



Interpreting the legislation – *Right to Information Act 2009*

Deliberative Process

- 1.0 Overview
- 2.0 Deliberative process information
- 3.0 Deliberative process involved in the functions of government
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1.0 Overview

Under the *Right to Information Act 2009*¹ (Qld) (**RTI Act**), people have the right to apply for documents held by Queensland government agencies². This right is subject to limitations, including where information would be exempt or contrary to the public interest to release.

1.1 *Deliberative process and breach of confidence*

Under schedule 3, section 8 of the RTI Act access can be refused to information that would found an action for breach of confidence if it was disclosed. This does not apply to deliberative process information.

This guideline explains the requirements of establishing deliberative process information. For guidance on applying the breach of confidence exempt information provision decision makers should refer to *Breach of Confidence*.

1.2 *Deliberative process public interest factors*

In addition to explaining how to establish deliberative process information, this guideline also explains the application of the two public interest factors against disclosure that relate to deliberative process.

These are :

- the prejudice factor; and
- the harm factor.³

¹ And chapter 3 of the *Information Privacy Act 2009* (Qld).

² In this guideline, an agency includes a Minister.

³ *TerraCom Limited and Department of Environment and Science; Lock the Gate Alliance Limited* (Third Party) (No. 2) [2018] QICmr 53 (19 December 2018)



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1.2.1 Deliberative process harm factor

The deliberative process harm factor arises where disclosure of deliberative process *information* could reasonably be expected to cause a public interest harm.⁴

There are a number of exceptions to the deliberative process harm factor.

1.2.2 Deliberative process prejudice factor

For the deliberative process prejudice factor⁵ to apply, there must be a reasonable expectation of prejudice occurring to the actual deliberative *process* from disclosure of the information.

2.0 Deliberative process information

The RTI Act defines deliberative process information as:

- (a) an opinion, advice or recommendation that has been obtained, prepared or recorded; or
- (b) 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.⁶

Examples include:

- a document prepared by an agency about projections of future revenue for the State
- a document prepared to inform a decision by an agency about potential road routes, where disclosure of all potential routes, including those that are subsequently rejected, could have a negative impact on property values or cause community concern.⁷

3.0 Deliberative processes involved in the functions of government

There are effectively two things that must be established when considering deliberative process under the RTI Act:

- the information, or process it records, must be a deliberative process; and
- that deliberative process must relate to a function of government.

⁴ Schedule 4, part 3, item 20 of the RTI Act

⁵ Schedule 4, part 4, section 4(1) of the RTI Act. Note, however, that the deliberative process harm factor does not apply in the circumstances set out in schedule 4, part 4, item 4, sections (2)-(4).

⁶ Schedule 3, section 8 and schedule 4, part 4, item 4, section (1)

⁷ Schedule 4, part 4, item 4, section (1)



Deliberative process status is permanent

The deliberative process status of information is not lost simply because an agency completes its deliberations.

However, the fact that a process has been finalised can have a significant impact on whether it will be contrary to the public interest to disclose the information. This is discussed below.

3.1 What is a deliberative process?

Deliberative process is, at its most basic, the thinking processes⁸ of an agency. It is "the process of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action".⁹

When an agency thinks, or deliberates, about something it will generally make judgements, evaluate evidence, weigh up different options, or consider competing arguments as part of making a decision.

3.1.1 Opinions, advice, recommendation, consultation and deliberation

The RTI Act refers specifically to 'opinions, advice or recommendations' and to 'consultation and deliberation'. These terms are not defined in the Act, but an opinion, advice, or recommendation is more than plain data, facts, or statistics.¹⁰ Generally, these would involve a judgement, view, attitude, or estimation, or present one or more options as advisable or expedient.

Consultation will generally involve a request or invitation by the agency to a third party to provide input. Deliberation may involve formal consultations or discussion, or careful considerations before a decision.

3.1.1.1 Not a class of documents

While the RTI Act refers specifically to 'opinion, advice and recommendation' and to 'consultation and deliberation', these are not defined document classes. A document titled 'Recommendation' does not automatically contain deliberative process information, and a deliberative process document is not rendered otherwise because it is titled 'Memo'.

⁸ *Eccleston and Department of Family Services and Aboriginal and Islander Affairs* (1993) 1 QAR 60 (*Eccleston*), citing with approval the definition given in *Re Waterford and Department of Treasury (No.2)* (1984) 5 ALD 588 at 606. While *Eccleston* concerns section 41(1)(a) of the repealed FOI Act, it remains relevant to the public interest test under section 49 and provides useful analysis of the wording still used in schedule 4, part 4, item 4 of the RTI Act.

