Interpreting the legislation - *Right to Information Act 2009*

Public interest balancing test

Section 49 of the *Right to Information Act 2009*

1.0 Overview

Access to information under the *Right to Information Act 2009* (RTI Act)\(^1\) can be refused if, on balance, its release would be contrary to the public interest. This guideline explains how to apply the public interest balancing test set out in the RTI Act. Decision makers should also consult the Annotated Legislation for more information on applying the public interest factors.

2.0 What is the public interest?

The term ‘public interest’ refers to considerations affecting the good order and functioning of the community and government affairs for the well-being of citizens. Public interest considerations are generally common to all members of, or a substantial segment of, the community, as distinct from matters that concern private or personal interests. However, some public interest considerations can apply for the benefit of an individual.

3.0 The public interest balancing test

The RTI Act requires you to follow the process set out in the Act to ensure all relevant factors are taken into account in deciding where the balance of the public interest lies.

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\(^1\) And Chapter 3 of the *Information Privacy Act 2009* (IP Act).
Schedule 4 lists factors that may be relevant for deciding the public interest, although other factors can also be taken into account.

To determine the balance of the public interest, you must follow the process set out in schedule 4:

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

**Remember**

Consideration of each factor involves a two step process:

1. Does the factor arise for balancing? (This requires a careful assessment of the wording of the factor, as explained below)
2. If the factor does arise, the weight to be accorded to the factor must be considered and balanced against all other relevant factors.

An applicant or third party is not required to identify specific public interest considerations. However, they may provide information which raises public interest factors that you can consider.

### 4.0 Irrelevant factors

Any irrelevant factors raised by the information or application must be identified and disregarded.

A reasonable expectation that disclosing the information could—

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

—are irrelevant considerations, as is the seniority of the individual who created the document.
5.0 Factors favouring disclosure

Schedule 4, part 2 of the RTI Act lists factors favouring disclosure which, in broad terms, deal with the following public interest considerations:

- accountability and transparency
- personal information
- interactions between persons (including business) and government that raise broader community concerns regarding the rights of persons; and
- specific concerns regarding the community as a whole, or sections of the community.

6.0 Identifying and applying factors favouring disclosure

All relevant factors favouring disclosure must be identified. In doing so, it is important to 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 assume particular facts, eg that a decision has been made (factor 11), a type of conduct exists (factor 6), or an application has been made (factor 8)?

For a factor to apply, there must be more than a coincidental connection between the information and the factor. It is also important to identify which characteristic or part of the information, in the context of the application, raises the factor and to address any threshold requirements within the factor to determine whether it applies to the particular information. For example, it may be necessary to:

- identify a specific type of information
- identify a reasonable basis for an expectation that disclosure will have a particular consequence; and/or
- make a determination about a specific subject, for example the ‘best interests of a child’.

Explaining why and how the factor applies, will assist the applicant to understand what you have taken into account in making your decision.

7.0 Factors favouring non-disclosure

7.1 Part 3 - factors favouring non-disclosure

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2 See items 1 to 6, 11 and 12 of schedule 4, part 2 of the RTI Act.
3 See items 7 to 9 of schedule 4, part 2 of the RTI Act.
4 See items 10 to 12, 16 and 17 of schedule 4, part 2 of the RTI Act.
5 See items 13 to 16, 18 and 19 of schedule 4, part 2 of the RTI Act.
Schedule 4, part 3 of the RTI Act lists factors favouring nondisclosure which, in broad terms, deal with the following public interest considerations:

- privacy\(^6\)
- interactions between persons (including business) and government that raise broader community concerns regarding the rights of persons\(^7\); and
- specific concerns regarding the community as a whole, or sections of the community\(^8\).

7.2 **Part 4 – factors favouring non-disclosure because of public interest harm**

The factors in schedule 4, part 4 of the RTI Act favour non-disclosure because of an identified public interest harm in disclosure.\(^9\) These factors relate to:

- relations with other governments
- investigations by the Ombudsman or audits by the Auditor-General
- particular operations of agencies
- deliberative processes involved in the functions of government
- the security and good order of corrective services facilities
- personal information
- trade secrets, business affairs and research
- confidential communications
- the State economy; and
- State financial or property interests.

