

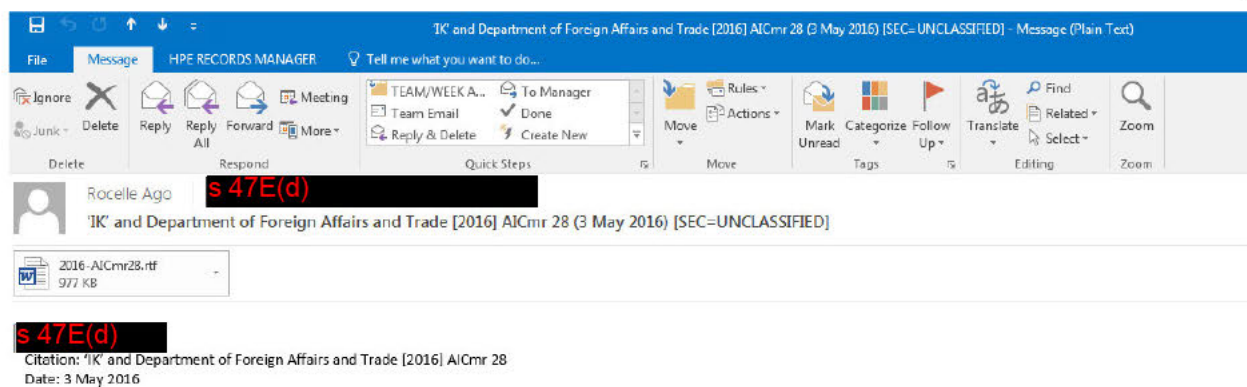
Publication of decision on AustLII

The decision will be sent to AustLII for publication.

To send a decision:

- New email – set the email to plain text. AustLII does not recognise any other email formats.
- Attach rtf file.
- Subject: Decision name/citation [Sec = UNCLASSIFIED]
- To: s 47E(d)
- Email content:
 - Password: s 47E(d)
 - Citation: [citation]
 - Date: [insert]

Example



* Each decision must be sent separately. AustLII cannot process bulk decisions in a single email.

* Where a decision needs to be re-issued (e.g due to errors in the decision):

1. Create a new email and follow the steps above
2. Attach the updated rtf decision file
3. Keep the same details (such as citation in the subject and body of the email) as the original email. AustLII will automatically recognise the entry and overwrite the original entry with the updated decision.

Publication of decision on OAIC website

The OAIC also publishes a table of IC review decisions that also link to AustLII. To update the table:

Send an email to Website@oaic.gov.au that contains the following content:

- Decision*
- Legislative provision
- Catchword summary (from the decision)
- Decision under review
- IC review decision

Example

RE: 2016 IC review decisions 23-26 [DLM=For Official-Use-Only]

Hi Amanda

Could you please publish the following entries? The decisions will be available on AUSTLII tomorrow.

Decision	Legislative provision/s	Catchword summary	Decision under review	IC review decision
David Sporns and Department of Veterans' Affairs [2016] AICmr 40 [22 April 2016]	ss 11A(5), 476, 55D	Freedom of Information — Whether disclosure would unreasonably affect an organization's business affairs — Whether disclosure would unreasonably affect a person's professional affairs — Whether contrary to the public interest to release conditionally exempt documents — Whether the agency has discharged its onus of establishing that its decision is justified	Access refusal	Set aside and substituted
Australian Associated Press Pty Ltd and Department of Immigration and Border Protection [2016] AICmr 25 [22 April 2016]	ss 11A, 42, 47E(4), 47F, 55C	Freedom of Information — Whether document subject to legal professional privilege — Whether disclosure would have a substantial adverse effect on the proper and efficient conduct of the operations of an agency — Whether disclosure of personal information is unreasonable — Whether contrary to public interest to release conditionally exempt documents	Access refusal	Varied
JL and Department of Immigration and Border Protection [2016] AICmr 28 [23 April 2016]	s 24A	Freedom of Information — Whether reasonable steps were taken to locate documents	Access refusal	Affirmed
Patrick Leahy and Australia Post [2016] AICmr 23 [20 April 2016]	ss 11A, 22, 47F	Freedom of Information — Whether disclosure of personal information is unreasonable — Whether contrary to public interest to release conditionally exempt documents — Whether reasonably practicable to prepare edited copy of video	Access refusal	Set aside and substituted

Many thanks
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* The decision will need to be hyperlinked to AustLII – You can copy and paste the link to the most recent decision on AustLII and manually update the citation number to the corresponding citation number in the decision to be published (ie. <http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AICmr/2019/19.html>)



Attachment F – Template summary of IC review decision

Review officers need to prepare a summary when a decision has been finalised under s 55K.

The subject line of the email will be ‘Case summary:’ followed by the citation.

The summary in the body of the email should include the following:

- The citation
- 3 trim links to a word, RTF and PDF version of the decision
- Key points
- Catchwords
- Decision
- Whether changes are recommended to the FOI Guidelines

Example

Subject: Case summary: ‘AEY’ and Department of Climate Change, Energy, the Environment and Water (Freedom of information) [2023] AICmr 95 (18 October 2023)

Dear All

Please find below the TRIM links for the Acting FOI Commissioner’s decision: ‘*AEY and Department of Climate Change, Energy, the Environment and Water (Freedom of information)*’ [2023] AICmr 95 (18 October 2023):

Word: [D2023/025259](#)

RTF: [D2023/025261](#)

PDF: [D2023/025258](#)

Key points: [insert key points]

Catchwords: Freedom of Information — Whether disclosure of personal information unreasonable — Whether disclosure would have a substantial adverse effect on the management of personnel (CTH) *Freedom of Information Act 1982* ss 11A(5), 47F, 47E(c)

Decision: Set aside

No updates to the FOI Guidelines are required.

Regards



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NOTE:

This document is intended to serve as a quick guide of the key provisions/references for each provision only. Additional references to the legislation, cases, and FOI Guidelines will need to be added on a case-by-case basis depending on which issues arise in that case. This document also needs to be updated upon the issuance of new FOI Guidelines. This version incorporates v1.6 of Part 5 and v1.4 of Part 6 of the FOI Guidelines.

Annexure A (s 22)

Relevant provisions of the FOI Act, FOI Guidelines, and decisions

Irrelevant material (s 22)

Section 22 of the FOI Act authorises an agency to prepare and to give an applicant access to an edited copy of a document if:

- an agency or Minister decides:
 - to refuse to give access to an exempt document (s 22(1)(a)(i)), or
 - that to give access to a document would disclose information that would reasonably be regarded as irrelevant to the request for access, and
- it is possible for the agency or Minister to prepare an edited copy of the document (s 22(1)(b)), and
- it is reasonably practicable to prepare an edited copy, having regard to the nature and extent of the modification required, and the resources available to modify the document (s 22(1)(c)), and
- it is not apparent, from an applicant's request or consultation with the applicant, that the applicant would decline access to the edited copy (s 22(1)(d)).