⁹ *Eccleston*

¹⁰ Raw data alone would be highly unlikely to ever qualify as deliberative process information. Also note the deliberative process harm factor in schedule 4, part 4, item 4(3)(b) does not apply to the extent that the documents consist of purely factual or statistical information, including the raw data or evidentiary material upon which decisions are made.



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The decision maker must assess the contents of the document, along with the processes and functions it relates to and any other relevant circumstances, to decide its deliberative process status.

For example, in *Straker and Sunshine Coast*,¹¹ the Commissioner accepted that material was a *consultation* but was not satisfied that the consultation involved a *deliberative process*, because it involved the company keeping Council informed of its intentions, setting terms in relation to the flow of information, and explaining processes and the company's process of community engagement. It did not relate to any current 'thinking processes' of Council.

Other documents recognised as deliberative process documents include:

- a valuation report prepared for the purposes of acquisition of land by the State
- reports and planning information prepared in relation to development and infrastructure upgrades
- referee reports and documents related to the termination of a contract of employment
- documents relating to deaths in custody; and
- minutes of a university senate meeting and drafts of a public statement.

3.2 *Functions of government*

As noted above, to be deliberative process information under the RTI Act it must involve the functions of government.¹² This will generally be the functions of the agency that holds the document.

For departments and Ministers, their functions can be found in the Administrative Arrangements Orders. For other agencies, their operative legislation, for example, the *Local Government Act* for Councils, or the instrument or Act that established the agency, can serve as a guide to their functions.

Deliberative process can cover any 'thinking processes' related to the performance of the agency's functions, including contributions to the formulation of policy and making decisions under the agency's statutory powers.

The administrative processes of an agency, however, are **not** part of its deliberative processes. For example, paying accounts, processing forms, publishing information and carrying out inspections do not form part of the deliberative processes of government.¹³

¹¹ *Straker and Sunshine Coast Regional Council; NBN Co Limited (Third Party)* [2016] QICmr 44 (28 October 2016)

¹² See also *Eccleston*

¹³ *Eccleston*



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Towards the end of the process

An agency's deliberative processes will usually occur towards the end of a larger, overall process—after an agency has conducted necessary investigations, established facts, acquired input from relevant sources, obtained expert opinion or analyses, and carried out any required consultations.

This is because, logically, the thinking processes of an agency can only occur once the agency has acquired something to think about.

3.3 Material provided by third parties outside government

Information provided by third parties outside government can be deliberative process information, as long as it relates to a deliberative process involved in the functions of government.¹⁴

For example, in *North Queensland Conservation Council Inc and Queensland Treasury*¹⁵, the deliberative process information was based on information confidentially communicated to the agency by a third party outside government.

3.4 Examples of deliberative process information

The following are examples of deliberative processes, or deliberative process information, taken from Office of the Information Commissioner decisions.¹⁶ Note that in many of these decisions access was **not** refused, as it was not contrary to the public interest to release:

- Information prepared during consultations undertaken by the Treasurer in deliberating on and evaluating matters in relation to proposed mining projects.¹⁷
- The Department's determination of the amount of a financial assurance required in respect of a mining company's replacement plan of operations and the process of approving that replacement plan of operations.¹⁸
- The processes relating to the Department's approval of an application for transfer of a mining lease.¹⁹

¹⁴ *Eccleston; North Queensland Conservation Council Inc and Queensland Treasury* [2016] QICmr 21 (10 June 2016)

¹⁵ [2016] QICmr 21 (10 June 2016)

¹⁶ Some of these were decided under the now repealed *Freedom of Information Act 1992*, however they remains relevant to the public interest test under section 49 and provide useful analysis of the wording still used in schedule 4, part 4, item 4 of the RTI Act.

