

Annexure A (s 47F 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.

Personal privacy exemption (s 47F)

Section 47F of the FOI Act states ‘A document is conditionally exempt if its disclosure under this Act would involve the unreasonable disclosure of personal information about any person (including a deceased person).’

Section 4(1) of the FOI Act states ‘personal information’ has the same meaning as the *Privacy Act 1988*, which provides:

personal information means information or an opinion about an identified individual, or an individual who is reasonably identifiable:

- (a) whether the information or opinion is true or not; and
- (b) whether the information or opinion is recorded in a material form or not.⁶⁰

Section 47F(2) of the FOI Act states that in determining whether the disclosure of the document would involve the unreasonable disclosure of personal information, an agency or Minister decision maker must have regard to the following matters:

- the extent to which the information is well known
- whether the person to whom the information relates is known to be (or to have been) associated with the matters dealt with in the document
- the availability of the information from publicly available sources, and
- any other matters that the agency or Minister considers relevant.

As discussed in the FOI Guidelines and IC review cases,⁶¹ the main requirements of this public interest conditional exemption are that a document contains ‘personal information;’ disclosure in response to the applicant’s FOI request would be ‘unreasonable’ (s 47(1)); and it would be ‘contrary to the public interest’ to release the material at the time of the decision (s 11A(5)).

The FOI Guidelines explain that the test of ‘unreasonableness’ in s 47F ‘implies a need to balance the public interest in disclosure of government-held information and the private interest in the privacy of individuals’.⁶²

⁶⁰ Section 6(1) of the *Privacy Act 1988* (Cth) (emphasis in original).

⁶¹ Generally, see FOI Guidelines at [6.119] – [6.155]; ‘AEE’ and *Department of Defence (Freedom of information)* [2023] AICmr 69; ‘AED’ and *Australian Criminal Intelligence Commission (Freedom of information)* [2023] AICmr 67; ‘OE’ and *Australian Taxation Office (Freedom of information)* [2018] AICmr 29.

⁶² FOI Guidelines at [6.133].

In addition to the mandatory factors outlined at s 47F(2) of the FOI Act, the FOI Guidelines explain that other relevant factors include:

- a) the author of the document is identifiable
 - b) the document contains third party personal information
 - c) release of the document would cause stress to the third party
 - d) no public purpose would be achieved through release.
- ...
- the nature, age and current relevance of the information
 - any detriment that disclosure may cause to the person to whom the information relates
 - any opposition to disclosure expressed or likely to be held by that person
 - the circumstances of an agency's or minister's collection and use of the information
 - the fact that the FOI Act does not control or restrict any subsequent use or dissemination of information released under the FOI Act
 - any submission an FOI applicant chooses to make in support of their request as to their reasons for seeking access and their intended or likely use or dissemination of the information and
 - whether disclosure of the information might advance the public interest in government transparency and integrity.⁶³

The last-mentioned factor – the public interest in government transparency and integrity – is to be balanced with all other relevant factors arising in the particular case, including the private interest that third party individuals may have in maintaining privacy of their personal information.⁶⁴

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

⁶³ FOI Guidelines at [6.137] – [6.138] (footnotes omitted).

⁶⁴ FOI Guidelines at [6.139].

(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.⁶⁵

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.⁶⁶

⁶⁵ FOI Guidelines at [6.229] – [6.233].

⁶⁶ FOI Guidelines at [6.238] (footnote omitted).

Annexure A (s 47G 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.

Business affairs exemption (s 47G)

Section 47G of the FOI Act states:

(1) A document is conditionally exempt if its disclosure under this Act would disclose information concerning a person in respect of his or her business or professional affairs or concerning the business, commercial or financial affairs of an organisation or undertaking, in a case in which the disclosure of the information:

- (a) would, or could reasonably be expected to, unreasonably affect that person adversely in respect of his or her lawful business or professional affairs or that organisation or undertaking in respect of its lawful business, commercial or financial affairs; or
- (b) could reasonably be expected to prejudice the future supply of information to the Commonwealth or an agency for the purpose of the administration of a law of the Commonwealth or of a Territory or the administration of matters administered by an agency.

Section 47G(2) – (3) of the FOI Act contain exceptions to the exemption in s 47G(1) of the FOI Act.