The FOI Guidelines state:

A request should be interpreted as extending to any document that might reasonably be taken to be included within the description the applicant has used.¹

¹ FOI Guidelines at [3.54] footnoting *Re Gould and Department of Health* [1985] AATA 63.

Annexure A (Practical refusal - ss 24, 24AB, and 24AA(1)(a))

Relevant provisions of the FOI Act, FOI Guidelines, and decisions

Whether a request consultation process was undertaken (s 24AB)

Section 24AB of the FOI Act relevantly states:

What is a request consultation process ?

Scope

(1) This section sets out what is a **request consultation process** for the purposes of section 24.

Requirement to notify

- (2) The agency or Minister must give the applicant a written notice stating the following:
- (a) an intention to refuse access to a document in accordance with a request;
 - (b) the practical refusal reason;
 - (c) the name of an officer of the agency or member of staff of the Minister (the contact person) with whom the applicant may consult during a period;
 - (d) details of how the applicant may contact the contact person;
 - (e) that the period (the **consultation period**) during which the applicant may consult with the contact person is 14 days after the day the applicant is given the notice.

Assistance to revise request

- (3) If the applicant contacts the contact person during the consultation period in accordance with the notice, the agency or Minister must take reasonable steps to assist the applicant to revise the request so that the practical refusal reason no longer exists.
- (4) For the purposes of subsection (3), **reasonable steps** includes the following:
- (a) giving the applicant a reasonable opportunity to consult with the contact person;
 - (b) providing the applicant with any information that would assist the applicant to revise the request.

Extension of consultation period

(5) The contact person may, with the applicant's agreement, extend the consultation period by written notice to the applicant.

Outcome of request consultation process

- (6) The applicant must, before the end of the consultation period, do one of the following, by written notice to the agency or Minister:
- (a) withdraw the request;
 - (b) make a revised request;
 - (c) indicate that the applicant does not wish to revise the request.
- (7) The request is taken to have been withdrawn under subsection (6) at the end of the consultation period if:
- (a) the applicant does not consult the contact person during the consultation period in accordance with the notice; or

(b) the applicant does not do one of the things mentioned in subsection (6) before the end of the consultation period. [emphasis in original]

The FOI Guidelines relevantly state:

Where an agency or minister is satisfied that a practical refusal reason exists, they must undertake a request consultation process with the applicant before making a decision to refuse the request (s 24AB).

...

The agency or minister must give the applicant a written notice that states:

- an intention to refuse access to a document in accordance with a request
- the practical refusal reason
- the name and contact details of an officer with whom the applicant may consult during the process, and details of how the applicant may contact them
- that the consultation period during which the applicant may consult the contact person is 14 days after the day the applicant is given the notice (s 24AB(2)).

Agencies and ministers are only obliged to undertake a request consultation process once for any particular request (s 24AB(9)), but they may choose to continue discussions with an applicant in order to refine a request that is still too large or vague.

...

If an applicant contacts a contact officer during the consultation period, the contact officer must take reasonable steps to help them revise the request so that the practical refusal reason no longer exists (s 24AB(3)). For example, a contact officer could provide a breakdown of the time estimated for each step of the process, explain the difficulties the agency will have in dealing with the request and suggest what would be a reasonable request in the circumstances.²

Whether a practical refusal reason exists (ss 24 and 24AA)

Section 24 of the FOI Act enables an agency or Minister to refuse access to a document where the agency has undertaken a request consultation process in accordance with s 24AB of the FOI Act, and after that process the agency or Minister is satisfied that the practical refusal reason still exists.

Subparagraph 24AA(1)(a) of the FOI Act lists the following practical refusal reason:

(1) For the purposes of section 24, a practical refusal reason exists in relation to a request for a document if either (or both) of the following applies:

(a) the work involved in processing the request:

- (i) in the case of an agency--would substantially and unreasonably divert the resources of the agency from its other operations; or
- (ii) in the case of a Minister--would substantially and unreasonably interfere with the performance of the Minister's functions;

Subsection 24AA(2) of the FOI Act lists matters which a decision maker must consider where relevant in deciding whether or not a practical refusal reason exists. It is a non-exhaustive list.

Subsection 24AA(3) of the FOI Act states:

² FOI Guidelines at [3.127], [3.129], [3.132], and [3.133].

(3) In deciding whether a practical refusal reason exists, an agency or Minister must not have regard to:

- (a) any reasons that the applicant gives for requesting access; or
- (b) the agency's or Minister's belief as to what the applicant's reasons are for requesting access; or
- (c) any maximum amount, specified in the regulations, payable as a charge for processing a request of that kind.

As set out in *'ACW' and Australian National Maritime Museum* [2023] AICmr 4 (*'ACW'*), a decision maker must consider the following 3 elements in determining the issue of whether a practical refusal reason exists for the purposes of s 24AA(1)(a)(i) of the FOI Act:

- First, I must determine whether a request consultation process has been undertaken in accordance with s 24AB of the FOI Act. In many cases, this element of the decision-making task may be dealt with briefly because it is clear that a relevant process has been validly conducted and no agreement as to validity arises between the parties to the IC review.
- Secondly, if I determine that a request consultation process has been validly undertaken, I must determine whether I am 'satisfied' that the work involved in processing the applicant's request (as revised, if at all, during the request consultation process) would 'substantially' divert the resources of the agency from its other operations.
- Thirdly, if I am satisfied of a substantial diversion of resources, I must determine whether I am also 'satisfied' that the work involved in processing the applicant's request would 'unreasonably' divert the resources of the agency from its other operations.³

To be 'satisfied' for the purposes of s 24(1) of the FOI Act that a practical refusal reason exists, a decision maker must 'feel' an 'actual persuasion' that the reason exists. They cannot be satisfied simply as a result of a 'mere mechanical comparison of probabilities independently of any belief in its reality'.⁴ Moreover, a decision maker's 'satisfaction' as to the existence of a practical refusal reason cannot be arbitrary or capricious; it must be formed 'according to law and not humour'.⁵

A diversion of an agency's resources will be considered to be 'substantial' if the diversion can be characterised as 'real or of substance' rather than 'large'.⁶

The FOI Guidelines explain:

In deciding if a practical refusal reason exists, an agency or minister must have regard to the resources required to perform the following activities specified in s 24AA(2):

- identifying, locating or collating documents within the filing system of the agency or minister

³ *'ACW' and Australian National Maritime Museum* [2023] AICmr 4 at [10].

⁴ *Briginshaw v Briginshaw* [1938] HCA 34; (1938) 60 CLR 336 at 361 (Dixon J)

⁵ *Federal Commissioner of Taxation v Bayly* [1952] HCA 31; (1952) 86 CLR 506 at 510 (Williams J). See also *Minister for Immigration and Multicultural Affairs v Eshetu* [1999] HCA 21; (1997) 197 CLR 611 at [145] (Gummow J).