¹⁷ *North Queensland Conservation Council Incorporated and Queensland Treasury* [2016] QICmr 9 (29 February 2016)

¹⁸ *TerraCom Limited and Department of Environment and Science; Lock the Gate Alliance Limited (Third Party)* (No.2) [2018] QICmr 53 (19 December 2018)

¹⁹ *TerraCom Limited and Department of Natural Resources, Mines and Energy; Lock the Gate Alliance Limited* [2018] QICmr [31] (2 July 2018)



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- Tender scores comprising opinions recorded in the course of Council's deliberative process in evaluating competing tender submissions.²⁰
- Opinions expressed in referee reports given to an agency for use in selection processes to appoint or promote staff.²¹
- Opinions and recommendations of an investigator, prepared to assist senior management of the Queensland Corrective Services Commission in considering measures to be taken in response to the death of a prisoner.²²
- Opinions expressed by members of a committee appointed to develop a charter for the corporatisation of the Queensland Forest Service.²³
- Opinions and recommendations expressed by an investigating officer as to whether a person should be charged with an offence.²⁴

4.0 Applying the public interest factors

Once a decision maker has identified deliberative process information, they need to determine if the harm and/or prejudice public interest factors apply.

4.1 Finalised decisions and processes

Deliberative process information remains deliberative process information even when the government's thinking processes are finalised.

However, where the deliberative process is finished and there are no outstanding government decisions to be made, the Commissioner has found that the deliberative process prejudice factor does not apply.²⁵

The Commissioner has also found that, when applying the harm factor, there can be a significant reduction of any public interest harm that could result from the information's disclosure, and often afforded it low weight.²⁶

²⁰ *Rylsey Enterprises Pty Ltd and Cassowary Coast Regional Council* [2015] QICmr 13 (12 May 2015)

²¹ *Pemberton and The University of Queensland* (1994) 2 QAR 293 at paragraph 70 (94032)

²² *Re Prisoners' Legal Service Inc and Queensland Corrective Services Commission* (1997) 3 QAR 503, at paragraph 71 (97004)

²³ *Re Australian Rainforest Conservation Society Inc and Queensland Treasury* (1996) 3 QAR 221 at paragraph 17 (96005)

²⁴ *Re McCann and Queensland Police Service* (1997) 4 QAR 30 at paragraph 102 (97010)

²⁵ *TerraCom Limited and Department of Environment and Science; Lock the Gate Alliance Limited (Third Party) (No.2)* [2018] QICmr 53 (19 December 2018) and *TerraCom Limited and Department of Natural Resources, Mines and Energy; Lock the Gate Alliance Limited* [2018] QICmr [31] (2 July 2018) and *Rylsey Enterprises Pty Ltd and Cassowary Coast Regional Council* [2015] QICmr 13 (12 May 2015)

²⁶ *TerraCom Limited and Department of Natural Resources, Mines and Energy; Lock the Gate Alliance Limited* [2018] QICmr [31] (2 July 2018)



Where the process is partially completed

The above does not apply if the process is only partially finished.

Even if some deliberations have been completed, if the deliberations in the information remain ongoing, if the government is still engaged in internal deliberations and consultation, and/or if it has not yet reached its final position, the prejudice factor will continue to apply and the harm factor will not be reduced.²⁷

4.2 *The deliberative process harm factor*

The deliberative process harm factor states that a public interest harm is caused if deliberative process information is disclosed. Decision makers will need to weigh up the information and the circumstances to decide the nature and extent of the public interest harm that could result from the disclosure.

4.2.1 *Deliberative process excluded from the harm factor*

The harm factor also contains exceptions, ie information that is **excluded** from the harm factor. Before applying the harm factor, decision makers should check to see if the information falls within an exception. If so, the harm factor does not apply to it.

However, information that falls within these exceptions is still deliberative process information and decision makers will need to consider whether the prejudice factor applies.²⁸

4.2.1.1 *Exception: Policy documents*

The harm factor will not apply to deliberative process information that appears in an agency's policy documents.

4.2.1.2 *Exception: Factual and statistical material*

Deliberative process information that consists of factual and/or statistical material is excluded from the harm factor.

For example, in *Barling and Brisbane City Council*,²⁹ the Commissioner decided that calculations as to the amount of estimated backpay owed to the applicant were a deliberative process, but because they were purely factual, the harm factor did not apply.

²⁷ *North Queensland Conservation Council Incorporated and Queensland Treasury* [2016] QICmr 9 (29 February 2016). Also see *North Queensland Conservation Council Inc. and Department of State Development* [2016] QICmr 46 (4 November 2016) and *North Queensland Conservation Council Inc and Queensland Treasury* [2016] QICmr 21 (10 June 2016)

²⁸ *Barling and Brisbane City Council* [2017] QICmr 47 (15 September 2017)

²⁹ [2017] QICmr 47 (15 September 2017)



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4.2.1.3 Exception: Expert opinion or analysis

Expert opinion or analysis³⁰ is excluded from the harm factor unless it was:

- commissioned in the course of the deliberative process; or
- commissioned for the deliberative process.

