

# clause 4(3)

## Commercial or business information

This is a plain English guide to the application of the exemption in clause 4(3) 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(3) forms one part of the 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 who the government obtains information.

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

### “person”

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

### 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(3) applies to certain kinds of information. It does not apply to information of the kind described in subclauses 4(1) and 4(2), i.e. trade secrets and information of commercial value.

### Criteria

For the exemption to apply, the document must contain information about:

- the business, professional, commercial or financial affairs of a person.

#### AND

- disclosure could reasonably be expected to either
- adversely affect those affairs,

#### OR

- prejudice the future supply of information of that kind to the Government or to an agency.

# Clause 4(3)

**Information about the business, professional, commercial or financial affairs**

- The information in question must be “**about**” or “**regarding**” the business, professional, commercial or financial affairs of a person. In terms of the exemption clause, it is not enough if the information is merely received from a person. Its disclosure must reveal something about the business, professional, commercial or financial affairs of the person for the first part of the exemption to apply.
- There is substantial overlap between the four categories of information mentioned and the phrase “business, professional, commercial or financial affairs” does not establish four distinct and exclusive requirements.
- The common factor is that the activities carried on by the person are for the purpose of generating income or profits.

**Professional affairs**

These words refer to the work activities of persons who are admitted to a recognized profession and who offer their professional services to the public for a fee.

**“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 expected adverse effect is reasonable, rather than absurd, irrational or ridiculous.

**What is an adverse effect?**

The answer to this question depends on the context in which the information is used by or concerns the business interests of the person. The adverse effect is most likely to be pecuniary in nature. Examples of adverse effects might be:

- Rendering a business less competitive
- Diminishing market-share of a commodity
- Revealing future marketing strategies
- Revealing markets to be targeted in the future

**Relevant Factors**

- Whether the person is a monopoly business.
- Whether the information is in the public domain or has been published in some way, such as in an Annual Report to shareholders.
- The degree of competition in the industry concerned.
- The effect of disclosure to a competitor, even though the applicant may not be a business competitor.

# Clause 4(3)

## Prejudice the future supply of such Information

- ◆ This requirement is directed at the ability of the government or agencies to obtain the the same or similar kinds of information in the future from the sources generally available to it.
- ◆ Even if the giver of the information says that it will not provide information in the future, that will not be enough to establish the exemption. The test is whether a substantial number of third parties who would normally provide that kind of information to the government or to agencies would refuse to do so if disclosure were to occur.
- ◆ If it is established that a substantial number would provide less detailed information in the future, that may be sufficient to establish the third criteria.
- ◆ Prejudice means “harm” or “injury” resulting from disclosure. Ask whether the ability of the agency to obtain that kind of information in the future be impaired (ie. harmed or injured) by disclosure of the particular document? If so, how?
- ◆ What material is there to support the view that disclosure would cause such harm? [Explain what it is and give your reasons].
- ◆ If information must be provided in order to gain some benefit, licence or approval from a government agency, it is unlikely that a reasonable expectation of prejudice to the future supply of that kind of information can be established.

## The limit on exemption in clause 4(7)

If a document or information satisfies all of the requirements of clause 4(3), then the public interest test must be applied. This requires an agency to weigh the public interest factors for and against disclosure [See the guide on the public interest test] .

## Further Reading

*Re Cannon and Australian Quality Egg Farms Limited* (1994) 1 QAR 491– general discussion about the equivalent exemption in the Queensland FOI Act.

*Re Cairns Port Authority and Department of Lands* (1994) 1QAR 663—discussion about the character of the information referred to in the exemption clause.

*Re Stewart and Department of Transport* (1993) 1QAR 227—discussion about the terms “business affairs”.

# Clause 4(3)

Clause 4(3) is in the following terms:

4(3) *Matter is exempt matter if its disclosure -*

(a) *would reveal information (other than trade secrets or information referred to in subclause(2)) about the business, professional, commercial or financial affairs of a person; and*

(b) *could reasonably be expected to have an adverse effect on those affairs or to prejudice the future supply of information of that kind to the government or to an agency.*

**Note that there are limits on this exemption**

**Clause 4(4) states that matter is not exempt merely because disclosure would reveal information about the business, professional, commercial or financial affairs of an agency.**

**Clause 4(5) states that matter is not exempt merely because disclosure would reveal information about the business, professional commercial or financial affairs of the applicant.**

**Clause 4(6) states that matter is not exempt if the person consents to disclosure.**

**Clause 4(7) states that matter is not exempt under clause 4(3) if its disclosure would, on balance, be in the public interest.**

## Decisions of the Information Commissioner

The following decisions of the Information Commissioner are included as a further guide to the application of the exemption in clause 4(3). The full decision and reasons can be found on the Information Commissioner's web site at <<http://www.foi.wa.gov.au>>. All decisions of the Information Commissioner involving a consideration of the exemption in clause 4(3) can be found at that source.

*Re Strelley Pastoral Pty Ltd and Others and Dept of Land Administration* [1995] WAICmr 9—Agricultural Inspection Report contained information about commercial affairs of a lessee, but disclosure could not reasonably be expected to result in forfeiture of the lease. Other legal and administrative requirements were necessary before this would occur. The document was not exempt under clause 4(3).

*Re E and L Melcalfe Pty Ltd and Western Power Corporation* [1996] WAICmr 23—letter to agency from a third party contained information about the business affairs of the third party. However, disclosure would not benefit a competitor or produce any adverse effects and it was not exempt under clause 4(3).

*Re Kobelke and Department of Productivity and Labour Relations* [1998] WAICmr 17—documents containing information about advertising charges, breakdown of costs and contract negotiations were about the business and commercial affairs of a third party. There was strong competition in the advertising industry and the costs structure negotiated by the third party were secret. Disclosure would enable competitors to calculate charges and affect the competitiveness of third party. Information was found to be exempt under clause 4(3).

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