As stated in the FOI Guidelines, this conditional exemption does not apply in the following circumstances:

... if the document contains only business information about the FOI applicant (s 47G(3)). Where the business information concerns both the FOI applicant and another business, the provision may operate to conditionally exempt the FOI applicant's information, but only if the FOI applicant's business information cannot be separated from the information of the other business or undertaking.

... to trade secrets or other information to which s 47 applies (s 47G(2)). In other words, a decision maker should consider an exemption under s 47 for documents containing trade secrets or other information to which s 47 applies if the circumstances call for it. This is a limited exception to the normal rule that more than one exemption may apply to the same information (see s 32).⁶⁷

Section 47G(1)(a)

The FOI Guidelines explain that the operation of s 47G of the FOI Act depends on the effect of disclosure, rather than the precise nature of the information itself.⁶⁸ Notwithstanding this, the information must have some relevance to a person in respect of their business or professional affairs or to the business, commercial and financial affairs of the organisation.⁶⁹

The FOI Guidelines state:

⁶⁷ FOI Guidelines at [6.179] – [6.180].

⁶⁸ FOI Guidelines at [6.181].

⁶⁹ FOI Guidelines at [6.181].

The use of the term ‘business or professional affairs’ distinguishes an individual’s personal or private affairs and an organisation’s internal affairs. The term ‘business affairs’ has been interpreted to mean ‘the totality of the money-making affairs of an organisation or undertaking as distinct from its private or internal affairs.’⁷⁰

In relation to the question of unreasonableness, the FOI Guidelines state:

The presence of ‘unreasonably’ in s 47G(1) implies a need to balance public and private interests. The public interest, or some aspect of it, will be one of the factors in determining whether the adverse effect of disclosure on a person in respect of his or her business affairs is unreasonable. A decision maker must balance the public and private interest factors to decide whether disclosure is unreasonable for the purposes of s 47G(1)(a), but this does not amount to the public interest test in s 11A(5) which follows later in the decision process.⁷¹

The FOI Guidelines further state:

The test of reasonableness applies not to the claim of harm but to the objective assessment of the expected adverse effect. For example, the disclosure of information that a business’ activities pose a threat to public safety, damage the natural environment, or that a service provider has made false claims for government money, may have a substantial adverse effect on that business but may not be unreasonable in the circumstances to disclose. Similarly, it would not be unreasonable to disclose information about a business that revealed serious criminality. These considerations require weighing the public interest against a private interest – preserving the profitability of a business. However at this stage it bears only on the threshold question of whether disclosure would be unreasonable.⁷²

Section 47G(1)(b)

The FOI Guidelines state:

This limb of the conditional exemption comprises 2 parts:

- a reasonable expectation of a reduction in the quantity or quality of business affairs information to the government
- the reduction will prejudice the operations of the agency.⁷³

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.

⁷⁰ FOI Guidelines at [6.191] (footnotes omitted).

⁷¹ FOI Guidelines at [6.184] (footnotes omitted).

⁷² FOI Guidelines at [6.185] (footnotes omitted).

⁷³ FOI Guidelines at [6.197] footnoting *Re Angel and the Department of the Arts, Heritage and the Environment; HC Sleigh Resources Ltd and Tasmania* [1985] AATA 314.

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.⁷⁴

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.⁷⁵

⁷⁴ FOI Guidelines at [6.229] – [6.233].

⁷⁵ FOI Guidelines at [6.238] (footnote omitted).



@ and [agency] (Freedom of information) [2024]
AICmr @ (@ 2024)

Decision and reasons for decision of

Freedom of Information Commissioner/ Australian Information Commissioner], [name]

Applicant	@
Respondent	@
Third Party	@
Decision date	@ 2024
Reference	MR__/_
Catchwords	Freedom of Information — Whether information protected by secrecy provisions — (CTH) <i>Freedom of Information Act 1982</i> s 38

Decision

- Under s 55K of the *Freedom of Information Act 1982* (the FOI Act), I [set aside/affirm/vary] the decision of the [agency] (the [Department / Respondent]) of [date], [if relevant] as varied on [date(s)].
- Within 28 days of this decision:
 - the [Department/ Respondent] must now provide the applicant with a copy of the documents, edited under s 22 of the FOI Act only to the extent necessary to delete exempt or irrelevant material.
 - the [Department/ Respondent] must advise whether it has fully implemented my decision or whether it will be seeking review of the decision by the Administrative Appeals Tribunal.

