



Applying the legislation

GUIDELINE *Right to Information Act 2009 and Information Privacy Act 2009*

Neither confirm nor deny the existence of documents

Overview

The intent of the *Right to Information Act 2009* (Qld) (**RTI Act**) and the *Information Privacy Act 2009* (Qld) (**IP Act**) is to make government-held information available unless doing so would be contrary to the public interest.

Both Acts, however, allow an agency¹ to respond to an access application by neither confirming nor denying the existence of the documents sought.²

This is an exception to the pro-disclosure bias and is to be used only in circumstances where any other response would reveal information that could cause harm to the community. Although it will only be used in rare and exceptional circumstances, it is important to understand how the 'neither confirm nor deny' provision works so that it is used correctly and appropriately.

When is it appropriate to use this provision?

The 'neither confirm nor deny' provision is only intended for situations where:

- Revealing that the agency does or does not have documents in response to a request would reveal certain types of exempt information or information contrary to the public interest. For example, an applicant applies for information regarding a complaint made to the Crime and Corruption Commission or requests access to all complaints made to the agency by a specified individual.
- There are legitimate grounds for refusing access to a document but explaining those grounds would reveal the information the agency is trying to protect or cause harm that the agency is trying to prevent.³

For all other situations, if an agency intends refusing access to documents, or is unable to locate any documents, the appropriate provisions for refusing access must be identified and reasons provided for the decision.

¹ In this Guideline, references to an 'agency' include Ministers, unless otherwise specified.

² Section 55 of the RTI Act and section 69 of the IP Act.

³ *EST and Department of Family Services and Aboriginal Affairs* (1995) 2 QAR 645 at paragraph 11 (citing the *1979 Report by the Senate Standing Committee on Constitutional and Legal Affairs on the Freedom of Information Bill 1978* at page 121, point 9.27), cited in *Tolone v Department of Police* (Unreported Queensland Information Commissioner, 9 October 2009) at paragraph 25.



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Case examples

In *Tolone v Department of Police*⁴ the applicant applied for access to documents relating to a complaint they had made to the Department about a named person and any corresponding admission made by that person. The Commissioner found the documents, if they existed, would comprise personal information the disclosure of which would be contrary to the public interest to release.

In *T95 and Queensland Police Service*⁵ the applicant sought access to information concerning interactions between a QPS officer and ‘tenants’ of a nominated address and a named real estate agency. The Commissioner was satisfied that if the documents existed they would identify individuals, connect them to a QPS matter, and would be likely to include information obtained from those individuals in the context of QPS inquiries, and constitute personal information that would be contrary to the public interest to release (along with other factors favouring non-disclosure).

The agencies in both these decisions were entitled to neither confirm nor deny the existence of these documents. Because of the specific way these access applications were framed, particularly their identification of individuals, acknowledging the existence or non-existence of the requested information would likely have caused the very kind of detriment the prescribed information provisions were intended to avoid.

For more examples, refer to:

- *Nadel and Queensland Police Service*⁶, where the applicant applied for Complaints, allegations, investigations, reviews, concerns of misconduct &/or inappropriate behaviour either alleged to have been, suspected to have been, or found to have been committed by a named individual
- *Laloyianni and Queensland Police Service*⁷, where the applicant applied for any information about a named individual, any complaints the named individual had made about anyone and any complaints made by anyone about the named individual; and
- *Winchester and Queensland Police Service*⁸, where the applicant applied for documents recording a complaint made by individuals other than himself about a specified officer.

⁴ (Unreported Queensland Information Commissioner, 9 October 2009)

⁵ QICmr 9 (18 February 2020)

⁶ [2020] QICmr 19 (6 April 2020)

⁷ [2018] QICmr 33 (24 July 2018)

⁸ [2017] QICmr 56 (4 December 2017)



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What are the requirements?

Section 55 can only be used to neither confirm nor deny the existence of a document if the decision maker is satisfied that the document would, if it existed, contain *prescribed information*. *Prescribed information* is defined in the RTI and IP Acts as specific kinds of exempt and contrary to the public interest information, for example, law enforcement or public safety information.⁹ It is irrelevant that the document might contain other, non-prescribed, information.

Although the neither confirm nor deny provision is only used in exceptional circumstances, the most common form of prescribed information that might invoke the provision is personal information, the disclosure of which would be contrary to the public interest.

Examples of personal information that will be prescribed information

Personal information that may be prescribed information would include:

- the identity of someone who made a complaint
- the identity of someone about whom a complaint has been made
- the identity of someone being investigated for a wrongdoing
- witnesses who are part of an investigation into a wrongdoing where disclosure of such information would, on balance, be contrary to the public interest under section 47(3)(b) of the RTI Act

If refusing access to personal information of the above kinds would require confirming the information, for example, Joe applies for all documents about the investigation into Bob's misconduct, it would be appropriate for an agency to respond with 'neither confirm nor deny'. This is particularly the case where the investigation is not completed.

