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State Records
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FOI and the Public Interest

Guideline

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Introduction

The *Freedom of Information Act 1991* (FOI Act) confers upon members of the public and Members of Parliament a legally enforceable right to access documents held by Government agencies, subject to certain exemptions.

State Records provides support to the Minister responsible for the administration of the FOI Act. This includes policy and legislative advice, the development of information sheets and guidelines, reporting, the management of the Freedom of Information Management System (FOIMS) and responding to enquiries from members of the public and agencies in relation to FOI.

Purpose

The purpose of this guideline is to give advice to agencies in relation to weighing public interest factors when determining FOI applications.

Right to Access Information

The objects of the FOI Act are to promote openness and accountability in government and facilitate effective participation by members of the public in the making and administration of laws and policies. The objects encourage disclosure of information over non-disclosure.

The objects are achieved by:

- ensuring that information concerning the operation of government is readily available
- conferring a legally enforceable right to be given access to documents held by government, subject only to such restrictions as are consistent with the public interest and the preservation of personal privacy.

The right to access government information provided by the FOI Act is not absolute. Section 12 provides that a person has a legally enforceable right to be given access to documents in accordance with the FOI Act. The FOI Act contains exemption provisions critical to balancing openness and accountability in government with the need to restrict access to some information to protect business and personal affairs and the proper working of government. These exemption provisions are contained in Schedule 1 of the FOI Act.

There are two types of exemption provisions. The first applies to certain types of documents without the need to refer to the effects of disclosure, eg documents subject to legal professional privilege. The second applies to documents only if it can be demonstrated that disclosure would be contrary to the public interest, eg internal working documents.



The Public Interest

The term 'public interest' appears in a number of exemption clauses in the FOI Act. There is no statutory definition for 'public interest' with a number of FOI reviews finding that it would be difficult to define given it would '*...change over time and according to the circumstances of each situation.*'¹

The public interest has been described as something that is of serious concern or benefit to the public. It is not usually something of individual interest, although it can be. It is an interest that is common to the community as a whole (or a substantial segment of it).

Where an Accredited FOI Officer determines that disclosure of information is in the public interest they must be satisfied that the benefit to the public resulting from disclosure will outweigh other public interests of non-disclosure. This is commonly known as the public interest test.

This guideline sets out a number of factors relevant to determining the public interest, however agencies must consider each application on a case by case basis. The list of factors relevant to determining the public interest is a starting point only and should not limit the agency in considering other factors.

Weighing the Public Interest

When considering an exemption that contains a public interest test the onus is on the Accredited FOI Officer to ascertain and then assess the relevant factors. A public interest test requires an assessment on why disclosure would, on balance, be contrary to the public interest. The reference to 'on balance' indicates the need to weigh up competing public interests before making a decision. It is critical that factors both for and against disclosure are assessed. The factors must include an explanation of the specific harm that may occur as a result of disclosure remembering that factors may be weighted differently in different circumstances.

Some of the factors in favour of disclosure may appear to contradict the factors favouring non-disclosure. Such contradictions are unavoidable given that the interests of the community and individuals within the community often differ and sometimes conflict. This is why applying the public interest test can be difficult and complex.

There is no restriction on the number of factors that an Accredited FOI Officer can consider when determining the public interest. A comprehensive argument will provide a better decision and is more likely to withstand scrutiny in the event of a review or an appeal. The process of weighing the public interest must be recorded to provide evidence as to why a decision to disclose or not to disclose a document was made.

¹ ALRC/ARC Report 77 Open government: a review of the federal Freedom of Information Act 1982



Public interest factors in favour of disclosure

The following information is provided to assist an Accredited FOI Officer determine why disclosure of a document may be in the public interest. The Accredited FOI Officer may also consider consulting the applicant to identify any additional factors that could be considered. This does not include asking the applicant why they want the information.

Meeting the objects of the FOI Act

- The District Court in South Australia held that the objects of the FOI Act impose a bias in favour of providing access to documents – therefore meeting the objects of the Act should be considered as a public interest factor to be weighed in favour of disclosure (*Moore v Registrar Medical Board SA* (2001) SADC 106).

Promoting public participation in government

- Allowing access to information about issues currently being considered by government is vital for public participation and informed debate.
- It is important that the operations of government and the thinking processes behind government decision-making are open to scrutiny so that the government can be held accountable for its decision-making.

Providing documents of community interest

- Disclosure of information about issues of general concern to the community can assist individuals make decisions about their own activities.
- Providing information about government spending, public health and safety, protection of the environment and the enforcement of the law, can be of significant value to the community.
- Providing information about possible deficiencies in government can help bring about valuable improvement and necessary change.