Key points

- This decision discusses [insert summary e.g. the application of s X of the FOI Act and paragraph Y of the FOI Guidelines to documents about Z]. It [is primarily of interest to the parties in relation to the specific documents sought/may have broader implications for agencies in relation to...].

Reasons for decision

4. The background and key procedural steps in this IC review are set out at **Annexure [A/B]**.

Scope of IC review

5. On [date], the applicant applied to the [agency] for access to [...].
6. [Briefly outline the documents at issue, and the parties' current stance – add a footnote that outlines the reviewable decision: see [AIH](#) at [4] and footnote 4 as an example. If the case requires background to be set out in full, do this in an 'Annexure B']
7. The [Department / the Respondent] maintains it is prohibited from disclosing the document under [relevant provision and its enactment] and the [document / documents / material] [is / are] exempt under s 38 of the FOI Act.
8. The applicant contends that the [document/ documents/ material] [is/ are] not exempt under s 38 of the FOI Act.
9. The issue[s] to be decided in this Information Commissioner review (IC review) [is/are] [update with reference to the Standard wording examples in the Decision writing checklist] under the secrecy provisions of enactments exemption (s 38), [is / are] exempt under that provision.
10. In an IC review of an access refusal decision, the agency bears the onus of establishing that its decision is justified, or that I should give a decision adverse to the applicant.¹
11. In making my decision, I have had regard to the following:
 - the [agency]'s decision and reasons for decision of [date]
 - [if relevant] the [agency]'s internal review decision and reasons for decision of [date]
 - [if relevant] the [agency]'s revised decision and reasons for decision of [date]
 - the document[s] at issue
 - the FOI Act²
 - [secrecy act]³
 - the Guidelines issued by the Australian Information Commissioner under s 93A of the FOI Act⁴ to which agencies must have regard in performing a function or exercising a power under the FOI Act,⁵ and
 - the parties' submissions.

¹ FOI Act s 55D(1).

² s 38 as set out in Annexure A.

³ Set out in Annexure A.

⁴ See, Office of the Australian Information Commissioner, *Guidelines issued by the Australian Information Commissioner under s 93A of the Freedom of Information Act 1982* (FOI Guidelines).

⁵ Set out in Annexure A.

Secrecy provisions – s 38

12. A document is exempt under s 38 of the FOI Act if its disclosure is prohibited under an enactment specified in Schedule 3 of the FOI Act or if s 38 is expressly applied to the document by an enactment.
13. [Specify whether secrecy provision is listed in sch 3 or if part of secrecy provision applies s 38]
14. [Summarise parties' subs].

Is disclosure of the material prohibited?

15. [...].

Does an exception to s 38 of the FOI Act apply?

16. [...].

Finding

17. I [am / am not] satisfied that the [document / documents / material] is exempt under s 38 of the FOI Act.

[Name]

[Freedom of Information Commissioner/ Australian Information Commissioner]

[date]

Annexure A

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)).⁶

[Relevant secrecy provisions]

[...]

Review rights

Review by the Administrative Appeals Tribunal

If a party to an IC review is unsatisfied with an IC review decision, they may apply under s 57A of the FOI Act to have the decision reviewed by the Administrative Appeals Tribunal (AAT). The AAT provides independent merits review of administrative decisions and has power to set aside, vary, or affirm an IC review decision.

An application to the AAT must be made within 28 days of the day on which the applicant is given the IC review decision (s 29(2) of the *Administrative Appeals Tribunal Act 1975*). An application fee may be payable when lodging an application for review to the AAT. Further information is available on the AAT's website (www.aat.gov.au) or by telephoning 1300 366 700.

Making a complaint to the Commonwealth Ombudsman

If you believe you have been treated unfairly by the OAIC, you can make a complaint to the Commonwealth Ombudsman (the Ombudsman). The Ombudsman's services are free. The Ombudsman can investigate complaints about the administrative actions of Australian Government agencies to see if you have been treated unfairly.

If the Ombudsman finds your complaint is justified, the Ombudsman can recommend that the OAIC reconsider or change its action or decision or take any other action that the Ombudsman considers is appropriate. You can contact the Ombudsman's office for more information on 1300 362 072 or visit the Commonwealth Ombudsman's website at <http://www.ombudsman.gov.au>.

