



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.

¹ And the *Information Privacy Act 2009* (Qld).

² And Ministers. References in this guideline to an agency include a Minister.

³ <https://www.oic.qld.gov.au/guidelines/for-government/access-and-amendment/decision-making/basic-guide-to-confidentiality>

⁴ <https://www.oic.qld.gov.au/annotated-legislation/rTI/schedule-3/8-information-disclosure-of-which-would-found-action-for-breach-of-confidence>



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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

3.0 Equitable breach of confidence

In order to found an action for a breach of equitable confidence, the information must satisfy four elements⁶:

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.

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 and Department of Health* (Unreported, Queensland Information Commissioner, 13 December 2011) (**TSO08G**) at paragraph 18, adopting the reasoning of *B and Brisbane North Regional Health Authority* (1994) 1 QAR 279 (**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.



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Decision makers must consider the content and substance of the information.⁹

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.

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 information¹⁰
- evidence of a crime, civil wrong or serious misdeed of public importance¹¹; and
- information which has previously been disclosed to the applicant¹².

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.¹³ For example, patients and third parties communicate sensitive health information to doctors on the understanding that it will be kept confidential.¹⁴

⁹ *B and BNRHA* at paragraph 71.

¹⁰ *TSO08G* at paragraph 20.

¹¹ *TSO08G* at paragraph 21, adopting the reasoning in *B and BNRHA* at paragraphs 121-131 and following the comments of Gummow J in *Corrs Pavey Whiting & Byrne v Collector of Customs (Vic)* (1987) 14 FCR 434.

¹² *Shaw and the University of Queensland* (1995) 3 QAR 107 at paragraph 16-25; *Kupr and Department of Primary Industries* (1999) 5 QAR 140 at paragraph 24-25 and 42, decisions made under the repealed FOI Act.

¹³ *B and BNRHA* at paragraph 90.

¹⁴ *TSO08G* at paragraph 25.



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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.¹⁵

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 confidentiality¹⁶
- any service or other agreements¹⁷
- any relevant statutory frameworks¹⁸
- where the provider of the information is a government entity¹⁹ — 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 confidence²⁰.

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.²¹

The existence of a public interest in releasing the information does not mean this element cannot be met. It is just one consideration, although it may be quite a strong one, to take into account when determining whether an obligation of confidence applies.²²

¹⁵ Ramsay.

¹⁶ Points 1-5 above: *Attorney-General (UK) v Heinemann Publishers Pty Ltd* (1987) 10 NSWLR 86; Ramsay.

¹⁷ Ramsay

¹⁸ Ramsay

¹⁹ Mason J in *Commonwealth of Australia v John Fairfax & Sons Limited and Others* (1981) 55 ALJR 45. See also *Sullivan v Department of Industry, Science and Technology and Australian Technology Group Pty Ltd* [1997] AATA 192.

²⁰ Ramsay.

²¹ Ramsay at paragraph 82.

²² Ramsay at paragraph 88.



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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.²³ 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.²⁴ 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".²⁵

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.²⁶

It is also necessary to consider if there has been an exchange of consideration between the parties in relation to the contract. In the absence of some form of consideration, then a confidentiality clause will not be capable of supporting an obligation of confidence.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. *"A contractual term requiring that certain information be kept secret will not necessarily equate to a*

²³ *Seager v Copydex Ltd* [1967] 1 WLR 923.

²⁴ *B and BNRHA* at paragraph 105.

²⁵ *B and BNRHA* at paragraph 106.

²⁶ *B and BNRHA* at paragraph 45.

²⁷ *Palmer and Townsville City Council* [2019] QICmr 43 (3 October 2019) (**Palmer**), referring to *B and BNRHA*.



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*contractual obligation of confidence: an issue may arise as to whether an action for breach of the contractual term would satisfy the description of an "action for breach of confidence."*²⁸

Further, where one party to a contractual obligation of confidence is a government agency with a duty of public accountability, the law has recognised that the "obligation may be limited to the extent necessary to serve the duty."²⁹ Confidentiality can be subject to right to information laws³⁰ and public authorities are taken not to bind themselves out of giving a proper account of their functions—including by way of giving information directly to the public³¹.

In some circumstances, decision makers will 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.

This was discussed in *Palmer and Townsville City Council*³², where the information claimed to be subject to a contractual obligation of confidentiality had not been created and communicated solely by a private party in exchange for a promise by Council not to disclose it. "*Rather, it [was] a mutual agreement co-authored—and thus essentially co-owned—by Council, and the broader community Council represents.*"³³ On that basis, taking into account the above principles, disclosure of the information would not have been a breach of the claimed obligation of confidence.

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—

²⁸ *B and BNRHA* at paragraph 45.

²⁹ *Palmer* at paragraph 54, referring to *Esso Australia Resources Ltd v Plowman* (1994-1995) 183 CLR 10.

³⁰ *Hughes Aircraft Systems International v Airservices Australia* [1997] FCA 558.

³¹ *Esso Australia Resources Ltd v Plowman* (1994-1995) 183 CLR 10.

³² [2019] QICmr 43 (3 October 2019).

³³ *Palmer* at paragraph 57.



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- 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.³⁴

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.

For more information on deliberative process refer to the [Deliberative Process guideline](#).

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.

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Published 30 November 2012 and Last Updated 10 December 2019

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

³⁴ Schedule 3, section 8(3) of the RTI Act.