



## Applying the legislation

GUIDELINE *Right to Information Act 2009*

### Applications for tender documents

The *Right to Information Act 2009*<sup>1</sup> (Qld) (**RTI Act**) creates a right of access to documents in the possession or control of an agency<sup>2</sup>, subject to some limitations. Access may be refused to exempt information or information if it would be contrary to the public interest to release and certain documents are not subject to the access provisions of the RTI Act<sup>3</sup>.

This Guideline has been developed to assist agencies dealing with access applications for documents related to government tender processes. Decision makers should also refer to the [Annotated Legislation](#).

#### Information previously provided or publicly available

Under the State Procurement Policy and guidelines<sup>4</sup>, some information about successful tenderers is publicly available. Unsuccessful tenderers may be entitled to feedback from the agency at the completion of the tender process.

Where an applicant has already been provided with information in the documents it would generally not be contrary to the public interest to release it. Where information is publicly available, an agency can either provide access to it or refuse access on the grounds that it is available through other means.<sup>5</sup>

#### Deciding applications for tender documents

When considering whether or not it would be contrary to the public interest to release tender documents agencies need to consider if the information is:

- exempt under schedule 3 of the RTI Act; or
- contrary to the public interest to release, taking into account the public interest factors in schedule 4 of the RTI Act.

#### Successful or unsuccessful tenderer

Whether the information applied for is about the successful tenderer or the unsuccessful tenderer is going to affect the access decision. Depending on the sector of government the agency is part of, different factors may come into play but, there will always be strong public accountability arguments about the decisions made to award tenders for work which will be paid for from public funds. Agencies must be able to demonstrate that tender processes have been carried out fairly and equitably, and that the successful tenderers were the best candidates, in terms of efficiency, effectiveness and economy (and taking into

<sup>1</sup> And chapter 3 of the IP Act.

<sup>2</sup> In this guideline, agency includes a Minister.

<sup>3</sup> As set out in section 11 and schedule 1 of the RTI Act.

<sup>4</sup> <http://www.hpw.qld.gov.au/SiteCollectionDocuments/QLDProcurementPolicy.pdf>

<sup>5</sup> Section 47(3)(f) of the RTI Act.



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account any sector-specific factors), in the delivery of services to be paid for from public funds.<sup>6</sup>

There will be much stronger arguments for the release of documents about the successful tenderer than about the unsuccessful tenderers. Generally, there will be few public interest factors favouring disclosure applying to the documents of unsuccessful tenderers.

**Example**

It was decided in *Wanless* that release of referee scores relating to customer satisfaction with the unsuccessful tenderer could have had an adverse effect on the unsuccessful tenderer's business, commercial or financial affairs.<sup>7</sup>

**Exempt information**

**Breach of confidence**

Information will be exempt under schedule 3, section 8 if it will found an action for breach of confidence, which requires the information to satisfy five tests. The information must be specifically identifiable as secret, have the necessary quality of confidence, and have been given and received in confidence. In addition, disclosure of the information to the applicant must be an unauthorised use of the information and likely to cause a detriment to the person who provided it. For more information refer to the [Breach of Confidence](#) guideline.

Decision makers will need to consider the tender and invitation to tender documents to determine what information was provided to potential tenderers about confidentiality. They may also need to speak to the officer in charge of managing the tender process. The circumstances surrounding its collection are as important as the nature of the information when determining whether or not information is confidential.

**Note**

Even if a document satisfies the other tests, if it is legally required to be available for inspection, it will not be exempt from release under schedule 3, section 8 of the RTI Act.<sup>8</sup>

Information is unlikely to be confidential where it is generic, common knowledge in the industry<sup>9</sup>, or already in the public domain<sup>10</sup>, for example on the tenderer's website or in its press releases.

<sup>6</sup> *CH32GI and Department of Justice and Attorney-General; and Third Parties* (Unreported, Queensland Information Commissioner, 22 November 2012) (**CH32GI**) at paragraph 48 applying *Wanless Wastecorp and Caboolture Shire Council* (**Wanless**).

<sup>7</sup> At paragraph 60.

<sup>8</sup> See *Helping Hands Network Pty Ltd and Department of Education, Training and Employment* (Unreported, Queensland Information Commissioner 30 October 2012) (**Helping Hands**) at paragraph 53.

<sup>9</sup> *Wanless* at paragraphs 162 and 41.

<sup>10</sup> In *Macrossan & Amiet Solicitors and Department of Health* (Unreported, Queensland Information Commissioner, 27 February 2002) (**Macrossan**)



## Public interest factors

If information is not exempt from release under schedule 3, decision makers will have to consider the public interest factors in schedule 4 to decide if it would be contrary to the public interest to release the information.

### Factors favouring disclosure

Schedule 4, part 2, lists the public interest factors favouring disclosure. Where the information relates to a successful tenderer<sup>11</sup>, significant weight should be given to factors relating to the promotion of discussion of public affairs and government accountability; contribution to positive and informed debate; effective oversight of public funds; informing the community of government operations; allowing or assisting inquiry into possible deficiencies in agency or official conduct or administration; and revelation of reasons, background, and context for government decisions.<sup>12</sup> These factors will rarely, if ever, apply to documents relating to unsuccessful tenderers.