⁶ See *Langer and Telstra Corporation Ltd* [2002] AATA 341 ('Langer') applied in *Cambridge; Chief Executive Officer, Services Australia and (Freedom of information)* [2021] AATA 1142 and *Farrell; Chief Executive Officer, Services Australia and (Freedom of information)* [2020] AATA 2390, noting that at the time of the decision in *Langer*, the reference to processing a request 'substantially and unreasonably' diverting the resources of an agency was contained in s 24 rather than s 24AA. However, there is nothing in the terms of s 24 as enacted at that time which would negate the application of the view reached by Forge DP in the context of s 24AA(1).

- examining the documents
- deciding whether to grant, refuse or defer access
- consulting with other parties
- redacting exempt material from the documents
- making copies of documents
- notifying an interim or final decision to the applicant.

Other matters that may be relevant in deciding if a practical refusal reason exists include:

- the staffing resources available to an agency or minister for FOI processing
- whether the processing work requires the specialist attention of a minister or senior officer, or can only be undertaken by one or more specialist officers in an agency who have competing responsibilities
- the impact that processing a request may have on other work in an agency or minister's office, including FOI processing
- whether an applicant has cooperated in framing a request to reduce the processing workload
- whether there is a significant public interest in the documents requested
- other steps taken by an agency or minister to publish information of the kind requested by an applicant
- as to a request to a minister — other responsibilities of the minister and demands on the minister's time, and whether it is open to the minister to obtain assistance from an agency in processing the request.⁷

⁷ FOI Guidelines at [3.116] – [3.117] (footnote omitted).

Annexure A (s 24A – searches)

Relevant provisions of the FOI Act, FOI Guidelines, and decisions

Searches – s 24A

Section 24A of the FOI Act requires that an agency take ‘all reasonable steps’ to find a requested document before refusing access to it on the basis that it cannot be found or does not exist.

The FOI Guidelines state:

The Act is silent on what constitutes ‘all reasonable steps’. The meaning of ‘reasonable’ in the context of s 24A(1)(a) has been construed as not going beyond the limit assigned by reason, not extravagant or excessive, moderate and of such an amount, size or number as is judged to be appropriate or suitable to the circumstances or purpose.

Agencies and ministers should undertake a reasonable search on a flexible and common-sense interpretation of the terms of the request. What constitutes a reasonable search will depend on the circumstances of each request and will be influenced by the normal business practices in the agency’s operating environment or the minister’s office. At a minimum, an agency or minister should take comprehensive steps to locate documents, having regard to:

- the subject matter of the documents
- the current and past file management systems and the practice of destruction or removal of documents, and
- the record management systems in place
- the individuals within an agency or minister’s office who may be able to assist with the location of documents, and
- the age of the documents.⁸

⁸ FOI Guidelines at [3.88] – [3.89]. For further information, see FOI Guidelines at [3.85] – [3.94]; ‘RD’ and Comcare (Freedom of information) [2019] AICmr 61; ‘PK’ and Department of the Prime Minister and Cabinet (Freedom of information) [2018] AICmr 65; ‘PI’ and Department of Human Services (Freedom of information) [2018] AICmr 62; ‘PF’ and Department of Human Services (Freedom of information) [2018] AICmr 59; ‘OP’ and Department of Home Affairs (Freedom of information) [2018] AICmr 43; Josh Taylor and Prime Minister of Australia (Freedom of information) [2018] AICmr 42.

Annexure A (s 33(a)(i))

Relevant provisions of the FOI Act, FOI Guidelines, and decisions

Section 11A(4) of the FOI Act states the agency or Minister is not required by this Act to give the person access to the document at a particular time if, at that time, the document is an exempt document.

National Security of the Commonwealth (s 33(a)(i))

Section 33(a)(i) of the FOI Act states that a document is an exempt document if its disclosure:

- (a) would, or could reasonably be expected to, cause damage to:
 - (i) the security of the Commonwealth...

As discussed in the FOI Guidelines⁹ and IC review and AAT decisions¹⁰, the term ‘security of the Commonwealth’ refers to the protection of:

- Australia and its population from activities that are hostile to, or subversive of, the Commonwealth’s interests, and
- the security of any communications system or cryptographic system of any country used for defence or the conduct of the Commonwealth’s international relations.¹¹

The FOI Guidelines further state:

It is well accepted that securing classified government information forms part of the security of the Commonwealth. The assessment that s 33(a)(i) requires must be made at the time the decision is made and in the environment that exists at the time. Where a request is received for classified government information, the documents must be considered both individually and collectively.¹²

⁹ Generally, see FOI Guidelines at [5.25] – [5.34] and the cases referenced there.

¹⁰ See *Prinn and Department of Defence (Freedom of information)* [2016] AATA 445; *Jonathan Kearsley and Australian Federal Police (Freedom of information)* [2022] AICmr 55; *Rex Patrick and Department of Defence (Freedom of information)* [2022] AICmr 40; ‘OZ’ and *Department of Defence (Freedom of information)* [2018] AICmr 49; ‘OL’ and *Department of Home Affairs (Freedom of information)* [2018] AICmr 36; ‘LD’ and *Department of Defence (Freedom of Information)* [2017] AICmr 32; and ‘HK’ and *Department of Defence* [2015] AICmr 72.

¹¹ FOI Guidelines at [5.30] (footnotes omitted).

¹² FOI Guidelines at [5.34].

Annexure A (s 33(a)(iii))

Relevant provisions of the FOI Act, FOI Guidelines, and decisions

Section 11A(4) of the FOI Act states the agency or Minister is not required by this Act to give the person access to the document at a particular time if, at that time, the document is an exempt document.

International relations (s 33(a)(iii))

Section 33(a)(iii) of the FOI Act relevantly states a document is an exempt document if disclosure of the document under this Act would, or could reasonably be expected to cause damage to the international relations of the Commonwealth.

As discussed in the FOI Guidelines and IC review cases,¹³ for a document to be exempt under s 33(a)(iii), it must be shown that disclosure would, or could reasonably be expected to, cause damage to the international relations of the Commonwealth. The phrase 'international relations' has been interpreted as meaning the ability of the Australian Government to maintain good working relations with other governments and international organisations and to protect the flow of confidential information between them.¹⁴

The FOI Guidelines explain:

the phrase does encompass intangible or speculative damage, such as loss of trust and confidence in the Australian Government or one of its agencies. The expectation of damage to international relations must be reasonable in all the circumstances, having regard to the nature of the information; the circumstances in which it was communicated; and the nature and extent of the relationship. There must also be real and substantial grounds for the exemption that are supported by evidence. These grounds are not fixed in advance, but vary according to the circumstances of each case.¹⁵

In *Secretary, Department of Foreign Affairs and Trade v Paul Whittaker*,¹⁶ the Full Federal Court considered the predecessor to s 33(a)(iii).¹⁷ The Full Court reiterated the following propositions which the AAT had accepted:

- Damage to international relations might reasonably be expected where the disclosure of a document may disclose sensitive information so as to cause, or reasonably be expected to cause, actual and significant damage.
- The concept of damage is not to be confined and may include damage to intangibles, such as personal relationships between high level officials and politicians.
- There is no public interest test criterion extending beyond the terms of the exemption provision, in that a document is either within the provision or it is not.