8.0 **Identifying and applying factors favouring non-disclosure**

After identifying any factors favouring non-disclosure 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 which has commercial value?

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\(^6\) See items 2 to 5 of schedule 4, part 3 of the RTI Act.

\(^7\) See items 2, 6, 8, 9 and 15 of schedule 4, part 3 of the RTI Act.

\(^8\) See items 1, 7, 8 and 10 to 22 of schedule 4, part 3 of the RTI Act.

\(^9\) The schedule 4, part 4 factors at items 4, 5, 6 and 7(1)(a) provide that disclosure of a specified type of information could reasonably be expected to cause public interest harm.
• Does the factor apply to a specific type of information, for example, a trade secret, personal information, or deliberative process information?

As with factors favouring disclosure, 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 the factors applies.\textsuperscript{10}

All relevant factors favouring non-disclosure must be identified. For part 3 factors, it is necessary to consider whether disclosure will cause a public interest harm; for part 4 factors, the RTI Act expressly provides that disclosure will cause a public interest harm. However, the significance or extent of the harm that could reasonably be expected to flow from disclosure must be determined in the factual circumstances of the application.

As with disclosure factors, explaining why and how the factor applies will assist the applicant to understand what you have taken into account in making your decision.

9.0 Balancing the public interest

Once all relevant factors favouring disclosure and non-disclosure have been identified, you must balance the public interest considerations to determine whether releasing the information would be contrary to the public interest. This is done by considering the relative importance of applicable public interest factors for and against disclosure, taking into account the extent of any public interest harm flowing from Part 4 Factors. This assessment must be informed by the particular circumstances of the application and be based on careful consideration of the information sought.

The object of this balancing 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.

9.1 Deciding the importance of competing factors

The degree of importance or 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. If the relevant public interest factor is a Part 4 Factor, the anticipated harm is specified, however, the seriousness of that effect may help you to identify how significant the public interest harm will be (ie how serious an effect that

\textsuperscript{10} 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.
disclosure of the information being considered will have on the public interest).

The following considerations may also affect how important a public interest factor is 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
- lapse of time
- changes in circumstances; or
- other information that has already been released.

9.2 Dealing with any overlap between factors

Some public interest factors, both for and against disclosure, cover similar public interest consideration. Where factors relevant to an application overlap it means that the factual circumstances of an application raise a common public interest consideration. Identify the common public interest consideration and give the factors that relate to it their necessary degree of importance in the context of the application as a whole.

If relevant factors favouring disclosure or relevant factors favouring non-disclosure address a common public interest consideration:

- group those factors together to avoid giving them extra importance just because there is more than one
- identify the public interest consideration that is raised in common by the different factors
- if a Part 4 Factor raises any identified common public interest consideration, note that public interest harm
- consider how important the effect of disclosure will be on the public interest consideration that is common to the grouped factors and why it is important; and
- to the extent that a particular factor in the group covers different public interest concerns, deal separately with those concerns.

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11 Sinclair v Mining Warden at Maryborough (1975) 132 CLR 473 at 487 per Jacobs J.
12 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.
13 Chandra and Department of Immigration and Ethnic Affairs [1984] AATA 437 at [78] per Deputy President Hall.
14 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.
15 Relevant factors favouring non-disclosure may include applicable factors from schedule 4, part 3 and applicable Part 4 Factors.
10.0 Making and communicating a decision

Having reached a conclusion on where the balance of the public interest lies, a decision maker is required to provide written reasons for their decision.

If access is refused to some or all of the information, a clear and succinct explanation of—

- the factors taken into account in reaching the decision; and
- the relative importance accorded to each of those factors and the reasons for this

—will assist the applicant to understand the basis for the decision.

OIC’s website contains a significant number of resources which illustrate and explain further the application of the public interest test including Information Commissioner decisions and annotated legislation (section 47(3)(b)).

For additional information and assistance please refer the OIC’s guidelines and Annotated Legislation or contact the Enquiries Service on 07 3234 7373 or email 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.

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16 Sections 54(2)(d) and 54(2)(g)(iv) of the RTI Act.