Accessing your information

If you would like access to the information that we hold about you, please contact FOIDR@oaic.gov.au. More information is available on the [Access our information](#) page on our website.

⁶ FOI Guidelines at [5.134].



@ and [agency] (Freedom of information) [2024]
AICmr @ (@ 2024)

Decision and reasons for decision of

Freedom of Information Commissioner/ Australian Information Commissioner], [name]

Applicant	@
Respondent	@
Third Party	@
Decision date	@ 2024
Reference	MR_/_/_____
Catchwords	Freedom of Information — Whether documents contain deliberative matter prepared for deliberative processes — Whether contrary to public interest to release conditionally exempt documents — (CTH) <i>Freedom of Information Act 1982</i> ss 11A and 47C

Decision

- Under s 55K of the *Freedom of Information Act 1982* (the FOI Act), I [set aside/affirm/vary] the decision of the [agency] (the [Department / Respondent]) of [date], [if relevant] as varied on [date(s)].
- Within 28 days of this decision:
 - the [Department/ Respondent] must now provide the applicant with a copy of the documents, edited under s 22 of the FOI Act only to the extent necessary to delete exempt or irrelevant material.
 - the [Department/ Respondent] must advise whether it has fully implemented my decision or whether it will be seeking review of the decision by the Administrative Appeals Tribunal.

Key points

- This decision discusses [insert summary e.g. the application of s X of the FOI Act and paragraph Y of the FOI Guidelines to documents about Z]. It [is primarily of interest to

the parties in relation to the specific documents sought/may have broader implications for agencies in relation to...].

Reasons for decision

4. The background and key procedural steps in this IC review are set out at Annexure [A/B].

Scope of IC review

5. On [date], the applicant applied to the [agency] for access to [...].
6. [Briefly outline the documents at issue, and the parties' current stance – add a footnote that outlines the reviewable decision: see AIH at [4] and footnote 4 as an example. If the case requires background to be set out in full, do this in an 'Annexure B']
7. In an Information Commissioner review (IC review) of an access refusal decision, the agency bears the onus of establishing that its decision is justified or that I should give a decision adverse to the applicant.¹
8. The issue to be decided in this IC review is whether the [document / documents / material] that the [agency] maintains [is/are] conditionally exempt under s 47C of the FOI Act [is/are] conditionally exempt under that provision, and if so, whether giving the applicant access to the conditionally exempt material at this time would, on balance, be contrary to the public interest (s 11A(5)).
9. In making my decision, I have had regard to the following:
 - the [agency]'s decision and reasons for decision of [date]
 - [if relevant] the [agency]'s internal review decision and reasons for decision of [date]
 - [if relevant] the [agency]'s revised decision and reasons for decision of [date]
 - the document[s] at issue
 - the FOI Act²
 - the Guidelines issued by the Australian Information Commissioner under s 93A of the FOI Act³ to which agencies must have regard in performing a function or exercising a power under the FOI Act,⁴ and
 - the parties' submissions.

Deliberative processes exemption (s 47C)

10. A document is conditionally exempt under s 47C if its disclosure 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

¹ FOI Act s 55D(1).

² Section 11A and 47C as set out in Annexure A.

³ See, Office of the Australian Information Commissioner, *Guidelines issued by the Australian Information Commissioner under s 93A of the Freedom of Information Act 1982* (FOI Guidelines).

⁴ Set out in Annexure A.

involved in the functions of an agency or a Minister or the Government of the Commonwealth.

11. [summarise parties' subs]
12. Deputy President Forgie explained in *Wood; Secretary, Department of Prime Minister and Cabinet (Freedom of information)* [2015] AATA 945 (*Wood*)⁵ that the words 'opinion', 'advice', and recommendations' in s 47C(1) of the FOI Act all involve consideration, followed by the formation of a view either about a certain subject or a course of action, and the subsequent transmission of that view. Similarly, the words 'consultation' and 'deliberation' both involve the notion of consideration but may not necessarily lead to the formation of an opinion, advice, or recommendation.
13. [...]

Finding

14. I [am / am not] satisfied that the [document/ documents/ material] [is / are] conditionally exempt under s 47C of the FOI Act.