¹³ FOI Guidelines at [5.38] – [5.44].

¹⁴ FOI Guidelines at [5.39].

¹⁵ FOI Guidelines at [5.40].

¹⁶ [2005] FCAFC 15; (2005) 143 FCR 15.

¹⁷ Prior to amendments made to s 33 of the FOI Act by the *Freedom of Information (Removal of Conclusive Certificates and Other Measures) Act 2009*, s 33(a)(iii) appeared in the FOI Act as s 33(1)(a)(iii). The terms of s 33(a)(iii) are identical to those of s 33(a)(iii).

- The test is not whether there is a risk of damage to international relations: the test requires a higher degree of certainty of damage.
- The test is to be applied to the documents at the time of decision and not at the time of creation of the documents.¹⁸

¹⁸ At [17].

Annexure A (s 37(2)(b))

Relevant provisions of the FOI Act, FOI Guidelines, and decisions

Section 11A(4) of the FOI Act states the agency or Minister is not required by this Act to give the person access to the document at a particular time if, at that time, the document is an exempt document.

Prejudice to law enforcement methods and procedures (s 37(2)(b))

Section 37(2)(b) of the FOI Act states:

(2) A document is an exempt document if its disclosure under this Act would, or could reasonably be expected to:

...

(b) disclose lawful methods or procedures for preventing, detecting, investigating, or dealing with matters arising out of, breaches or evasions of the law the disclosure of which would, or would be reasonably likely to, prejudice the effectiveness of those methods or procedures; or

...

As discussed in the FOI Guidelines and in IC review cases,¹⁹ for a document to be exempt under s 37(2)(b) of the FOI Act, it would need to be shown that disclosure would, or could, reasonably be expected to disclose lawful methods or procedures for preventing, detecting, investigating, or dealing with matters arising out of breaches or evasions of the law, the disclosure of which would, or could be reasonably likely to, prejudice the effectiveness of those methods or procedures.

The FOI Guidelines explain:

This exemption requires satisfaction of 2 factors. There must be a reasonable expectation that a document will disclose a method or procedure and a reasonable expectation or a real risk of prejudice to the effectiveness of that investigative method or procedure.¹¹⁴ If the only result of disclosing the methods would be that those methods were no surprise to anyone, there could be no reasonable expectation of prejudice. However, where a method might be described as 'routine', but the way in which it is employed can reasonably be said to be 'unexpected', disclosure could prejudice the effectiveness of the method.²⁰

¹⁹ Generally, see FOI Guidelines at [5.124] – [5.129]; 'AED' and *Australian Criminal Intelligence Commission (Freedom of information)* [2023] AICmr 67; 'LR' and *Australian Federal Police (Freedom of information)* [2017] AICmr 58; and 'DP' and *Department of Immigration and Border Protection* [2014] AICmr 125.

²⁰ FOI Guidelines at [5.127] (footnotes omitted).

Annexure A (s 38)

Relevant provisions of the FOI Act, FOI Guidelines, and decisions

Section 11A(4) of the FOI Act states the agency or Minister is not required by this Act to give the person access to the document at a particular time if, at that time, the document is an exempt document.

Documents to which secrecy provisions of enactments apply (s 38)

Section 38 of the FOI Act states:

- (1) Subject to subsection (1A), a document is an exempt document if:
- (a) disclosure of the document, or information contained in the document, is prohibited under a provision of an enactment or a Norfolk Island law; and
 - (b) either:
 - (i) that provision is specified in Schedule 3; or
 - (ii) this section is expressly applied to the document, or information, by that provision, or by another provision of that enactment or law or any other enactment or Norfolk Island law.

(1A) A person's right of access to a document under section 11 or 22 is not affected merely because the document is an exempt document under subsection (1) of this section if disclosure of the document, or information contained in the document, to that person is not prohibited by the enactment or law concerned or any other enactment or Norfolk Island law.

(2) Subject to subsections (3) and (3A), if a person requests access to a document, this section does not apply in relation to the document so far as it contains personal information about the person.

The FOI Guidelines state:

A document is exempt if its disclosure is prohibited under a provision of another Act (s 38(1)(a)) and either:

- that provision is specified in Schedule 3 to the FOI Act (s 38(1)(b)(i)) or
- s 38 prohibits disclosure of the document or information contained in the document, where s 38 is expressly applied to the document, or information by that provision, or by another provision of that or other legislation (s 38(1)(b)(ii)).²¹

[Relevant secrecy provisions]

[...]

²¹ FOI Guidelines at [5.134].

Annexure A (s 42)

Relevant provisions of the FOI Act, FOI Guidelines, and decisions

Section 11A(4) of the FOI Act states the agency or Minister is not required by this Act to give the person access to the document at a particular time if, at that time, the document is an exempt document.

Legal professional privilege (s 42)

Section 42 of the FOI Act states:

- (1) A document is an exempt document if it is of such a nature that it would be privileged from production in legal proceedings on the ground of legal professional privilege.
- (2) A document is not an exempt document because of subsection (1) if the person entitled to claim legal professional privilege in relation to the production of the document in legal proceedings waives that claim.
- (3) A document is not an exempt document under subsection (1) by reason only that:
 - (a) the document contains information that would (apart from this subsection) cause the document to be exempt under subsection (1); and
 - (b) the information is operational information of an agency.

As discussed in the FOI Guidelines and in IC review cases,²² a document will be exempt under s 42 if it is of such a nature that it would be privileged from production in legal proceedings on the ground of legal professional privilege (s 42(1)) and privilege has not been waived (s 42(2)).

Legal professional privilege protects confidential communications between a lawyer and a client from compulsory production. The FOI Guidelines relevantly explain that, at common law, determining whether a communication is privileged requires consideration of the following:

1. whether there is a legal adviser-client relationship
2. whether the communication was for the dominant purpose of giving or receiving legal advice, or use in connection with actual or anticipated litigation
3. whether the advice given is independent, and
4. whether the advice given is confidential.²³

The FOI Guidelines explain that a communication may have been brought into existence for more than one purpose but will be privileged if the main purpose of its creation was for

²² Generally, see FOI Guidelines at [5.144] – [5.182]; ‘VO’ and Northern Australia Infrastructure Facility (Freedom of information) [2020] AICmr 47; ‘VH’ and Australian Taxation Office (Freedom of information) [2020] AICmr 43; ‘PQ’ and Australian Taxation Office (Freedom of information) [2019] AICmr 1; ‘PO’ and Australian Federal Police (Freedom of information) [2018] AICmr 72; Chris Lewis and Australian National University (Freedom of information) [2018] AICmr 63; Rex Bashford and Department of Jobs and Small Business (Freedom of information) [2018] AICmr 55 and ‘OL’ and Department of Home Affairs (Freedom of information) [2018] AICmr 36.

