

Clause 4(2)

Commercial information

This is a plain English guide to the application of the exemption in clause 4(2) of the FOI Act. An agency can refuse access to exempt matter or an exempt document. The word “matter” refers to a piece of information. It can be a whole page or part of a page, or a single word or figure on a page. Parts of a page can be exempt when other parts are not. Exemptions are not mandatory; agencies have discretion to disclose documents that may be technically exempt where that may properly be done.

Purpose

Clause 4(2) forms one part of the three-part exemption in clause 4. The purpose of the exemption in clause 4 is to prevent unwarranted commercial disadvantage to a business or a person from whom the government obtains information.

The business or the person concerned is called a **third party**.

“person”

The person can be a single person, such as a sole operator of a business, or it can be a public body, a company, an incorporated or an unincorporated business or association.

The definition of “person” in the *Interpretation Act 1984* applies.

A NOTE OF CAUTION

Clause 4 describes 3 distinct categories of information and there is no over-lap between them. This means that the same matter cannot be exempt under more than one of the subclauses in clause 4.

Clause 4 applies to information supplied by third parties. If an agency wishes to claim exemption for its own commercial information, then it must use clause 10.

The exemption in clause 4(2) applies to commercially valuable information. It does not apply to information of the kind described in subclauses 4(1) and 4(3).

Criteria

Two criteria must be satisfied:

- ◆ the information must have a commercial value to a person

AND

- ◆ some loss or diminution of that commercial value could reasonably be expected to follow from its disclosure.

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What kind of information may have a commercial value?

Information may have a commercial value if it is valuable for the purposes of carrying on the commercial activities of the business or person concerned. Agencies should **consult** the business or person concerned and **consider the context** in which the information is used or exists to help them decide whether the information has a commercial value.

The investment of time and money, for example, to commission a consultant to compile a particular report, does not mean that the information in the report is commercially valuable. The **cost** of obtaining information may be a **relevant factor**, but it is not decisive.

Possible examples

- Information about prices that are calculated according to a special formula; future business plans; price structures used by a business and the components of those structures; wages policies that give a competitive edge; and the nature of, and techniques used in tests, might have a commercial value.
- Information may have commercial value if it is secret and known only to the person concerned. Unless a person is well known to the agency, it is important to consult before forming a view about the value of the information in question. Agencies must ask questions of the person and not merely accept at face value the claims that are made about the value of particular information.
- Commercial value must be determined at the time of the FOI request. If information had a commercial value when it was given to an agency, it may no longer have any commercial value when the application for access is made.

What kind of information may not be commercially valuable?

Information that is in the public domain, such as in published research papers, trade journals or the like or in published Annual Reports, or information that is included in contract specifications or tender documents.

“could reasonably be expected”

- ◆ A reasonable expectation is one for which real and substantial grounds exist, not merely a possibility or speculation. It is not enough to just assume that disclosure will result in some kind of adverse consequences.
- ◆ The test is whether the expectation of loss or diminished value is reasonable, rather than absurd, irrational or ridiculous.

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When is the expectation of loss or diminished value reasonably based?

To answer this question the agency must make proper inquiries with the third party and consider the context in which the information is used or exists.

An example might be certain business information that is given to an agency in a tender document where the information concerns the commercial viability of the third party.

Relevant issues

- The extent to which the information is in the public domain.
- The extent to which the information is common knowledge in the particular industry.
- The significance of the information in the commercial context of the business of the third party.

Further reading

Re Caruth and Department of Health, Housing, Local Government and Community Services (unreported, 18 June 1993), at paras 54-59—Information about stability and shelf life of a pharmaceutical product, why the formulation was changed and the agency's response to the new formulation were found to have a commercial value.

Re Pfizer Pty Ltd and Department of Health, Housing and Community Services (1993) 30 ALD 647 at 676—Test techniques and tests results had a commercial value.

Re The Staff Development and Training Centre and Secretary, Department of Employment, Workplace Relations and Small Business [2000] 300 AAR 330 at 365-368—A departmental Operations Manual that assisted in determining the financial viability of tenderers did not have a commercial value.

Re Cannon and Australian Quality Egg Farms Limited (1994) 1 QAR 491—Discussion by Queensland Information Commissioner about the purpose of the exemption, the mutual exclusivity of the three exemptions, and the meaning of the term "commercial value".

Re GSA Industries (Aust) Pty Ltd and Brisbane City Council and GS Technology Pty Ltd (1994) 2 QAR 49—Information about innovative aspects of water meter assemblies had been deposited with the Australian Patents Office where it could be accessed by the public. Disclosure could not reasonably be expected to destroy or diminish its commercial value.

Clause 4(2)

Clause 4(2) of Schedule 1 to the FOI Act is in the following terms:

“4. Commercial or business information

Exemptions

...

(2) *Matter is exempt matter if its disclosure -*

- (a) *would reveal information (other than trade secrets) that has a commercial value to a person; and*
- (b) *could reasonably be expected to destroy or diminish that commercial value.”*

Note — Clause 4(2) is not limited by a “public interest” test.

Decisions of the Information Commissioner

The following decisions of the Information Commissioner are included as a further reference guide to the application of the exemption in clause 4(2). The full decision and reasons, as well as other relevant decisions, can be found at the Information Commissioner’s web site at <<http://www.foi.wa.gov.au>>.

Re E and L Metcalfe Pty Ltd and Western Power Corporation [1996] WAICmr 23—Information about the relationship between certain companies and details of products did not have a commercial value. The information was common knowledge in the private sector industry; the documents were 18 months old and the information was out of date.

Re Precious Metals Australia Limited and Department of Minerals and Energy [1997] WAICmr 12—The Information Commissioner rejected claims that information paid for by the complainant concerning the right to prospect and mine tenements had a commercial value.

Re Belmont Forum Shopping Centre Pty Ltd and Ministry for Planning and Westfield Limited and Jebb Holland Dimasi Pty Ltd [1997] WAICmr 32—Information about the current and future projected retail turnover of the Westfield Group had a commercial value and would be valuable to competitors in the business of constructing shopping centres. It related to design proposals and future commercial expansion of a particular shopping centre that would be in direct competition with those of the applicant. Some loss or diminution of that commercial value was an expectation that was reasonably based.

Re Buddhist Society of WA (Inc) and Main Roads Department and BGC Contracting Pty Ltd [1999] WAICmr 38—Information in an Annual Extra Mass Permit issued to BGC, which permitted it to reconfigure heavy vehicles to carry increased loads, did not have a commercial value that could be destroyed or diminished by disclosure of the permit. The Information Commissioner considered that the commercial value of the information was lost once the vehicles were used on the open roads where the number of tyres and the configuration of loads were readily observable.

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