### Factors favouring non-disclosure

Schedule 4, parts 3 and 4, list the public interest factors favouring non-disclosure. The factors favouring non-disclosure that are likely to apply to tender documents relate to financial, commercial and business affairs and commercial information and trade secrets.<sup>13</sup>

#### Prejudice future supply of information

Generally, this will not be a factor favouring non-disclosure that will arise in relation to tender documents. OIC decisions have consistently found that the release of information relating to tenders will not prejudice future supply of information or incline potential tenderers to leave commercially valuable information out of their tenders, as it could disadvantage them in the tender process.<sup>14</sup>

There may also be incidental personal information contained in tender documents, which will require decision makers to consider the privacy and personal information factors.<sup>15</sup>

## Types of information appearing in tender documents

### Business systems and service standards

Decision makers should carefully consider information relating to the tenderer's business systems and service standards. The public interest may favour disclosure if this information simply indicates what the tenderer has the capability to offer.

<sup>11</sup> Helping Hands at paragraph 61 and 62.

<sup>12</sup> Schedule 2, part 2, items 1, 2, 3, 4, 5, and 11.

<sup>13</sup> Schedule 4, part 3, item 2 and item 15; schedule 4, part 4, item 7(1).

<sup>14</sup> *Huang and Redland City Council* (Unreported, Queensland Information Commissioner, 8 September 2010) at paragraph 30.

<sup>15</sup> Schedule 4, part 3, item 3 and part 4, item 6.



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The public interest may favour nondisclosure if:

- the information details *how* the tenderer would propose to implement significant aspects of service under the contract and comprises a detailed description of its business systems and service standards; and
- there is a reasonable basis for expecting that its disclosure would confer a competitive advantage to competing businesses by enabling the competitor to match or exceed the service standards contained in the document.

### Pricing information

Pricing information has a degree of commercial sensitivity for commercial suppliers of goods and services. The sensitivity of the information will depend on the circumstances of each tender. Issues to consider include: the nature and detail of the pricing information, its age, and the specifics of the particular market.<sup>16</sup> Generally, the lump sum quote will be less sensitive than detailed pricing structures.<sup>17</sup>

### **Commercial information**

If information (other than trade secrets) has a commercial value to an agency or a person and releasing the information would destroy or diminish the commercial value of the information<sup>18</sup> then this would be a factor favouring nondisclosure. Information has commercial value if:

- the information is valuable for the purposes of carrying on the commercial activity in which the agency or person is involved. The information may be important or essential to the profitability or viability of continuing business operations or a one-off commercial transaction; or
- there is a genuine market for the sale of such information and that market would be destroyed if the information was disclosed.<sup>19</sup>

There must be a reasonable expectation that disclosure of the information would be likely to diminish or destroy its commercial value. A merely speculative, irrational or absurd reason is not sufficient.<sup>20</sup>

Information contained in tender documents is unlikely to satisfy these requirements if:

- the information is available to the public or already public knowledge<sup>21</sup>
- the information in question is purely the structure or presentation of the tender that shows no particular innovation or style that influences the choice of tenderer and simply complies with the tender requirements<sup>22</sup>

<sup>16</sup> CH32G/

<sup>17</sup> CH32G/

<sup>18</sup> Schedule 4, part 4, item 7(1)(a) and (b)

<sup>19</sup> Wanless at paragraph 45; Macrossan at paragraph 79.

<sup>20</sup> Attorney-General's Department v Cockcroft (1986) 64 ALR 97 at paragraph 106.

<sup>21</sup> Wanless at paragraph 56; Helping Hands at paragraph 28.

<sup>22</sup> Macrossan at paragraph 85; Helping Hands at paragraph 25



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- the information has lost any value it may once have had by virtue of the conclusion of the tender process<sup>23</sup>; or
- the information is aged or out of date.<sup>24</sup>

### Example

Whether something is considered aged or out of date is likely to vary depending on what the information specifically relates to. In *Wanless*, the Information Commissioner decided that customer lists often possess commercial value. However, in this instance they were almost three years old and many of the contracts were expired, so it was considered that there was no particular commercial sensitivity remaining.

### Trade secrets

If disclosure of the information would disclose trade secrets<sup>25</sup> then this will be a factor favouring nondisclosure. A trade secret is different from confidential information as someone involved in the trade or industry must be able to use the information to their advantage.<sup>26</sup>

Factors that indicate a trade secret include<sup>27</sup>: the extent to which the information is not known outside the business; measures taken to guard the secrecy of the information<sup>28</sup>; the value of the information to the business and its competitors; the amount of effort or money spent by the owner in developing the information; and the ease or difficulty with which the information could be acquired or duplicated.<sup>29</sup>

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

<sup>23</sup> *Wanless* at paragraph 138].

<sup>24</sup> *Wanless* at paragraph 47.

<sup>25</sup> Schedule 4, part 4, section 7(1)(a).

<sup>26</sup> *Searle Australia Pty Ltd v Public Interest Advocacy Centre and Department of Community Services and Health* (1992) 108 ALR 163.

<sup>27</sup> *Ansell Rubber Co Pty Ltd v Allied Rubber Industries Pty Ltd* (1967) VR 37.

<sup>28</sup> *Wanless* at paragraph 35 and *Macrossan* at paragraph 75.

<sup>29</sup> These factors have been widely accepted in Queensland when considering what may constitute a trade secret. See for example: *Cannon and Australian Quality Egg Farms Limited* (1994) 1 QAR 491; *Fairfield Constructions Pty Ltd: Fairfield Land Pty Ltd and Department of Environment and Resource Management* (Unreported, Queensland Information Commissioner, 23 December 2009); *Electrical Trades Union (Simpson) and Treasury Department; Third Parties* (Unreported, Queensland Information Commissioner, 24 August 2009).