²³ FOI Guidelines at [5.149].

giving or receiving legal advice (legal advice privilege), or for use in connection with actual or anticipated litigation (litigation privilege).²⁴

In relation to whether a legal adviser client relationship exists, the FOI Guidelines relevantly explain:

A legal adviser-client relationship exists where a client retains the services of a lawyer for the purpose of obtaining professional advice. If the advice is received from an independent external legal adviser, establishing the existence of the relationship is usually straightforward.²⁵

The FOI Guidelines further explain that the following factors are relevant to establishing whether a legal adviser-client relationship exists:

- the legal adviser must be acting in their capacity as a professional legal adviser
- the dominant purpose test must be satisfied
- the giving of the advice must be attended by the necessary degree of independence
- the advice must be confidential
- the fact that the advice arose out of a statutory duty does not preclude the privilege from applying
- whether the lawyer is subject to professional standards can be relevant.²⁶

If the communications were confidential communications between a professional legal adviser and client for the dominant purpose of giving or receiving legal advice, they will attract the privilege.²⁷

²⁴ FOI Guidelines at [5.160].

²⁵ FOI Guidelines at [5.150].

²⁶ FOI Guidelines at [5.154] (footnotes omitted).

²⁷ *AWB v Cole (No. 5)* (2006) 155 FCR 30 at 44; *Waterford v Commonwealth* (1986) 163 CLR 54 at 95.

Annexure A (s 47)

Relevant provisions of the FOI Act, FOI Guidelines, and decisions

Section 11A(4) of the FOI Act states the agency or Minister is not required by this Act to give the person access to the document at a particular time if, at that time, the document is an exempt document.

Trade secrets (s 47(1)(a))

Section 47(1) of the FOI Act states:

(1) A document is an exempt document if its disclosure under this Act would disclose:

(a) trade secrets; or

...

The FOI Guidelines state:

The term 'trade secret' is not defined in the FOI Act. The Federal Court [in *Department of Employment, Workplace Relations and Small Business v Staff Development and Training Company* [2001] FCA 1375 at [14]; (2001) 114 FCR 301] has interpreted a trade secret as information possessed by one trader which gives that trader an advantage over its competitors while the information remains generally unknown. has interpreted a trade secret as information possessed by one trader which gives that trader an advantage over its competitors while the information remains generally unknown.

The Federal Court referred to the following test in considering whether information amounts to a trade secret:

- the information is used in a trade or business
- the owner must limit the dissemination of it or at least not encourage or permit widespread publication
- if disclosed to a competitor, the information would be liable to cause real or significant harm to the owner of the secret.²⁸

The FOI Guidelines further state:

Factors that a decision maker might regard as useful guidance, but which do not constitute an exhaustive list of factors to consider include:

- the extent to which the information is known outside the business of the owner of that information
- the extent to which the information is known by persons engaged in the owner's business
- measures taken by the owner to guard the secrecy of the information
- the value of the information to the owner and to their competitors
- the effort and money spent by the owner in developing the information
- the ease or difficulty with which others might acquire or duplicate the secret.²⁹

²⁸ FOI Guidelines at [5.229] – [5.230].

²⁹ FOI Guidelines at [5.231].

Commercially valuable information (s 47(1)(b))

Section 47(1) of the FOI Act states:

(1) A document is an exempt document if its disclosure under this Act would disclose:

...

(b) any other information having a commercial value that would be, or could reasonably be expected to be, destroyed or diminished if the information were disclosed.

The FOI Guidelines state:

It is a question of fact whether information has commercial value, and whether disclosure would destroy or diminish that value. The commercial value may relate, for example, to the profitability or viability of a continuing business operation or commercial activity in which an agency or person is involved. The information need not necessarily have 'exchange value', in the sense that it can be sold as a trade secret or intellectual property. The following factors may assist in deciding whether information has commercial value:

- whether the information is known only to the agency or person for whom it has value or, if it is known to others, to what extent that detracts from its intrinsic commercial value
- whether the information confers a competitive advantage on the agency or person to whom it relates — for example, if it lowers the cost of production or allows access to markets not available to competitors
- whether a genuine 'arm's-length' buyer would be prepared to pay to obtain that information
- whether the information is still current or out of date (out of date information may no longer have any value)
- whether disclosing the information would reduce the value of a business operation or commercial activity — reflected, perhaps, in a lower share price.³⁰

The FOI Guidelines further state:

The second requirement of s 47(1)(b) — that it could reasonably be expected that disclosure of the information would destroy or diminish its value — must be established separately by satisfactory evidence. It should not be assumed that confidential commercial information will necessarily lose some of its value if it becomes more widely known. Nor is it sufficient to establish that an agency or person would be adversely affected by disclosure; for example, by encountering criticism or embarrassment. It must be established that the disclosure would destroy or diminish the commercial value of the information.³¹

³⁰ FOI Guidelines at [5.235].

³¹ FOI Guidelines at [5.237].

Annexure A (s 47B(a) and 11A(5))

Relevant provisions of the FOI Act, FOI Guidelines, and decisions

Section 11A(4) of the FOI Act states the agency or Minister is not required by this Act to give the person access to the document at a particular time if, at that time, the document is an exempt document.

Commonwealth–State relations exemption (s 47B(a))

Subsection 47B(a) of the FOI Act states:

A document is conditionally exempt if disclosure of the document under this Act:

- (a) would, or could reasonably be expected to, cause damage to relations between the Commonwealth and a State;

The FOI Guidelines explain:

A decision maker may consider that disclosure would, or could reasonably be expected to, damage the relations of the Commonwealth and one or more States (s 47B(a)). The term ‘relations’ has received judicial consideration under the term ‘working relations’, which was found to encompass all interactions of the Australian Government and the States, from formal Commonwealth-State consultation processes such as the National Cabinet through to any working arrangements between agencies undertaken as part of their day-to-day functions.³²

The FOI Guidelines further explain that disclosure of a document may cause damage by:

- interrupting or creating difficulty in negotiations or discussions that are underway, including in the development of joint or parallel policy
- adversely affecting the administration of a continuing Commonwealth-State project
- substantially impairing (not merely modifying) Commonwealth-State programs²³
- adversely affecting the continued level of trust or co-operation in existing inter-office relationships
- impairing or prejudicing the flow of information to and from the Commonwealth.³³

Furthermore, the FOI Guidelines clarify that:

Decision makers may also need to consider future working relationships where disclosure may, for example:

- impair or prejudice the future flow of information
- adversely affect Commonwealth-State police operations or investigations
- adversely affect the development of future Commonwealth-State projects.

The potential damage need not be quantified, but the effect on relations arising from the disclosure must be adverse.³⁴

³² FOI Guidelines at [6.25] (footnote omitted).

³³ FOI Guidelines at [6.26] (footnotes omitted).

³⁴ FOI Guidelines at [6.27] – [6.28] (footnotes omitted).