Whether access would be contrary to the public interest (s 11A(5))

15. Having found the [document/ documents/ material] to be conditionally exempt under s 47C of the FOI Act, I am required to consider whether it would be contrary to the public interest to give the applicant access to conditionally exempt material at this time. The requirements of the public interest test are set out at Annexure A. I have considered the relevant mandatory factors listed in s 11B(3) of the FOI Act. I have not considered the irrelevant factors as set out in s 11B(4) of the FOI Act.⁶ In considering the public interest, I have had regard to the parties' submissions.
16. [summarise parties' subs].
17. I give [limited/ moderate/ significant] weight to the following factors in favour of disclosure, noting that they reflect the parties' submissions [in part/ in full]:
 - [...].
18. I give [limited/ moderate/ significant] weight to the following factors against disclosure, noting that they reflect the parties' submissions [in part/ in full]:
 - [...].
19. On balance, I consider that the public interest factors [against disclosure/ in favour of disclosure], which I have given [X] weight, outweigh the factors [favouring / against] disclosure.

[Name]

[Freedom of Information Commissioner/ Australian Information Commissioner]

[date]

⁵ *Wood; Secretary, Department of Prime Minister and Cabinet and (Freedom of information)* [2015] AATA 945.

⁶ Listed in Annexure A.

Annexure A

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.⁷

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

⁷ 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).⁸

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)).⁹

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).¹⁰

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.¹¹

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

⁸ FOI Guidelines at [6.48].

⁹ FOI Guidelines at [6.49].

¹⁰ FOI Guidelines at [6.52].

¹¹ 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.¹²

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.¹³

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.

¹² FOI Guidelines at [6.54] – [6.58] (footnotes omitted)

¹³ 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.¹⁴

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.¹⁵

Review rights

Review by the Administrative Appeals Tribunal

If a party to an IC review is unsatisfied with an IC review decision, they may apply under s 57A of the FOI Act to have the decision reviewed by the Administrative Appeals Tribunal (AAT). The AAT provides independent merits review of administrative decisions and has power to set aside, vary, or affirm an IC review decision.

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¹⁴ FOI Guidelines at [6.229] – [6.233].

¹⁵ FOI Guidelines at [6.238] (footnote omitted).

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@ and [agency] (Freedom of information) [2024]
AICmr @ (@ 2024)

Decision and reasons for decision of

Freedom of Information Commissioner/ Australian Information Commissioner], [name]

Applicant	@
Respondent	@
Third Party	@
Decision date	@ 2024
Reference	MR___/_____
Catchwords	Freedom of Information — Whether disclosure would have a substantial adverse effect on the management or assessment of personnel — Whether contrary to public interest to release conditionally exempt documents — (CTH) <i>Freedom of Information Act 1982</i> ss 11A and 47E(c)

Decision

- Under s 55K of the *Freedom of Information Act 1982* (the FOI Act), I [set aside/affirm/vary] the decision of the [agency] (the [Department / Respondent]) of [date], [if relevant] as varied on [date(s)]
- Within 28 days of this decision:
 - the [Department/ Respondent] must now provide the applicant with a copy of the documents, edited under s 22 of the FOI Act only to the extent necessary to delete exempt or irrelevant material.
 - the [Department/ Respondent] must advise whether it has fully implemented my decision or whether it will be seeking review of the decision by the Administrative Appeals Tribunal.

Key points

- This decision discusses [insert summary e.g. the application of s X of the FOI Act and paragraph Y of the FOI Guidelines to documents about Z]. It [is primarily of interest to

the parties in relation to the specific documents sought/may have broader implications for agencies in relation to...].

Reasons for decision

4. The background and key procedural steps in this IC review are set out at Annexure [A/B].

Scope of IC review

5. On [date], the applicant applied to the [agency] for access to [...].
6. [Briefly outline the documents at issue, and the parties' current stance – add a footnote that outlines the reviewable decision: see AIH at [4] and footnote 4 as an example. If the case requires background to be set out in full, do this in an 'Annexure B']
7. In an Information Commissioner review (IC review) of an access refusal decision, the agency bears the onus of establishing that its decision is justified or that I should give a decision adverse to the applicant.¹
8. The issue to be decided in this IC review is whether the [document / documents / material] that the [agency] maintains [is/are] conditionally exempt under s 47E(c) of the FOI Act [is/are] conditionally exempt under that provision, and if so, whether giving the applicant access to the conditionally exempt material at this time would, on balance, be contrary to the public interest (s 11A(5)).
9. In making my decision, I have had regard to the following:
 - the [agency]'s decision and reasons for decision of [date]
 - [if relevant] the [agency]'s internal review decision and reasons for decision of [date]
 - [if relevant] the [agency]'s revised decision and reasons for decision of [date]
 - the document[s] at issue
 - the FOI Act²
 - the Guidelines issued by the Australian Information Commissioner under s 93A of the FOI Act³ to which agencies must have regard in performing a function or exercising a power under the FOI Act,⁴ and
 - the parties' submissions.

