



Interpreting the legislation – *Right to Information Act 2009 / Information Privacy Act 2009*

Commissions of Inquiry under the RTI Act

- 1.0 Overview
- 2.0 Entities to which the RTI Act does not apply
- 3.0 Commissions of Inquiry
- 4.0 Documents of a finalised Commission of Inquiry
- 5.0 Applications for Commission of Inquiry documents
- 6.0 Exempt information
- 7.0 Public interest factors

1.0 Overview

The *Right to Information Act 2009* (Qld) (**RTI Act**)¹ provides a right to access information held by Queensland government agencies². This right is subject to some limitations where access would be contrary to the public interest.

One of these limitations is Commissions of Inquiry, which Parliament has decided are entirely excluded as an entity from the operation of the RTI Act. Documents of a Commission of Inquiry, however, can be subject to the RTI Act where they are in the possession or control of an agency.

2.0 Entities to which the RTI Act does not apply

A person has a right to apply for access to documents in the possession and control of an agency. The definition of agency excludes an entity to which the RTI Act does not apply.³

A Commission of Inquiry issued by the Governor in Council, whether before or after the commencement of schedule 2, is an entity to which

¹ And Chapter 3 of the *Information Privacy Act 2009* (IP Act), which provides a right of access to documents containing the applicant's personal information. Unless otherwise stated, references to the right of access in the RTI Act include a reference to the right of access in the IP Act.

² Unless otherwise stated, reference to an agency includes a Minister.

³ Section 14(2) of the RTI Act. Section 17 of the RTI Act provides that an entity to which the Act does not apply includes an entity mentioned in schedule 2, part 1.



the RTI Act does not apply.⁴ As such, there is no right to apply to a Commission of Inquiry for access to documents under the RTI Act.

3.0 Commissions of Inquiry

Commissions of Inquiry are issued by the Governor acting with the advice of the Executive Council. The provisions of the *Commissions of Inquiry Act 1950* (Qld) facilitate their conduct.

Past Commissions of Inquiry include:

- Bundaberg Hospital Inquiry
- Queensland Floods Inquiry
- Child Protection Inquiry; and
- The Fitzgerald Inquiry.

Commissions of Inquiry are temporary entities, which cease to exist when the Inquiry is finalised. While a Commission of Inquiry is active, documents in its possession or control cannot be applied for, because the Commission is not an agency under the RTI Act.⁵ When an Inquiry is finalised and the Commission is wound up, its documents are transferred to another entity.

4.0 Documents of a finalised Commission of Inquiry

Documents of a Commission of Inquiry are not excluded from the operation of the RTI Act. If documents of a former Commission of Inquiry are transferred to an agency they become *documents of an agency* and an RTI application can be submitted to the agency which has possession or control of the documents.

5.0 Applications for Commission of Inquiry documents.

An RTI application seeking access to a finalised Commission of Inquiry's documents must be dealt with in the same manner as any other access application. The starting point is that there should be a right of access to finalised Commission documents held by an agency unless, on balance, it is contrary to the public interest to deal with the application or to give access to the documents.⁶

The decision maker must identify any applicable exempt information provisions. If some or all of the information is not exempt information, they will have to identify and weigh relevant public interest factors for and against disclosure to decide if release would, on balance, be contrary to the public interest.

⁴ Schedule 2, part 1, item 4.⁵ If the documents of an active Commission were held by another agency an applicant could seek access from the other agency.

⁵ If the documents of an active Commission were held by another agency an applicant could seek access from the other agency.

⁶ Sections 39 and 44 of the RTI Act.



6.0 Exempt information

6.1 Documents of a Commission of Inquiry

Documents of a finalised Commission of Inquiry may be exempt from release because they:

- were produced or given in evidence to a Commission and their disclosure would be contrary to a non-publication order; or
- contain other exempt information, for example, legal advice,⁷ information that reveals the identity or evidence of informants in certain circumstances,⁸ or information prohibited from disclosure by provisions in Acts other than the RTI Act.⁹

6.2 Non-publication orders

If a non-publication order applies to documents sought by the applicant, the relevant documents will be exempt from release.

Under section 16 of the *Commissions of Inquiry Act 1950*, a commission may order that any evidence given before it, or the contents of any book, document, writing or record produced at the inquiry, shall not be published.

Schedule 3, section 6(b)(i) of the RTI Act states that information is exempt if its public disclosure would be contrary to an order made or a direction given by a royal commission or commission of inquiry.

It is important to check the wording of the order and whether it applies to the documents sought by the applicant. In some cases an order will only apply to some documents or parts of documents. Where it is not clear to the decision-maker, it is necessary to make enquiries or obtain other documents that will help clarify the application of the order to the documents sought.

Scope of non-publication orders - evidence given or documents produced

In *Orth v Medical Board of Queensland*¹⁰, the Information Commissioner considered documents subject to a Commission's order that 'no aspect of these proceedings is to be published in any form'. The power of the Commission to make a non-publication order is limited only to evidence given or documents *produced* to it.

⁷ Schedule 3, section 7 of the RTI Act.

⁸ When the information comprises breach of confidence information, information revealing the existence of identity of a source, or information that may endanger a person – see schedule 3, sections 8, 10(1)(b) and 10(1)(c) of the RTI Act respectively.

⁹ Schedule 3, section 12 of the RTI Act.

¹⁰ (2003) 6 QAR 209



Office of the Information Commissioner
Queensland

Because the documents in question had never been produced or given in evidence to the Commission the Information Commissioner found that they were not exempt from release¹¹ as the Commission had exceeded its power in making the non-publication order.

If non-publication orders do not apply to the documents or some of the documents, the agency must consider if other exempt information provisions apply or if disclosure would be contrary to the public interest.

7.0 Public interest factors

Disclosure of information contained in documents of a finalised Commission of Inquiry may, on balance, be contrary to the public interest. The public interest test provides a flexible and comprehensive framework for considering and balancing all relevant public interest factors, taking into account the nature of the information, the sensitivities of the information and surrounding circumstances and its age.

The public interest factors listed in schedule 4 of the RTI Act are not exhaustive¹², and the decision-maker is required to identify and consider all relevant public interest factors, including any relevant factors not listed in schedule 4. The type of information in the documents will determine which public interest factors are relevant, but where they contain, for example, information about individuals releasing the documents could disclose personal information¹³ or could prejudice the protection of the individual's right to privacy¹⁴.

A Commission might indicate that documents, whilst not subject to a non-publication order, should not be published because it considers the information to be highly sensitive; this could give rise to a factor favouring nondisclosure.

Example

An applicant applied to an agency for documents relating to a finalised Commission of Inquiry. The documents were not subject to a non-publication order but comments had been made by the Commission that some of the documents were highly sensitive. The remaining documents contained unsubstantiated and contentious allegations of wrongdoing and sensitive personal information of members of the community. As such, the decision maker considered the comments made by the Commission gave rise to a public interest factor favouring nondisclosure which should be attributed substantial weight despite the passing of time.

¹¹ Under the Freedom of Information Act equivalent to schedule 3, section 6(b)(i) of the RTI Act

¹² As indicated by the words 'including any factor mentioned in schedule 4, part 2 / parts 3 and 4' in section 49(3)(b) and (c) of the RTI Act.

¹³ Schedule 4, part 4, item 6.

¹⁴ Schedule 3, part 3, item 3.



Office of the Information Commissioner
Queensland

For additional information and assistance please refer to the OIC's guidelines, 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.

Published 6 October 2015 and Last Updated 6 October 2015