Public interest test

Section 11A(5) of the FOI Act states the agency or Minister must give the person access to the document if it is conditionally exempt at a particular time unless (in the circumstances) access to the document at that time would, on balance, be contrary to the public interest.

Section 11B(3) of the FOI Act sets out a non-exhaustive list of public interest factors favouring disclosure for consideration, those factors being where disclosure of the document would do any of the following:

- (a) promote the objects of the FOI Act
- (b) inform debate on a matter of public importance
- (c) promote effective oversight of public expenditure
- (d) allow a person access to their personal information.

Section 11B(4) of the FOI Act also lists the following irrelevant factors that must not be taken into consideration when deciding whether access would, on balance, be contrary to the public interest:

- (a) access to the document could result in embarrassment to the Commonwealth Government, or cause a loss of confidence in the Commonwealth Government
- (b) access to the document could result in any person misinterpreting or misunderstanding the document
- (c) the author of the document was (or is) of high seniority in the agency to which the request for access to the document was made
- (d) access to the document could result in confusion or unnecessary debate.

In addition to the factors set out at s 11B(3) of the FOI Act, the FOI Guidelines set out a further non-exhaustive list of public interest factors in favour of disclosure, as well as public interest factors against disclosure.³⁵

The FOI Guidelines explain:

To conclude that, on balance, disclosure of a document would be contrary to the public interest is to conclude that the benefit to the public resulting from disclosure is outweighed by the benefit to the public of withholding the information. The decision maker must analyse, in each case, where on balance the public interest lies based on the particular facts at the time the decision is made.³⁶

³⁵ FOI Guidelines at [6.229] – [6.233].

³⁶ FOI Guidelines at [6.238] (footnote omitted).

Annexure A (s 47B(b) and 11A(5))

Relevant provisions of the FOI Act, FOI Guidelines, and decisions

Section 11A(4) of the FOI Act states the agency or Minister is not required by this Act to give the person access to the document at a particular time if, at that time, the document is an exempt document.

Information communicated in confidence (s 47B(b))

Subsection 47B(b) of the FOI Act states:

A document is conditionally exempt if disclosure of the document under this Act:

...

(b) would divulge information or matter communicated in confidence by or on behalf of the Government of a State or an authority of a State, to the Government of the Commonwealth, to an authority of the Commonwealth or to a person receiving the communication on behalf of the Commonwealth or of an authority of the Commonwealth;

The FOI Guidelines explain:

This exemption only applies if disclosure would divulge information that is communicated in confidence by a State Government or authority to the Commonwealth Government or agency, and not the reverse.³⁷

As discussed in the FOI Guidelines:

When assessing whether the information was communicated in confidence, the test is whether the communication was considered to be confidential at the time of the communication. The circumstances of the communication may also need to be considered, such as:

- whether the communication was ad hoc, routine, or required
- whether there were any existing, implied or assumed arrangements or understandings between the Commonwealth and State concerning the exchange or supply of information
- how the information was subsequently handled, disclosed or otherwise published.³⁸

Public interest test

Section 11A(5) of the FOI Act states the agency or Minister must give the person access to the document if it is conditionally exempt at a particular time unless (in the circumstances) access to the document at that time would, on balance, be contrary to the public interest.

Section 11B(3) of the FOI Act sets out a non-exhaustive list of public interest factors favouring disclosure for consideration, those factors being where disclosure of the document would do any of the following:

- (a) promote the objects of the FOI Act
- (b) inform debate on a matter of public importance

³⁷ FOI Guidelines at [6.35] (footnote omitted).

³⁸ FOI Guidelines at [6.36] (footnotes omitted).

- (c) promote effective oversight of public expenditure
- (d) allow a person access to their personal information.

Section 11B(4) of the FOI Act also lists the following irrelevant factors that must not be taken into consideration when deciding whether access would, on balance, be contrary to the public interest:

- (a) access to the document could result in embarrassment to the Commonwealth Government, or cause a loss of confidence in the Commonwealth Government
- (b) access to the document could result in any person misinterpreting or misunderstanding the document
- (c) the author of the document was (or is) of high seniority in the agency to which the request for access to the document was made
- (d) access to the document could result in confusion or unnecessary debate.

In addition to the factors set out at s 11B(3) of the FOI Act, the FOI Guidelines set out a further non-exhaustive list of public interest factors in favour of disclosure, as well as public interest factors against disclosure.³⁹

The FOI Guidelines explain:

To conclude that, on balance, disclosure of a document would be contrary to the public interest is to conclude that the benefit to the public resulting from disclosure is outweighed by the benefit to the public of withholding the information. The decision maker must analyse, in each case, where on balance the public interest lies based on the particular facts at the time the decision is made.⁴⁰

³⁹ FOI Guidelines at [6.229] – [6.233].

⁴⁰ FOI Guidelines at [6.238] (footnote omitted).

Annexure A (s 47C and 11A(5))

Relevant provisions of the FOI Act, FOI Guidelines, and decisions

Section 11A(4) of the FOI Act states the agency or Minister is not required by this Act to give the person access to the document at a particular time if, at that time, the document is an exempt document.

Deliberative processes (s 47C)

Section 47C of the FOI Act states:

(1) A document is conditionally exempt if its disclosure under this Act would disclose matter (**deliberative matter**) in the nature of, or relating to, opinion, advice or recommendation obtained, prepared or recorded, or consultation or deliberation that has taken place, in the course of, or for the purposes of, the deliberative processes involved in the functions of:

- (a) an agency; or
- (b) a Minister; or
- (c) the Government of the Commonwealth.

Section 47C(2) of the FOI Act declares that deliberative matter does not include operational information (defined in section 8A of the FOI Act) or purely factual material.

Section 47C(3) of the FOI Act states:

- (3) This section does not apply to any of the following:
- (a) reports (including reports concerning the results of studies, surveys or tests) of scientific or technical experts, whether employed within an agency or not, including reports expressing the opinions of such experts on scientific or technical matters;
 - (b) reports of a body or organisation, prescribed by the regulations, that is established within an agency;
 - (c) the record of, or a formal statement of the reasons for, a final decision given in the exercise of a power or of an adjudicative function.

Note: Access must generally be given to a conditionally exempt document unless it would be contrary to the public interest (see section 11A).

As discussed in the FOI Guidelines, a decision maker must be satisfied of 3 requirements for this conditional exemption to apply:

Firstly, the decision maker must be satisfied that information within the scope of the request includes deliberative matter. Secondly, if the decision maker is satisfied, they are then required to be satisfied that the deliberative matter was obtained, prepared or recorded in the course of, or for the purposes of, deliberative processes. Thirdly, the decision maker must be satisfied that the deliberative processes were involved in the functions exercised by or intended to be exercised by an Australian Government agency or minister.⁴¹

The FOI Guidelines further explain that:

Deliberative matter is content that is in the nature of, or relating to either:

- an opinion, advice or recommendation that has been obtained, prepared or recorded or

⁴¹ FOI Guidelines at [6.46].