Management of personnel exemption (s 47E(c))

10. Subsection 47E(c) of the FOI Act provides that a document is exempt if its disclosure 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.

¹ FOI Act s 55D(1).

² Section 11A and 47E(c) as set out in Annexure A.

³ See, Office of the Australian Information Commissioner, *Guidelines issued by the Australian Information Commissioner under s 93A of the Freedom of Information Act 1982* (FOI Guidelines).

⁴ Set out in Annexure A.

11. [summarise parties' subs]
12. [...]

Finding

13. I [am / am not] satisfied that the [document/ documents/ material] [is / are] conditionally exempt under s 47E(c) of the FOI Act.

Whether access would be contrary to the public interest (s 11A(5))

14. Having found the [document/ documents/ material] to be conditionally exempt under s 47E(c) of the FOI Act, I am required to consider whether it would be contrary to the public interest to give the applicant access to conditionally exempt material at this time. The requirements of the public interest test are set out at Annexure A. I have considered the relevant mandatory factors listed in s 11B(3) of the FOI Act. I have not considered the irrelevant factors as set out in s 11B(4) of the FOI Act.⁵ In considering the public interest, I have had regard to the parties' submissions.
15. [summarise parties' subs].
16. I give [limited/ moderate/ significant] weight to the following factors in favour of disclosure, noting that they reflect the parties' submissions [in part/ in full]:
 - [...].
17. I give [limited/ moderate/ significant] weight to the following factors against disclosure, noting that they reflect the parties' submissions [in part/ in full]:
 - [...].
18. On balance, I consider that the public interest factors [against disclosure/ in favour of disclosure], which I have given [X] weight, outweigh the factors [favouring / against] disclosure.

[Name]

[Freedom of Information Commissioner/ Australian Information Commissioner]

[date]

Annexure A

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.

⁵ Listed in Annexure A.

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).⁶

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.⁷

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.

⁶ At [6.90] and [6.92].

⁷ FOI Guidelines at [6.103] (footnote omitted).

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.⁸

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.⁹

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If a party to an IC review is unsatisfied with an IC review decision, they may apply under s 57A of the FOI Act to have the decision reviewed by the Administrative Appeals Tribunal (AAT). The AAT provides independent merits review of administrative decisions and has power to set aside, vary, or affirm an IC review decision.

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If the Ombudsman finds your complaint is justified, the Ombudsman can recommend that the OAIC reconsider or change its action or decision or take any other action that the Ombudsman considers is appropriate. You can contact the Ombudsman's office for more information on 1300 362 072 or visit the Commonwealth Ombudsman's website at <http://www.ombudsman.gov.au>.

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If you would like access to the information that we hold about you, please contact FOIDR@oaic.gov.au. More information is available on the [Access our information](#) page on our website.

⁸ FOI Guidelines at [6.229] – [6.233].

⁹ FOI Guidelines at [6.238] (footnote omitted).



@ and [agency] (Freedom of information) [2024]
AICmr @ (@ 2024)

Decision and reasons for decision of

Freedom of Information Commissioner/ Australian Information Commissioner], [name]

Applicant	@
Respondent	@
Third Party	@
Decision date	@ 2024
Reference	MR___/_____
Catchwords	Freedom of Information — Whether disclosure would have an adverse effect on the proper and efficient conduct of the operations of an agency — Whether contrary to public interest to release conditionally exempt documents — (CTH) <i>Freedom of Information Act 1982</i> ss 11A and 47E(d)

Decision

- Under s 55K of the *Freedom of Information Act 1982* (the FOI Act), I [set aside/affirm/vary] the decision of the [agency] (the [Department / Respondent]) of [date], [if relevant] as varied on [date(s)].
- Within 28 days of this decision:
 - the [Department/ Respondent] must now provide the applicant with a copy of the documents, edited under s 22 of the FOI Act only to the extent necessary to delete exempt or irrelevant material.
 - the [Department/ Respondent] must advise whether it has fully implemented my decision or whether it will be seeking review of the decision by the Administrative Appeals Tribunal.

