquiries Service on 3234 7373 or email [enquiries@oic.qld.gov.au](mailto:enquiries@oic.qld.gov.au).

This guide is introductory only, and deals with issues in a general way. It is not legal advice. Additional factors may be relevant in specific circumstances. For detailed guidance, legal advice should be sought.

If you have any comments or suggestions on the content of this document, please submit them to [feedback@oic.qld.gov.au](mailto:feedback@oic.qld.gov.au)

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