



@ 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 — Access grant — Whether disclosure of personal information unreasonable — Whether contrary to public interest to release conditionally exempt documents — (CTH) <i>Freedom of Information Act 1982</i> ss 11A and 47F

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 Freedom of Information applicant (FOI 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 / In an Information Commissioner review (IC review) of an access grant decision, the IC review applicant bears the onus of establishing that a decision refusing the request is justified or that I should give a decision adverse to the FOI applicant.²]
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 47F 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 Act³
 - 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 FOI Act s 55D(2).

³ Sections 11A and 47F 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.

Personal privacy exemption (s 47F)

10. A document contains 'personal information'; disclosure in response to the applicant's FOI request would be 'unreasonable' (s 47F(1)); and it would be 'contrary to the public interest' to release the material at the time of the decision (s 11A(5)).
11. [summarise parties' subs].

Whether the [document / documents / material] contains personal information

12. 'Personal information' under the FOI Act has the same meaning as the equivalent term in the *Privacy Act 1988*.⁶ That definition is set out in Annexure A.
13. [...]

Finding on personal information

14. I find that the [personal info], being [brief description] [is/are] 'personal information' for the purposes of s 47F(1) of the FOI Act.

Whether disclosure would involve an unreasonable disclosure of personal information

15. I have examined an unedited and unredacted copy of the [document/ documents/ material], as well as the parties' submissions. I have considered the mandatory factors in s 47F(2) of the FOI Act as well as the other relevant factors below.

Consideration of whether disclosure of personal information would be unreasonable

16. [...]
17. Having weighed the relevant factors, I find that disclosure [would/ would not] involve an unreasonable disclosure of personal information. This is because:
 - [...].

Finding

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

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

19. Having found the [document/ documents/ material] to be conditionally exempt under s 47F 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.⁷ In considering the public interest, I have had regard to the parties' submissions.

⁶ *Privacy Act 1988* s 6(1) (definition of 'personal information').

⁷ Listed in Annexure A.

20. [summarise parties' subs].
21. 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]:
- [...].
22. I give [limited/ moderate/ significant] weight to the following factors against disclosure, noting that they reflect the parties' submissions [in part/ in full]:
- [...].
23. 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.

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.⁸

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.

⁸ Section 6(1) of the *Privacy Act 1988* (Cth) (emphasis in original).

As discussed in the FOI Guidelines and IC review cases,⁹ 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’.¹⁰

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.¹¹

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.¹²

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.

⁹ 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.

¹⁰ FOI Guidelines at [6.133].

¹¹ FOI Guidelines at [6.137] – [6.138] (footnotes omitted).

¹² FOI Guidelines at [6.139].

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.¹³

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.¹⁴

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

¹³ FOI Guidelines at [6.229] – [6.233].

¹⁴ FOI Guidelines at [6.238] (footnote omitted).

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.





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

Applicant	@
Respondent	@
Third Party	@
Decision date	@ 2024
Reference	MR_/_/_____
Catchwords	Freedom of Information — Access grant — Whether material contains trade secrets — Whether material contains commercially valuable information — Whether disclosure would unreasonably affect an organisation in respect of its lawful business affairs — Whether contrary to public interest to release conditionally exempt documents — (CTH) <i>Freedom of Information Act 1982</i> ss 11A, 47, and 47G

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

3. 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 Freedom of Information applicant (FOI 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 / In an Information Commissioner review (IC review) of an access grant decision, the IC review applicant bears the onus of establishing that a decision refusing the request is justified or that I should give a decision adverse to the FOI applicant.²]
8. The issue to be decided in this IC review are whether the:
 - [document / documents / material] that the [IC review applicant / Department/ Respondent] maintains [is/are] exempt under s 47 of the FOI Act are exempt under that provision, and
 - [document / documents / material] that the [IC review applicant / Department/ Respondent] maintains [is/are] conditionally exempt under s 47G of the FOI Act 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 Act³

¹ FOI Act s 55D(1).