Key points

- This decision discusses [insert summary e.g. the application of s X of the FOI Act and paragraph Y of the FOI Guidelines to documents about Z]. It [is primarily of interest to

the parties in relation to the specific documents sought/may have broader implications for agencies in relation to...].

Reasons for decision

4. The background and key procedural steps in this IC review are set out at Annexure [A/B].

Scope of IC review

5. On [date], the applicant applied to the [agency] for access to [...].
6. [Briefly outline the documents at issue, and the parties' current stance – add a footnote that outlines the reviewable decision: see AIH at [4] and footnote 4 as an example. If the case requires background to be set out in full, do this in an 'Annexure B']
7. In an Information Commissioner review (IC review) of an access refusal decision, the agency bears the onus of establishing that its decision is justified or that I should give a decision adverse to the applicant.¹
8. The issue to be decided in this IC review is whether the [document / documents / material] that the [agency] maintains [is/are] conditionally exempt under s 47E(d) of the FOI Act [is/are] conditionally exempt under that provision, and if so, whether giving the applicant access to the conditionally exempt material at this time would, on balance, be contrary to the public interest (s 11A(5)).
9. In making my decision, I have had regard to the following:
 - the [agency]'s decision and reasons for decision of [date]
 - [if relevant] the [agency]'s internal review decision and reasons for decision of [date]
 - [if relevant] the [agency]'s revised decision and reasons for decision of [date]
 - the document[s] at issue
 - the FOI Act² in particular ss 11A(5) and 47E(d)
 - the Guidelines issued by the Australian Information Commissioner under s 93A of the FOI Act³ to which agencies must have regard in performing a function or exercising a power under the FOI Act,⁴ and
 - the parties' submissions.

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

10. A document will be conditionally exempt if:

¹ FOI Act s 55D(1).

² Sections 11A and 47E(d) as set out in Annexure A.

³ See, Office of the Australian Information Commissioner, *Guidelines issued by the Australian Information Commissioner under s 93A of the Freedom of Information Act 1982* (FOI Guidelines).

⁴ Set out in Annexure A.

- 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 (s 47E(d)), and
- it would be 'contrary to the public interest' to release the material at the time of the decision (s 11A(5)).

11. [summaries parties' subs].

12. [...].

Finding

13. I [am / am not] satisfied that the [document/ documents/ material] [is / are] conditionally exempt under s 47E(d) of the FOI Act.

Whether access would be contrary to the public interest (s 11A(5))

14. Having found the [document/ documents/ material] to be conditionally exempt under s 47E(d) of the FOI Act, I am required to consider whether it would be contrary to the public interest to give the applicant access to conditionally exempt material at this time. The requirements of the public interest test are set out at Annexure A. I have considered the relevant mandatory factors listed in s 11B(3) of the FOI Act. I have not considered the irrelevant factors as set out in s 11B(4) of the FOI Act.⁵ In considering the public interest, I have had regard to the parties' submissions.

15. [summarise parties' subs].

16. I give [limited/ moderate/ significant] weight to the following factors in favour of disclosure, noting that they reflect the parties' submissions [in part/ in full]:

- [...].

17. I give [limited/ moderate/ significant] weight to the following factors against disclosure, noting that they reflect the parties' submissions [in part/ in full]:

- [...].

18. On balance, I consider that the public interest factors [against disclosure/ in favour of disclosure], which I have given [X] weight, outweigh the factors [favouring / against] disclosure.

[Name]

[Freedom of Information Commissioner/ Australian Information Commissioner]

[date]

Annexure A

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.

⁵ Listed in Annexure A.

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 Guidelines⁶ and in IC review decisions,⁷ 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)).⁸

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.⁹

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.

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

⁶ See FOI Guidelines at [6.90] – [6.92], and [6.112] – [6.118] and the cases referenced there.

⁷ 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.

⁸ FOI Guidelines at [6.18] – [6.19] (footnotes omitted).

⁹ At page 699.

- (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:

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¹⁰ FOI Guidelines at [6.229] – [6.233].

¹¹ FOI Guidelines at [6.238] (footnote omitted).