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

**Exempt Information - Breach of confidence**

**Schedule 3, section 8 of the RTI Act**

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1.0 **Overview**

The *Right to Information Act 2009*¹ (Qld) (RTI Act) gives people the right to access documents in the possession or control of Queensland government agencies². This right of access is subject to some limitations. These limitations include information which is exempt from release under schedule 3 of the RTI Act.

2.0 **Information that would found an action for breach of confidence**

Schedule 3, section 8 of the RTI Act provides that information will be exempt from release if its disclosure would found an action for breach of confidence.

Decision makers should refer to the [Basic Guide to Confidentiality]³ if they are not sure whether confidentiality is relevant to their documents or the [Annotated Legislation]⁴ for a more detailed discussion of relevant case law.

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¹ And the *Information Privacy Act 2009* (Qld).
² And Ministers. References in this guideline to an agency include a Minister.
2.1 **An action for breach of confidence?**

An action for breach of confidence can be an action for:

- an equitable breach of confidence; or
- a breach of a contractual obligation of confidence.\(^5\)

### Equitable breach of confidence

In order to found an action for a breach of equitable confidence, the information must satisfy four elements\(^6\):

1. The information in question must be identified with specificity
2. It must have the necessary quality of confidence
3. It must have been received in circumstances importing an obligation of confidence; and
4. There must be an actual or threatened misuse of the information.

The elements are cumulative; if any of them cannot be satisfied, the information cannot be subject to an equitable obligation of confidentiality.

#### 3.1 The four cumulative elements

##### 3.1.1 Specifically identifiable information

The first element is that the information must be specifically identifiable as secret, rather than generally known or available\(^7\). The more general the information, the harder it will be to show that it was imparted or received in confidential circumstances.\(^8\)

When making their decision, decision makers must identify the specific information within documents that they consider is confidential.

##### 3.1.2 Necessary quality of confidence

The second element is that the information must have the necessary quality of confidence. Marking a document “Secret” or “Confidential” does not automatically give it the required quality of confidence.

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\(^5\) *Ramsay Health Care Ltd v Information Commissioner & Anor* [2019] QCATA 66 (*Ramsay*) at paragraph 66

\(^6\) *Ramsay* at paragraph 94, adopting previous formulations in *Optus Networks Pty Ltd v Telstra Corporation Ltd* (2010) 265 ALR 281 and *Smith Kline & French Laboratories (Aust) Ltd v Secretary, Department of Community Services & Health* (1990) 22 FCR 73.

\(^7\) *TSO08G* at paragraph 18, adopting the reasoning of *B and BNRHA* at paragraphs 60-63.

\(^8\) *B and BNRHA* at paragraph 60, adopting *Independent Management Resources Pty Ltd v Brown* (1986) 9 IPR 1.
Decision makers must consider the content and substance of the information.

The following kinds of information have been found to have the necessary quality of confidence:

- trade secrets
- customer and client lists
- doctor's records
- bankers' client information.10

The following types of information have been identified as not having the necessary quality of confidence:

- generally available information in the public domain
- common knowledge
- useless or trivial information11
- evidence of a crime, civil wrong or serious misdeed of public importance12; and
- information which has previously been disclosed to the applicant13.

**Note**

Decision makers need to consider whether parts of the document are already common knowledge or generally known, for example because the information has been mentioned in a media statement or in other publicly available information. The relevant business units or areas within the agency may be able to advise on this.

3.1.3 Received in circumstances importing an obligation of confidence

The third element is that the information must have been received in circumstances that import an obligation of confidence.

It does not require that the receiver of the information expressly promised to keep it confidential; the obligation can be inferred from the circumstances.14 For example, patients and third parties communicate
sensitive health information to doctors on the understanding that it will be kept confidential.\textsuperscript{15}

Decision makers will need to consider the circumstances surrounding the supply of the information to determine whether those circumstances as a whole imparted an obligation of confidence.\textsuperscript{16}

Relevant circumstances could include:

- whether the information was provided for free or in exchange for payment
- whether there exists and is any past relationship or practices that could lead to an understanding that provided information would be treated confidentially
- whether the provider of the information has any demonstrable interest in the information or the purpose to which it will be put
- the nature and sensitivity of the information and the relationship between the parties
- any warnings or promises that were given or requested about confidentiality\textsuperscript{17}
- any service or other agreements\textsuperscript{18}
- any relevant statutory frameworks\textsuperscript{19}
- where the provider of the information is a government entity\textsuperscript{20} — any harm that would result to the public from the disclosure of the information; and
- the public interest in the information being subject to an obligation of confidence\textsuperscript{21}.

\textbf{3.1.3.1 The public interest in an obligation of confidence}

When considering obligations of confidentiality that apply to information produced to or held by government, the public interest in having access to the information will be a relevant consideration.