- a consultation or deliberation that has taken place, in the course of, or for the purposes of, a deliberative process of the government, an agency or minister (s 47C(1)).

‘Deliberative matter’ does not include operational information or purely factual material (s 47C(2)). ‘Operational information’ is defined in s 8A and is information that an agency must publish under the Information Publication Scheme (see Part 13 of the FOI Guidelines).⁴²

The FOI Guidelines state that the conditional exemption does not apply to:

- reports (including reports concerning the results of studies, surveys or tests) of scientific or technical experts, whether employed within an agency or not, including reports expressing the opinions of such experts on scientific or technical matters (see [6.73] – [6.72] below)
- reports of a body or organisation, prescribed by the regulations, that is established within an agency (currently none are prescribed)
- the record of, or a formal statement of the reasons for, a final decision given in the exercise of a power or of an adjudicative function (s 47C(3)).⁴³

The FOI Guidelines provide:

Agencies and ministers should only claim this conditional exemption in clearly applicable circumstances, noting that s 47C is subject to an overriding public interest test that is weighted toward disclosure. Not every document generated or held by a policy area of an agency is ‘deliberative’ in the sense used in this provision, even if it appears to deal with the development or implementation of a policy. This is reinforced by the language of the FOI Act which describes what does not constitute ‘deliberative matter’. A decision maker should ensure that the content of a document strictly conforms with the criteria for identifying ‘deliberative matter’ prepared or recorded for the purposes of a ‘deliberative process’ before claiming this conditional exemption (see [6.46] above and [6.59] – [6.58] below).⁴⁴

In relation to assessing ‘deliberative matter’ the FOI Guidelines explain:

The presence or absence of particular words or phrases is not a reliable indication of whether a document includes deliberative matter. The agency should assess the substance and content of the document before concluding it includes deliberative matter. Similarly, the format or class of the document, such as a ministerial brief or submission, or the document being a draft version of a later document does not automatically designate the content as deliberative matter.

Material that is not deliberative matter, where not already excluded as operational information, purely factual material or a scientific report, would include:

- content that is merely descriptive
- incidental administrative content
- procedural or day to day content
- the decision or conclusion reached at the end of the deliberative process
- matter that was not obtained, prepared or recorded in the course of, or for the purposes of, a deliberative process.⁴⁵

The FOI Guidelines explain that a deliberative process involves the exercise of judgement in developing and making a selection from different options:

⁴² FOI Guidelines at [6.48].

⁴³ FOI Guidelines at [6.49].

⁴⁴ FOI Guidelines at [6.52].

⁴⁵ FOI Guidelines at [6.61] – [6.62] (footnotes omitted).

The action of deliberating, in common understanding, involves the weighing up or evaluation of competing arguments or considerations that may have a bearing upon one's course of action. In short, the deliberative processes involved in the functions of an agency are its thinking processes – the processes of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action.

It is not enough for the purposes of s 47C(1) that an opinion, advice or recommendation is merely obtained, prepared or recorded; it must be obtained, prepared or recorded in the course of, or for the purposes of, the deliberative processes involved in the functions of the agency, minister or government.

The functions of an agency are usually found in the Administrative Arrangements Orders or the instrument or Act that established the agency. For the purposes of the FOI Act, the functions include both policy making and the processes undertaken in administering or implementing a policy. The functions also extend to the development of policies in respect of matters that arise in the course of administering a program. The non-policy decision making processes required when carrying out agency, ministerial or governmental functions, such as code of conduct investigations, may also be deliberative processes.

...

An opinion or recommendation does not need to be prepared for the sole purpose of a deliberative process. However, it is not sufficient that an agency or minister merely has a document in its possession that contains information referring to matters for which the agency or minister has responsibility.⁴⁶

In relation to 'purely factual material', the FOI Guidelines explain:

'Purely factual material' does not extend to factual material that is an integral part of the deliberative content and purpose of a document, or is embedded in or intertwined with the deliberative content such that it is impractical to excise it.

Where a decision maker finds it difficult to separate the purely factual material from the deliberative matter, both the elements may be exempt. If the 2 elements can be separated, the decision maker should consider giving the applicant a copy with deletions under s 22 to provide access to the purely factual material.⁴⁷

Public interest test

Section 11A(5) of the FOI Act states the agency or Minister must give the person access to the document if it is conditionally exempt at a particular time unless (in the circumstances) access to the document at that time would, on balance, be contrary to the public interest.

Section 11B(3) of the FOI Act sets out a non-exhaustive list of public interest factors favouring disclosure for consideration, those factors being where disclosure of the document would do any of the following:

- (a) promote the objects of the FOI Act
- (b) inform debate on a matter of public importance
- (c) promote effective oversight of public expenditure
- (d) allow a person access to their personal information.

⁴⁶ FOI Guidelines at [6.54] – [6.58] (footnotes omitted)

⁴⁷ FOI Guidelines at [6.70] – [6.71] (footnotes omitted).

Section 11B(4) of the FOI Act also lists the following irrelevant factors that must not be taken into consideration when deciding whether access would, on balance, be contrary to the public interest:

- (a) access to the document could result in embarrassment to the Commonwealth Government, or cause a loss of confidence in the Commonwealth Government
- (b) access to the document could result in any person misinterpreting or misunderstanding the document
- (c) the author of the document was (or is) of high seniority in the agency to which the request for access to the document was made
- (d) access to the document could result in confusion or unnecessary debate.

In addition to the factors set out at s 11B(3) of the FOI Act, the FOI Guidelines set out a further non-exhaustive list of public interest factors in favour of disclosure, as well as public interest factors against disclosure.⁴⁸

The FOI Guidelines explain:

To conclude that, on balance, disclosure of a document would be contrary to the public interest is to conclude that the benefit to the public resulting from disclosure is outweighed by the benefit to the public of withholding the information. The decision maker must analyse, in each case, where on balance the public interest lies based on the particular facts at the time the decision is made.⁴⁹

⁴⁸ FOI Guidelines at [6.229] – [6.233].

⁴⁹ FOI Guidelines at [6.238] (footnote omitted).



Annexure A (s 47E(c) and 11A(5))

Relevant provisions of the FOI Act, FOI Guidelines, and decisions

Section 11A(4) of the FOI Act states the agency or Minister is not required by this Act to give the person access to the document at a particular time if, at that time, the document is an exempt document.

Certain operations of agencies exemption (s 47E(c))

Section 47E(c) of the FOI Act states a document is conditionally exempt if its disclosure under this Act would, or could reasonably be expected to have a substantial adverse effect on the management or assessment of personnel by the Commonwealth or by an agency.

The FOI Guidelines explain:

the predicted effect needs to be reasonably expected to occur... There must be more than merely an assumption or allegation that damage may occur if the document is released.

...

