



## Information Sheet

*Right to Information Act 2009*

### What is confidentiality? An introduction for applicants and third parties

Under the *Right to Information Act 2009 (Qld) (RTI Act)*<sup>1</sup>, people can apply to access documents held by Queensland government agencies. If a third party could be concerned about an agency releasing some of those documents, the agency has to consult with them.<sup>2</sup>

This may require access applicants and consulted third parties to deal with the concept of confidentiality. It may be part of an agency decision, and access applicants may need to discuss it with agency decision makers or consider it when deciding whether or not to seek a review. Consulted third parties may need to decide whether to object to the release of documents, and if so, whether or not the information in the documents is confidential.

This information sheet provides a basic introduction to the concept of confidentiality for access applicants and consulted third parties, and covers what is required to establish that information is exempt because it is confidential under the RTI Act.

#### Exempt from release

An agency decision maker can refuse access to information because it is *exempt information* or because it is *contrary to the public interest information*.<sup>3</sup>

Confidential information may be exempt from release if it would breach a contractual confidentiality clause or if it meets four specific criteria.

#### Note

There is also strong a pro-disclosure bias under the RTI Act. For example, if a company contracts with an agency and is paid from public funds, that raises strong public interest factors favouring release of the information, including enhancing government accountability and ensuring effective oversight of expenditure of public funds.

The four criteria are set out below. Information must pass all of the criteria; if it fails even one, it will *not* be exempt from release. The criteria are:

1. The information must be specifically identified.

<sup>1</sup> And the *Information Privacy Act 2009 (Qld)*.

<sup>2</sup> Refer to the Information Sheet: [What does it mean if you are consulted as a third party](#)

<sup>3</sup> For more information on the difference between these, refer to the Information Sheets: [What is Exempt Information](#) and [What is the Public Interest](#).



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2. The information must have a 'quality of confidence'—it can't be trivial or useless, it must not be in the public domain, common knowledge, or something which the applicant already knows, and it cannot be evidence of a crime.
3. When the information was given to the agency, the person who provided it must have meant for it to be kept confidential; when the agency received it, they must *also* have meant for it to be kept confidential. *Both* of them must have believed it was going to be confidential; if only one of them meant it to be confidential, the information will fail this criteria.
4. Giving the information to the applicant would be an unauthorised use of the information—if the applicant *wasn't* authorised to receive the information by the person who gave it to the agency, the information will pass this criteria.

Even if the information can't pass all the criteria, it could still raise public interest factors against release. If those outweigh the public interest factors favouring release, the information will be contrary to the public interest to disclose.

#### Complainants and confidentiality

The identity of people who make complaints to an agency is, except in extraordinary circumstances, contrary to the public interest to release. One of the reasons for this is because releasing it would prejudice the agency's ability to obtain confidential information.<sup>4</sup>

For more information, refer to the Information Sheet: [Applying for complaint documents](#).

#### What confidentiality is not

Confidentiality is often referred to in situations when another concept would be more appropriate, or where it simply does not apply.

#### Documents stamped 'confidential' or 'commercial in confidence'

Marking documents as 'confidential' or 'commercial in confidence' has no effect on whether the information they contain is confidential. Agency decision makers will carefully consider the contents of all documents to decide if their contents:

- satisfy the criteria for equitable confidentiality and are exempt; or
- fall within relevant public interest factors for and against release to determine if they are contrary to the public interest.

<sup>4</sup> Schedule 4, part 3, item 16 of the RTI Act – this is a public interest factor favouring refusal of access.



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**Email disclaimers**

Many emails have automatic disclaimers added to the bottom that state they are confidential. This does not make the emails confidential, and agency decision makers will still need to consider the information in the email to decide if it satisfies the five tests for confidentiality or if it is contrary to the public interest to release.

**Confidentiality and privacy**

There are public interest factors against release that relate to personal information<sup>5</sup> and privacy<sup>6</sup>. These can weigh heavily against refusal of access, particularly where the information is highly personal, such as medical records.

While personal information may sometimes be able to pass the four tests to be 'confidential', privacy and personal information are not the same as confidentiality.

For additional information and assistance please refer to the [Breach of Confidence](#) guideline or contact the Enquiries Service on 07 3234 7373 or email [enquiries@oic.qld.gov.au](mailto:enquiries@oic.qld.gov.au).

**This information sheet 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).

**Published 13 September 2018 and Last Updated 18 July 2019**

*Changes to legislation after the update date are not included in this document*

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<sup>5</sup> Schedule 4, part 4, section 6 of the RTI Act.

<sup>6</sup> Schedule 4, part 3, item 3 of the RTI Act.