For example, in *Beilby and Brisbane City Council*³¹, the documents included an expert opinion/analysis from a recognised expert in the relevant field. However, as the Council had commissioned it for the purposes of its deliberative processes relating to flood mitigation, the Commissioner found that the harm factor applied.

4.2.1.4 Exception: A report of a body or organisation within the agency

Any report prepared by a body or organisation that is established within the agency and is prescribed under a regulation is excluded from the harm factor.

4.2.1.5 Exception: Final decision, order, or ruling

If there's been a power, an adjudicative or a statutory function, or the administration of a publicly funded scheme exercised to give a:

- final decision
- order or
- ruling;

then the record of the final decision, order, or ruling that forms the formal statement of reasons is excluded from the harm factor.

4.3 The deliberative process prejudice factor

For the deliberative process prejudice factor to apply, a reasonable expectation of prejudice to the relevant deliberative process must be established. This is harm to the actual process itself.

When considering whether this factor applies, decision makers should first determine:

- if the relevant deliberative process has concluded; and
- if there is any outstanding government decision to be made.

If it has concluded and there is no decision left to be made, the factor will not apply³² (see above for discussion of this point).

³⁰ By a person recognised as an expert in the field of knowledge to which the opinion or analysis relates.

³¹ [2015] QICmr 1 (14 January 2015)

³² *TerraCom Limited and Department of Natural Resources, Mines and Energy; Lock the Gate Alliance Limited* [2018] QICmr [31] (2 July 2018)



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If the process is not finalised, decision makers will need to consider the information, what it reveals about the relevant deliberative process, and what potential prejudice could be caused to that process if it was disclosed.

The fact that a relevant process is ongoing, does not, of itself, permit a conclusion that disclosure would, on balance, be contrary to the public interest.³³ For example, in *Barling and Brisbane City Council*,³⁴ the deliberative process (calculations and determination of applicable pay rates) was ongoing, but any potential prejudice to it was outweighed by other public interest factors.

The Commissioner has recognised that prejudice can be caused to a deliberative process where releasing a document would:

- cause disruptive public debate
- require reallocation of resources to deal with the disruption (resources which would otherwise be involved in finalising the deliberative process); and
- result in interference with the ability of an agency to objectively consider its options and reach a decision.³⁵

It would be rare, however, for any anticipated disruption (particularly given the requirement to disregard any potential mischievous conduct by the applicant³⁶) to rise to a level that would amount to an injury to the public interest.³⁷

If the decision maker concludes that disclosure of the information could not reasonably be expected to prejudice the deliberative process, the prejudice factor will not apply.

4.4 **Balancing the factors**

The deliberative process prejudice and harm factors are just two public interest factors among the many a decision maker must consider. There will, in almost all cases, also be numerous factors favouring disclosure.

The nature of deliberative process information is such that it attracts strong accountability and transparency factors favouring disclosure, and these factors must be balanced against the factors favouring nondisclosure.

³³ *Johnson and Department of Transport; Department of Public Works* (2004) 6 QAR 307 at [39]. While this decision was made under the now repealed FOI Act, it remains relevant to the public interest test under section 49 and provides useful analysis of the wording still used in schedule 4, part 4, item 4 of the RTI Act..

³⁴ [2017] QICmr 47 (15 September 2017)

³⁵ *Pallara Action Group Inc and Brisbane City Council* (Unreported, Queensland Information Commissioner, 21 September 2012) at [42]-[43] and *Johnston and Brisbane City Council* (Unreported, Queensland Information Commissioner, 6 December 2013) at [39] and [42].

³⁶ Irrelevant factor 3, schedule 4, part 1, that the decision maker is required to identify and disregard.

³⁷ *Eccleston*



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These factors favouring disclosure are likely to include that disclosure:

- could reasonably be expected to promote open discussion of public affairs and enhance the Government's accountability³⁸
- could reasonably be expected to inform the community of the Government's operations, including, in particular, the policies, guidelines and codes of conduct followed by the Government in its dealings with members of the community³⁹
- could reasonably be expected to advance the fair treatment of individuals and other entities in accordance with the law in their dealings with agencies⁴⁰
- could reasonably be expected to reveal the reason for a government decision and any background or contextual information that informed the decision⁴¹.

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.

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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³⁸ Schedule 4, part 2, item 1

³⁹ Schedule 4, part 2, item 3

⁴⁰ Schedule 4, part 2, item 10

⁴¹ Schedule 4, part 2, item 11