An agency cannot merely assert that an effect will occur following disclosure. The particulars of the predicted effect should be identified during the decision-making process, including whether the effect could reasonably be expected to occur. Where the conditional exemption is relied on, the relevant particulars and reasons should form part of the decision maker's statement of reasons, if they can be included without disclosing exempt matter (s 26, see Part 3).⁵⁰

As stated in the FOI Guidelines:

For this conditional exemption to apply, the document must relate to either:

- the management of personnel – including broader human resources policies and activities, recruitment, promotion, compensation, discipline, harassment and work health and safety
- the assessment of personnel – including the broader performance management policies and activities concerning competency, in-house training requirements, appraisals and underperformance, counselling, feedback, assessment for bonus or eligibility for progression.⁵¹

Public interest test

Section 11A(5) of the FOI Act states the agency or Minister must give the person access to the document if it is conditionally exempt at a particular time unless (in the circumstances) access to the document at that time would, on balance, be contrary to the public interest.

Section 11B(3) of the FOI Act sets out a non-exhaustive list of public interest factors favouring disclosure for consideration, those factors being where disclosure of the document would do any of the following:

- (a) promote the objects of the FOI Act
- (b) inform debate on a matter of public importance
- (c) promote effective oversight of public expenditure

⁵⁰ At [6.90] and [6.92].

⁵¹ FOI Guidelines at [6.103] (footnote omitted).

(d) allow a person access to their personal information.

Section 11B(4) of the FOI Act also lists the following irrelevant factors that must not be taken into consideration when deciding whether access would, on balance, be contrary to the public interest:

(a) access to the document could result in embarrassment to the Commonwealth Government, or cause a loss of confidence in the Commonwealth Government

(b) access to the document could result in any person misinterpreting or misunderstanding the document

(c) the author of the document was (or is) of high seniority in the agency to which the request for access to the document was made

(d) access to the document could result in confusion or unnecessary debate.

In addition to the factors set out at s 11B(3) of the FOI Act, the FOI Guidelines set out a further non-exhaustive list of public interest factors in favour of disclosure, as well as public interest factors against disclosure.⁵²

The FOI Guidelines explain:

To conclude that, on balance, disclosure of a document would be contrary to the public interest is to conclude that the benefit to the public resulting from disclosure is outweighed by the benefit to the public of withholding the information. The decision maker must analyse, in each case, where on balance the public interest lies based on the particular facts at the time the decision is made.⁵³

⁵² FOI Guidelines at [6.229] – [6.233].

⁵³ FOI Guidelines at [6.238] (footnote omitted).

Annexure A (s 47E(d) and 11A(5))

Relevant provisions of the FOI Act, FOI Guidelines, and decisions

Section 11A(4) of the FOI Act states the agency or Minister is not required by this Act to give the person access to the document at a particular time if, at that time, the document is an exempt document.

Certain operations of agencies exemption (s 47E(d))

Section 47E(d) of the FOI Act states a document is conditionally exempt if its disclosure under this Act would, or could reasonably be expected to have a substantial adverse effect on the proper and efficient conduct of the operations of an agency.

As discussed in the FOI Guidelines⁵⁴ and in IC review decisions,⁵⁵ a document is conditionally exempt under s 47E(d) if its disclosure would, or could reasonably be expected to, have a substantial adverse effect on the proper and efficient conduct of the operations of an agency.

With respect to the term ‘substantial adverse effect’, the FOI Guidelines also explain:

The term ‘substantial adverse effect’ broadly means ‘an adverse effect which is sufficiently serious or significant to cause concern to a properly concerned reasonable person’. The word ‘substantial’, in the context of substantial loss or damage, has been interpreted as including ‘loss or damage that is, in the circumstances, real or of substance and not insubstantial or nominal’.

A decision maker should clearly describe the expected effect and its impact on the usual operations or activity of the agency in the statement of reasons under s 26 to show their deliberations in determining the extent of the expected effect. It may sometimes be necessary to use general terms to avoid making the statement of reasons itself an ‘exempt document’ (s 26(2)).⁵⁶

Further, in *Re James and Others and Australian National University* (1984) 6 ALD 687; [1984] AATA 501, Deputy President Hall explained:

As a matter of ordinary English, I think that the expression “the conduct of the operations of an agency” is capable of extending to the way in which an agency discharges or performs any of its functions.⁵⁷

⁵⁴ See FOI Guidelines at [6.90] – [6.92], and [6.112] – [6.118] and the cases referenced there.

⁵⁵ See, *Raymond Williams and Department of Defence (Freedom of information)* [2023] AICmr 26; *Refugee Advice & Casework Service and Department of Foreign Affairs and Trade (Freedom of information)* [2023] AICmr 16; *Christis Tombazos and Australian Research Council (Freedom of information)* [2023] AICmr 14; *‘ACF’ and Australian Public Service Commission (Freedom of information)* [2022] AICmr 73; *Rex Patrick and Department of the Prime Minister and Cabinet (No. 2) (Freedom of information)* [2022] AICmr 66; *‘ZA’ and Department of Veterans Affairs (Freedom of information)* [2021] AICmr 83; *Australian Society for Kangaroos and Rural Industries Research and Development Corporation trading as AgriFutures Australia (Freedom of information)* [2019] AICmr 31; and *‘PR’ and Comcare (Freedom of information)* [2019] AICmr 2.

⁵⁶ FOI Guidelines at [6.18] – [6.19] (footnotes omitted).

⁵⁷ At page 699.

Public interest test

Section 11A(5) of the FOI Act states the agency or Minister must give the person access to the document if it is conditionally exempt at a particular time unless (in the circumstances) access to the document at that time would, on balance, be contrary to the public interest.

Section 11B(3) of the FOI Act sets out a non-exhaustive list of public interest factors favouring disclosure for consideration, those factors being where disclosure of the document would do any of the following:

- (a) promote the objects of the FOI Act
- (b) inform debate on a matter of public importance
- (c) promote effective oversight of public expenditure
- (d) allow a person access to their personal information.

Section 11B(4) of the FOI Act also lists the following irrelevant factors that must not be taken into consideration when deciding whether access would, on balance, be contrary to the public interest:

- (a) access to the document could result in embarrassment to the Commonwealth Government, or cause a loss of confidence in the Commonwealth Government
- (b) access to the document could result in any person misinterpreting or misunderstanding the document
- (c) the author of the document was (or is) of high seniority in the agency to which the request for access to the document was made
- (d) access to the document could result in confusion or unnecessary debate.

In addition to the factors set out at s 11B(3) of the FOI Act, the FOI Guidelines set out a further non-exhaustive list of public interest factors in favour of disclosure, as well as public interest factors against disclosure.⁵⁸

The FOI Guidelines explain:

To conclude that, on balance, disclosure of a document would be contrary to the public interest is to conclude that the benefit to the public resulting from disclosure is outweighed by the benefit to the public of withholding the information. The decision maker must analyse, in each case, where on balance the public interest lies based on the particular facts at the time the decision is made.⁵⁹

⁵⁸ FOI Guidelines at [6.229] – [6.233].

⁵⁹ FOI Guidelines at [6.238] (footnote omitted).