Providing an individual with information about their personal affairs

- Providing individuals with the information government holds about them and allowing them to seek amendment if they consider the information is incomplete, incorrect, out-of-date or misleading is an essential right of all members of the public.

Providing an individual with information of special interest to them

- There may be a public interest in allowing individuals with a special interest in a particular matter to obtain information of relevance to them. For example, there may be a public interest in a complainant accessing information about how their complaint was handled.

Facilitating research and innovation

- Providing access to research information will often allow reuse of the information that could provide opportunities for economic or social development.



Public interest factors that may favour non-disclosure

The following factors may assist Accredited FOI Officers in determining why disclosure would not be in the public interest.

Satisfying the elements of an exemption clause

- Satisfying the elements of one or more exemption clause that contains a public interest test may be an indication that disclosure would not be in the public interest, especially where the elements are easily satisfied.

Ensuring efficient and effective conduct of government functions

- It may not be in the public interest to disclose information that would adversely affect the efficient and effective conduct of government functions. For example when access is sought to documents in draft form, which, if released, could impair the integrity and/or viability of the agency's decision-making process. It should be noted that once a decision has been made the argument not to provide access is weakened and there may be a public interest in disclosure of draft documents that show how the decision was developed (see *Ipex Info Tech v Dept of Info Tech Services* (1997) SADC 3618 (16 June 1997) Lunn J).

Maintaining free and frank advice to government

- While the FOI Act provides a legally enforceable right to access information held by government it also balances this with the adverse impact release of some documents could have on the conduct of public affairs. That is, it recognises that access to documents may need to be refused where it can be demonstrated that 'free and frank expression of opinions' will be restricted, particularly by those who provide advice to government. This advice can originate from both within and external to government.
- Consideration of this factor would usually relate to decision making and policy development at highest levels of government where candour and freedom to explore a number of options are paramount to the proper workings of government. Release of information should not discourage public servants from providing unfettered advice to Ministers.
- Claiming that disclosure of certain information would not be in the public interest because it would prevent free and frank advice to government must be considered on a case by case basis and supported by factual evidence of the harm and damage it could cause to government.

Protecting the personal information of an individual

- The privacy surrounding the personal information of an individual (other than the applicant) may outweigh the public interest in the applicant having access to the information they seek (*Barbaro v Liquor Licensing Commissioner* (1995) SADC D3240 (6 April 1995) Noblet J).
- Disclosure of information should not interfere with or threaten the way law enforcement or other regulatory authorities perform their functions.



Factors excluded from consideration of the public interest

The FOI Act does not specify matters that should be excluded from consideration for the purposes of weighing the public interest. However, the following factors are generally considered not to be sufficient to form the basis of an argument that disclosure would, on balance, be contrary to the public interest.

Embarrassment or inconvenience to the Government

- The possibility of embarrassing or inconveniencing the Government is irrelevant to whether a document should or should not be disclosed (see *Ipex Info Technology v Dept Info Tech Services* (1997) SADC 3618).

Potential loss of confidence in the Government

- It is irrelevant whether the release of information could cause a loss of confidence in the Government.

Author of the document was (or is) of high seniority in government

- It would be very difficult to justify that disclosure of a document would be contrary to the public interest simply because it was authored by someone working in a senior position in government.

Information is incomplete or confusing and could be misinterpreted

- The possibility that information is incomplete or confusing and may be misinterpreted or misunderstood by an applicant is not enough to claim disclosure of a document would be contrary to the public interest.
- While release of particular information may have the potential to create ill-informed speculation and/or public confusion, it would be difficult to claim as a reason not to disclose information unless it is supported by factual evidence of the harm it would cause.
- If there is concern that information may not be understood or could cause confusion agencies are encouraged to release additional information to support and provide context to information they release.



References

The NSW FOI Manual – A joint publication of NSW Department of Premier and Cabinet and the NSW Ombudsman, August 2007.

Australian Law Reform Commission (ALRC)/Administrative Review Council (ARC), Open Government: a review of the federal Freedom of Information Act 1982, ALRC Report No. 77, ARC Report No. 40, November 1995. Further Information and Assistance

FOI – Public interest test in exemptions – Office of the Information Commissioner Northern Territory <http://www.infocomm.nt.gov.au/foi/public.htm>

Practice Guidelines - Official Information New Zealand
<http://www.ombudsmen.govt.nz/imagelibrary/100117.pdf>

The Right to Information – Reviewing Queensland Freedom of Information Act (June 2008)
Dr David Solomon AM

For further information in relation to public interest considerations please contact the FOI and Privacy team at State Records via email at foi@sa.gov.au or telephone 8204 8786.