As part of determining whether an obligation of confidence applies, decision makers should consider whether there is a public interest in the information being released and, if so, how strong that interest is.\textsuperscript{22}

The existence of a public interest in releasing the information does not mean this element cannot be met. It is just one consideration, although

\textsuperscript{15} TSO08G at paragraph 25.
\textsuperscript{16} Ramsay.
\textsuperscript{17} Points 1-5 above: Attorney-General (UK) v Heinemann Publishers Pty Ltd (1987) 10 NSWLR 86; Ramsay.
\textsuperscript{18} Ramsay
\textsuperscript{19} Ramsay
\textsuperscript{21} Ramsay.
\textsuperscript{22} Ramsay at paragraph 82.
it may be quite a strong one, to take into account when determining whether an obligation of confidence applies.\textsuperscript{23}

3.1.4 Actual or threatened misuse of the information

The fourth element is that there is an actual or threatened misuse of the information. The decision maker will need to determine if release under the RTI Act would be inconsistent with the purpose for which it was received.\textsuperscript{24} This will depend upon the scope of the obligation of confidence.

An obligation of confidence can be waived by express or implied consent of the confider.\textsuperscript{25} Agencies may need to consider contacting the confider to determine whether they would object to disclosure of the information. This is particularly the case where the information’s age or character would indicate it may have “lost the sensitivity or value to the confider which made it worthy of protection as confidential information in the first place”.\textsuperscript{26}

4.0 Contractual breach of confidence

An action for breach of a contractual confidentiality requires there to be a contract in place. A contract is a specific type of legally binding agreement, and does not include other kinds of agreements, such as Memorandums of Understanding or deeds.

If the agreement is not a contract or the confidentiality clause is not legally binding—for example, if the parties are still negotiating or the clause has expired—there can be no breach of contractual confidence.\textsuperscript{27}

4.1 The confidentiality clause

Decision makers will need to consider the information and the relevant confidentiality clause to determine if the clause applies, as some confidentiality clauses may be limited by subject matter, author, date, or other factors. Some confidentiality clauses may also exclude RTI from the clause’s application; if so, release under the RTI Act cannot found an action for breach of contractual confidence.

4.2 Not absolute

Contractual confidentiality is not absolute. Parties who contract with government are taken to understand that confidentiality can be subject to right to information laws\textsuperscript{28}; public authorities are taken not to bind

\textsuperscript{23} Ramsay at paragraph 88.
\textsuperscript{24} Seager v Copydex Ltd [1967] 1 WLR 923.
\textsuperscript{25} B and BNRHA at paragraph 105.
\textsuperscript{26} B and BNRHA at paragraph 106.
\textsuperscript{27} B and BNRHA at paragraph 45.
\textsuperscript{28} Hughes Aircraft Systems International v Airservices Australia [1997] FCA 558
themselves out of giving a proper account of their functions—including by way of giving information directly to the public.\textsuperscript{29}

In some circumstances, decision makers may need to consider the nature of the information; how it came into existence, for example whether it was produced incidentally as part of the contract's performance, co-created by the agency, or created solely by the other party; or any legitimate community interest in accessing the information.

5.0 Exception - Deliberative process information

Schedule 3, section 8(2) states that deliberative process information is not exempt information unless it consists of information communicated by an entity other than the State, an agency, or a person in the capacity of:

- a Minister
- a member of the staff, or a consultant to, a Minister
- an officer of an agency.

5.1 What is deliberative process information?

Deliberative process information is information disclosing—

- an opinion, advice or recommendation that has been obtained, prepared or recorded; or
- a consultation or deliberation that has taken place

—in the course of, or for the purposes of, the deliberative processes involved in the functions of government.\textsuperscript{30}

*Deliberative process* refers to the processes of evaluating relevant evidence, expert opinion, and arguments about the merits of competing opinions for the purpose of making a decision related to the performance of the agency’s functions. It includes contributions to the formulation of policy, as well as the making of decisions under statutory powers.

Normally, deliberative processes occur towards the end stage of a large process. They often take place following the ‘evidence gathering’ stage which could include investigations, establishing facts, getting input from relevant sources and perhaps obtaining expert opinion or analysis. Officers of agencies then evaluate all these inputs to make a decision or make recommendations to the decision-maker.

Administrative processes of an agency are **not** part of its deliberative processes. For example, paying accounts, processing forms, publishing

\textsuperscript{29} Esso Australia Resources Ltd v Plowman (1994-1995) 183 CLR 10.

\textsuperscript{30} Schedule 3, section 8(3) of the RTI Act.
information and carrying out inspections do not form part of the deliberative processes of government.\textsuperscript{31} Deliberative process information must be connected with the making of a decision related to the performance of the agency’s functions.

Information can be deliberative process matter even though it originated outside government, provided it was obtained in the course of, or for the purposes of, the deliberative processes of government.

6.0 Disclaimer

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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\textsuperscript{31} Eccleston and Department of Family Services and Aboriginal and Islander Affairs (1993) 1 QAR 60 at paragraphs 28-29.