

Clause 6

Deliberative Process

This is a plain English guide to the application of the exemption in clause 6 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 a discretion to disclose documents that may be technically exempt where that may properly be done.

Purpose

The exemption in clause 6 ensures effective public administration by protecting from disclosure material forming part of the decision-making of agencies or of the government, when circumstances require confidentiality of those deliberations.

Criteria

The exemption will only apply if the information is **either**:

- opinion, advice or recommendation that has been obtained, prepared or recorded; **or**
- any consultation or deliberation that has taken place

AND

- it was obtained, prepared, recorded or it took place in the course of, or for the purposes, of the deliberative processes of the Government or an agency

AND

- disclosure would be **contrary** to the public interest.

What are deliberative processes?

Deliberative processes are “thinking processes”. It refers to the way that an agency makes decisions. It involves the gathering of information from a wide variety of sources, including consultation with people inside agencies and also outside agencies, and weighing or considering carefully all of the information and facts obtained with a view to making a decision or reflecting upon the reasons for or against a particular choice.

Identifying the particular deliberative process

Agencies make decisions every day, but not all of those decisions will be covered by the exemption in clause 6. To decide whether information is of the relevant kind, an agency should identify or describe the particular deliberative process. Sometimes it helps to briefly describe the context in which a document was created or information was obtained or recorded. It is also helpful to identify the stage the deliberations have reached and whether or not a decision has in fact been made.

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“in the course of, or for the purposes of”

These words indicate that there must be a connection between the information and the particular deliberative process.

What kind of documents contain information relating to the deliberative processes?

- ◆ Documents about the formulation and making of policy.
- ◆ Documents or draft reports prepared for discussion.
- ◆ Records of discussions of inter-agency and intra-agency committees.
- ◆ Interim and draft reports.
- ◆ Documents relating to the “give and take” of decision-making.

What kind of information may not be covered by the exemption?

- ◆ Documents disclosing the final decision and its implementation.
- ◆ Administrative documents and those dealing with routine matters.
- ◆ Information that is purely factual or statistical.
- ◆ Information in the guidelines, internal manuals and administrative instructions issued by agencies.

Disclosure may be contrary to the public interest if:

When is it contrary to the public interest to disclose deliberative process documents?

- Deliberations are on-going and disclosure would have the effect of interfering with those deliberations. An example might be when it would have the effect of preventing an agency from obtaining necessary information if people are reluctant to contribute to the discussion.
- Deliberations are on-going and disclosure would have the effect of diverting the discussion to unrelated matters.
- A decision is imminent.
- Premature disclosure would be detrimental to a successful outcome or proper conclusion of the decision-making process. An example might be if a document discloses a particular point of view or recommendation that could be subject to change.
- Some other essential public interests are likely to be harmed in some way.

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Weighing competing public Interests

Documents containing information which relates to the deliberative processes of an agency or the Government are not automatically exempt as a “class” of documents. It is necessary to weigh and balance the competing interests for and against disclosure.

FOR - The public interest in citizens being informed of the processes of government; the means by which decisions are made; and enabling citizens to contribute in a meaningful manner.

AGAINST - The public interest in the proper workings of government and its agencies.

Some relevant Issues to consider

- Is the document to be disclosed no later than after the decision to which it relates is made? If yes, then the public interest in the proper workings of government and its agencies might carry more weight. However, it is part of the public interest that the public is informed and know of the options being considered by agencies. The public interest against disclosure is to ensure effective public administration; it is not to protect Ministers or agencies from scrutiny of reasons underlying their decisions.
- Is the document setting out options or is it arguing for a particular choice? Disclosure of information about options may serve the public interest by promoting discussion and debate and informing the public about the importance of certain issues.
- If the document contains advice, is the person giving the advice in a neutral position or does it favour a particular interest group or a particular position? There is a public interest in knowing the source of advice and whether it is given objectively.
- Would release of the document give an advantage to individuals or groups to which they are not entitled? If circumstances require a “level playing field”, then the public interest against disclosure might carry more weight. However, it may not be contrary to the public interest to ensure that all parties have access to the same information.
- Who was the author or the document and who was the recipient ? The public interest in ensuring effective administration might require that confidential advice given at the highest levels of government should not be disclosed. Examples might be correspondence between Ministers, or between Commonwealth and State Ministers.
- **The need for candour and frankness in agencies and between agencies is unlikely to justify non-disclosure without a factual basis for the claim.**

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Further reading

Re Waterford and Department of Treasury (No 2) (1984) 5 ALD 588— for a discussion about the deliberative process.

Re Murtagh and Commissioner of Taxation (1984) 54 ALR 313—reasons for rejecting the “candour and frankness” argument.

Re Harris v Australian Broadcasting Corporation (1983) 50 ALR 551—for a discussion of relevant public interest factors.

Ministry for Planning v Collins (1996) 93 LGERA 69—for a discussion of clause 6 in the context of the WA FOI Act.

Clause 6(1) is in the following terms:

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

(a) *would reveal -*

(i) *any opinion, advice or recommendation that has been obtained, prepared or recorded; or*

(ii) *any consultation or deliberation that has taken place,*

in the course of, or for the purpose of, the deliberative processes of the Government, a Minister or an agency; and

(b) *would, on balance, be contrary to the public interest."*

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 6. 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 Read and Public Service Commission [1994] WAICmr 1-file notes containing data gathered during an agency's investigation into an employee grievance were not considered to be part of the deliberative processes of the agency.

Re Veale and Town of Bassendean [1994] WAICmr 4-memorandum prepared by former Town Clerk which identified problems for consideration by the Council of the agency was not a deliberative process document.

Re Rindos and the University of Western Australia [1995] WAICmr 20 - documents relating to an in-house review of the tenure of a senior academic were part of the deliberative process, but disclosure was not contrary to the public interest.

Re Collins and Ministry for Planning [1996] WAICmr 41 – documents relating to the deliberative processes of setting a price for purchasing land and outlining options for consideration by the WA Planning Commission were deliberative but disclosure was not contrary to the public interest.

Re Martin and Ministry for Planning [2000] WAICmr 56 - reports of consultants containing planning options, alternatives and environmental issues were deliberative, but disclosure would enable public to participate in policy formulation, therefore, it was not contrary to the public interest to disclose the reports.

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