Examples of personal information that will not be prescribed information

In order to be personal information, the identity of an individual must be apparent or reasonably ascertained from the information.¹⁰ This means that information which does not identify an individual will not be personal information and therefore cannot be prescribed information.

⁹ Prescribed information includes specific types of exempt information and personal information. See section 55(1) of the RTI Act, section 69(1) of the IP Act; see Schedule 5 of the RTI Act and IP Acts for the full definition of 'prescribed information'.

¹⁰ See section 12 of the IP Act



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Case example

The applicant in *Marchant and Queensland Police Service (QPS) (Unreported, Queensland Information Commissioner, 10 September 2013)* applied for access to documents listing all the occasions that police were called out to a women's hostel in New Farm between January 2009 and December 2011. The applicant specifically stated that she was not seeking access to the personal information of residents or employees of the hostel.

For the period for which information was sought, 16 women resided at the hostel and the average period they stayed was 16 weeks.

Because of the transient nature of the residents, the general and de-identified nature of the information requested and the fact that the hostel's address was already in the public domain, the Assistant Information Commissioner was satisfied that the callout information could not reasonably be expected to identify any one individual. As a result, it was not personal information as defined in the IP Act and was not prescribed information for the purposes of section 55 of the RTI Act.

Therefore, QPS's decision was set aside by finding that QPS cannot neither confirm nor deny the existence of the information sought by the applicant and a decision was made that disclosure of the information was not, on balance, contrary to the public interest under section 47(3)(b) of the RTI Act.

Does the agency need to search for documents?

If, based on the decision maker's knowledge, it is obvious from the terms of the application that any documents which might exist would contain prescribed information there is no need to conduct a search if the decision maker can make this assessment without viewing the documents. If the terms of the application capture documents which, if they existed, would contain prescribed information and documents which would not contain prescribed information, the agency must search for the latter. In some circumstances it will only be apparent from reading the documents that it is appropriate to neither confirm nor deny their existence.

Can an agency neither confirm nor deny when there are no documents?

Generally, where an agency conducts a search for documents in response to an RTI application it would inform the applicant if no documents are found. However, in some circumstances, confirming the non-existence of documents could be contrary to the public interest where that fact in itself reveals sensitive information. In such circumstances, an agency can neither confirm nor deny the existence of documents provided that, if the documents did exist, they would contain prescribed information.



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Example

A person makes an access application for documents about the complaint made by a family member about the treatment of a child by their parent. The parent is the subject of a current investigation and it appears they are trying to identify who provided information to the child protection agency.

A response that confirms documents exist would reveal that the family member had in fact made a complaint (even where the documents themselves were exempt from disclosure). A response that states that documents do not exist would enable the person to eliminate the family member as the informant and identify the actual informant.

The information was provided on the basis that the informant's identity as the source of the notification would be kept confidential, consistent with agency policy, and is therefore prescribed information as it is exempt information mentioned in schedule 3, section 10.

What do you put in the notice?

The requirements of a prescribed written notice neither confirming nor denying the existence of a document are set out in section 55(2) of the RTI Act and section 69(2) of the IP Act. It is important to ensure that prescribed information is not inadvertently included in the written notice.

A template for writing neither confirm nor deny prescribed written notices is attached at Appendix A.

For additional information and assistance please refer to the Guideline [Processing RTI Access Applications](#), the [Annotated Legislation for Section 55](#), and the OIC's other [RTI 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

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Appendix A

Template for neither confirm nor deny decisions

Dear *[applicant's name]*,

Thank you for your application of *[date of application]* requesting access to documents about *[insert type of information/documents request by the applicant]* under the *[Right to Information Act 2009 (RTI Act)/Information Privacy Act 2009 (IP Act)]*.

I am delegated to make decisions on access applications under section *[30(2) of the RTI Act/50(2) of the IP Act]*. Under section *[55 of the RTI Act/69 of the IP Act]* I neither confirm nor deny that *[name of agency]* holds documents of the type sought by your application.

If such documents did exist they would be documents to which access would be refused under section *[47(3)(a) or (b) of the RTI Act/67 of the IP Act as applied under the Right to Information Act 2009]* on the grounds that, if such documents existed, they would contain *[exempt information mentioned in Schedule 3] of the RTI Act that is prescribed information for section [55 of the RTI Act/69 of the IP Act] /personal information the release of which would be contrary to the public interest]*.

This decision should not be taken as an indication that the documents you requested do, or do not, exist.

If you are dissatisfied with this decision, you have the right to apply for an internal review. Please direct your request for an internal review to *[details of officer and address to which it should be sent]*. Any application for internal review must be made within 20 business days after the date of the decision letter.

Alternatively, you may apply to the Office of the Information Commissioner for an external review of this decision. The Information Commissioner can be contacted at:

Office of the Information Commissioner
PO Box 10143,
Adelaide St Brisbane Qld 4000

The Information Commissioner can also be contacted by telephone on (07) 3234 7373. Any application for an external review must be made within 20 business days from the date on this decision letter.

Yours sincerely,