



Information Act Guideline

Prima facie evidence test

When is a “*prima facie*” decision made?

Once the Information Commissioner accepts a Freedom of Information or Privacy complaint, the next stage of the complaint process is investigation.

On completing the investigation, the Commissioner (or delegate) must decide whether there is sufficient *prima facie* evidence to substantiate the matter complained of (s.110).

If there is sufficient *prima facie* evidence, the complaint proceeds to mediation and, if necessary to hearing. If there is not sufficient *prima facie* evidence, the complaint is dismissed.

In almost every case, the investigation is carried out, and the decision on *prima facie* evidence is made, by a delegate of the Commissioner. This allows the Commissioner to be available to conduct a hearing if that proves necessary (see s.128).

This guideline discusses the requirements of the *prima facie* evidence test. More information on the investigation stage of complaints, and the complaints process in general, is available in the *How we deal with Complaints* guideline.

What the *prima facie* evidence test requires

The Information Commissioner’s present view about the requirements of the test is:

1. The test is intended to ensure that a complaint that goes forward to the mediation and hearing stages has substance, so that the time and

resources of the Commissioner and other parties is not taken up in processing a complaint that could not succeed at hearing.

2. The test is made out when, on the material available, inferences are open which, if translated into findings of fact, would establish each of the elements necessary to substantiate the matter complained of.
3. The test is a preliminary one. It does not call for a substantial inquiry. The kind of evidence adduced on a preliminary inquiry of this kind should be in proportion to the nature of such an interlocutory issue. The purpose is to determine by way of a mini rather than a mega trial whether there is sufficient *prima facie* evidence.
4. Questions of law are likely to have a bearing on what evidence is required to establish sufficient *prima facie* evidence to substantiate a complaint. If there is a question of law, the decision-maker should form a view on it for the purpose of deciding whether there is sufficient *prima facie* evidence. It is not sufficient to conclude that the question is arguable, and that on that basis there is sufficient *prima facie* evidence.
5. The issues should not be determined solely on material provided by the complainant. The Commissioner is required to investigate. The decision-maker should consider what avenues of inquiry can reasonably be undertaken in order to establish whether there is sufficient *prima facie* evidence. This may be particularly important in the case of an applicant for access, who has not had the

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advantage of examining information that is claimed to be exempt, and so is not in a position to base submissions or evidence on knowledge of its contents.

6. In cases involving the application of a public interest test, a measured assessment of the relative weights of the competing public interest factors is not required at this stage. A finding of insufficient prima facie evidence will be appropriate if the public interest factors against disclosure so far outweigh the factors for disclosure in the particular case that there could be no real prospect of success by the complainant at a hearing. However, if there is competition between factors of substantive weight favouring disclosure and non-disclosure, assessment of their relative strengths is better left to the hearing stage.

In forming the above views, the Information Commissioner has considered, drawn on and paraphrased comments in a number of cases that have discussed the meaning of “prima facie”. The cases are listed below.

Cases

For discussion of the meaning of “prima facie” in various contexts, see:

- *Dew v Anti Discrimination Commissioner* (1996) 130 FLR 1, at 17, particularly paragraphs 46-47, per Martin CJ
- *Re Waanyi People's Native Title Application* (1995) 129 ALR 100, at 114, per French J
- *WSGAL Pty Ltd v Trade Practices Commission* (1992) 39 FCR 472, at 476, per Beaumont J
- *WA v Vetter Trittler Pty Ltd (In Liq)* (1991) 30 FCR 102, at 110, per French J
- *Costa Vraca v Bell Regal Pty Ltd* [2003] FCA 65 (12 February 2003), paragraph 15, per Merkel J.

For discussion of the approach to questions of law, see:

- *Re Waanyi People's Native Title Application*, at 112 and 115, per French J.



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This guideline is produced by the Information Commissioner to promote awareness and understanding about the *Information Act*. It is not a substitute for the Act. You should read the relevant provisions of the Act to see how it applies in any particular case. Any views expressed in this guideline about how the Act works are preliminary only. In every case, the Commissioner is open to argument by a member of the public or a public sector organisation that a different view should be taken.