

# EXEMPTIONS – OVERVIEW OF SOME KEY EXEMPTION ISSUES UNDER THE FREEDOM OF INFORMATION ACT 2011

Maurice Asielue

Principal Partner

Westfields Legal Practitioners

An exemption is simply a valid reason for refusing to disclose information.

FOIA 2011 contains 7 exemptions to the right of access and they set boundaries to this right of access.

If information is exempt generally no right of access.

## Role of Exemptions under FOIA

To ease the tension between: right to access information and duty of responsible release by ensuring a proper balance is achieved between

(a) Right to know.

(b) Right to privacy.

(c) Delivery of effective government.

## TYPES OF EXEMPTIONS

1. Non-Qualified Exemption: no need to consider Public Interest Test (Sections 15(2), 16, and 17).
2. Qualified Exemption: Public Interest Test to be considered (Sections 11, 12, and 14).

3. Injury-based Exemption: Qualified exemption where injury to the specified purpose of the exemption is considered (Sections 11 and 12).

4. Discretionary Exemption: Exemption that may be disclosed even where the exemption can be validly applied to deny a FOIA application (Sections 16 and 17).

# TWIN TESTS FOR FOIA EXEMPTIONS

1. INJURY TEST.

2. PUBLIC INTEREST TEST.

## INJURY TEST

Sections 11, 12, 14, 15(1) and 19 are exemptions in which disclosure:

(a) 'may' cause harm (simple possibility or fair chance of injury).

(b) 'could reasonable expected to to' cause harm (reasonable expectation or likely).

(c) 'would' cause harm (significant and real).

## PUBLIC INTEREST TEST (PIT)

Not defined under the Act.

Public institution is making an informed decision on whether in the circumstances of the FOIA application it serves the public better to withhold or disclose information by balancing factors for disclosure against the injury identified under the section.



## **KEY MESSAGE**

Under FOIA, PIT is weighted in favour of refusing the information.

There is a presumption that the specified harm outweighs the public interest in disclosure.

## PUBLIC INTEREST TEST (PIT)

Under Sections 11, 12 and 19 the institution must disclose information if the PIT in disclosure outweighs the harm identified.

“Outweigh” criterion is easier threshold to argue for disclosure; and is present in Discretionary Exemptions where the public institution may disclose even when the exemption validly applies.

Under Sections 14 and 15(4) the institution must disclose information if the PIT in disclosure clearly outweighs the harm identified.

Under “clearly outweigh” criterion it is more difficult to argue for disclosure; and the public institution must withhold the information once the exemption validly applies (subject to consent and publicly available exceptions).

## THINGS TO CONSIDER IN PIT

1. Is the information already in the public domain?
2. The passage of time generally diminishes the public interest in withholding information.
3. The distinction between “what interests the public”; and “what is in the public interest”.

## PIT – PRIMARY FACTORS FOR DISCLOSURE:

1. Promoting accountability and transparency (in decisions and spending of public funds.
2. Public participation in government and governance.

## PRIMARY FACTORS AGAINST DISCLOSURE

1. Injury set out in the exemptions.
2. Injury to the effective conduct of government business.
3. Injury to the formulation of policy and the economy.

## KEY MESSAGE

Before applying an exemption, the exemption **MUST BE ENGAGED**. If it is not engaged then the exemption does not apply. Consequently, the information must be released.

**Example 1:** for injury-based exemptions the injury must initially be established before the PIT can be considered.

**Example 2:** Under Section 17 information must initially be privileged before it can be refused.

**Example 3:** Under Section 19, information must initially belong to the class of information specified before PIT can be considered

## SECTION 14 – PERSONAL INFORMATION

If the requested information is in the class of information listed in Section 14 (1) it is personal information (and engaged).

Section 14 assumes the privacy of a person must be protected except the public interest in disclosure clearly outweighs this privacy.

Section 14 is not a Discretionary Exemption.



## SECTION 14 – PERSONAL INFORMATION

Once the this exemption is validly applied (i.e. it is engaged and public interest in disclosure does not clearly outweigh the privacy of the person) personal information cannot be disclosed under the Act EXCEPT the individual consents to its disclosure or the information is in the public domain.

Section 14 assumes the privacy of a person must be protected except the public interest in disclosure clearly outweighs this privacy.

## SECTION 14 – PERSONAL INFORMATION

Privacy of the person:

(a) Fairness and potential adverse effects of disclosure.

(b) Reasonable expectations of the individual during collection of information.

(c) Special circumstances, e .g. whistleblower.

## SECTION 14 – PERSONAL INFORMATION

### Private versus Public life.

Generally high profile public officials or elected politicians should expect that their public actions will be subject to greater scrutiny than their private lives. However , counter argument that *“If you cannot stand the heat do not sleep in the kitchen”* i.e. by seeking to live high profile public life has its consequences.

**POTENTIAL PROBLEM ISSUE:** Health of high profile political office holders.

## SECTION 15 – THIRD PARTY INFORMATION

If the requested information is in the class of information listed in Section 15 (1) it is third party information (and is consequently engaged).

Section 15 assumes the commercial interests of third parties must be protected except the public interest in disclosure clearly outweighs this commercial harm as listed in Section 15(4).

Public institutions purchase many goods and services so would possess sensitive information relating to procurement.

Regulatory institutions may hold information supplied by third parties in order to fulfil their regulatory functions. For example, Central Bank.

Private Public Partnerships to assess potential private sector partners. This category will become increasingly relevant

## SECTION 15 – THIRD PARTY INFORMATION

Not a Discretionary Exemption.

Subject to PIT (including public health and safety, and protection of environment considerations)

Information cannot be disclosed if it contains:

1. Trade Secret, proprietary commercial or financial information.
2. Information that can reasonably interfere with contractual negotiations of a third party.
3. Proposals and bids for contracts.

## EXCEPTIONS

1. If the third party consents to disclosure.
2. If it is publicly available then the exemption is not engaged and must be disclosed, e.g. information obtainable from the Corporate Affairs Commission and various Land Registries.
3. If it is not a trade secret or commercially sensitive information, the exemption is not engaged and must be disclosed.
4. The passage of time may diminish commercial sensitivity.

## EXCEPTIONS - continued

1. If the third party consents to disclosure.
2. If it is publicly available then the exemption is not engaged and must be disclosed, e.g. information obtainable from the Corporate Affairs Commission and various Land Registries.
3. If it is not a trade secret or is commercially sensitive information, the exemption is not engaged and must be disclosed.
4. The passage of time may diminish commercial sensitivity.



## **KEY MESSAGE**

Confidentiality clauses contained within the information very often imposes a legal duty of confidence. Legal advice should be sought.

## SECTION 26 – EXEMPTED INFORMATION

Not a true exemption under the Act. If the requested information is:

1. published material or material available for purchase by the public.
2. Library or museum material.
3. Material placed in National Library, National Museum or non-public section of National Archive

The information is outside the scope of the Act.

## **KEY MESSAGE**

If there is another route to access the information the applicant should utilise it.

# THE END???

Questions