² FOI Act s 55D(2).

³ Sections 11A, 47, and 47G as set out in Annexure A.

- 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.

Documents disclosing trade secrets or commercially valuable information (s 47)

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

10. A document will be exempt under this subsection if its disclosure would disclose trade secrets.
11. [summarise parties' subs].

Whether the [document / documents / material] contain[s] trade secrets

12. [...]

Finding

13. I [am / am not] satisfied that the [document/ documents/ material] [is / are] exempt under s 47(1)(a) of the FOI Act.

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

14. A document will be exempt under s 47(1)(b) of the FOI Act if its disclosure would reveal information that has commercial value that would be, or could reasonably be expected to be, destroyed or diminished if it were disclosed.
15. [summarise parties' subs].

Consideration of the commercial value of the document

16. [...]

Finding

17. I [am / am not] satisfied that the [document/ documents/ material] [is / are] exempt under s 47(1)(b) of the FOI Act.

Business affairs exemption (s 47G)

18. A document will be conditionally exempt if it discloses information (business information) concerning the business, commercial or financial affairs of an organisation or undertaking, where the disclosure of the business information would, or could reasonably be expected to:
 - unreasonably affect the organisation adversely in respect of its lawful business, commercial or financial affairs (s 47G(1)(a)), or
 - or 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

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.

Territory or the administration of matters administered by an agency (s 47G(1)(b), and

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

Information in respect of business affairs (s 47G(1)(a))

19. [...]
20. [summarise parties' subs].

Consideration

21. [...]
22. As discussed in the FOI Guidelines, assessing if the impact is unreasonable requires me to balance the public and private interest factors. I [accept/ do not accept] that the private interests of the [third party / third parties / applicant] are such that release of the information could cause them to [...].
23. On balance, I [do/ do not] consider the public interest factors outweigh the private interests of the [third party / third parties / applicant] and I therefore [do/do not] consider that the impact claimed by the [third party / third parties / applicant] would be unreasonable in the circumstances.

Finding

24. I [am/ am not] satisfied that the [document / documents / material] [is/are] conditionally exempt under 47G(1)(a) of the FOI Act.

Prejudice the future supply of information (s 47G(1)(b))

25. [summarise parties' subs]

Consideration

26. [...]

Finding

27. I [am/ am not] satisfied that the [document / documents / material] [is/are] conditionally exempt under 47G(1)(b) of the FOI Act.

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

28. Having found the [document/ documents/ material] to be conditionally exempt under s 47G 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.

29. [summarise parties' subs].

⁶ Listed in Annexure A.

30. 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]:
- [...].
31. I give [limited/ moderate/ significant] weight to the following factors against disclosure, noting that they reflect the parties' submissions [in part/ in full]:
- [...].
32. 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.

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.⁷

The FOI Guidelines further state:

⁷ FOI Guidelines at [5.229] – [5.230].

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.⁸

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.⁹

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

⁸ FOI Guidelines at [5.231].

⁹ FOI Guidelines at [5.235].

encountering criticism or embarrassment. It must be established that the disclosure would destroy or diminish the commercial value of the information.¹⁰

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).¹¹

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.¹² 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.¹³

The FOI Guidelines state:

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

¹⁰ FOI Guidelines at [5.237].

¹¹ FOI Guidelines at [6.179] – [6.180].

¹² FOI Guidelines at [6.181].

¹³ FOI Guidelines at [6.181].

interpreted to mean ‘the totality of the money-making affairs of an organisation or undertaking as distinct from its private or internal affairs.’¹⁴

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.¹⁵

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.¹⁶

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.¹⁷

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.

¹⁴ FOI Guidelines at [6.191] (footnotes omitted).

¹⁵ FOI Guidelines at [6.184] (footnotes omitted).

¹⁶ FOI Guidelines at [6.185] (footnotes omitted).

¹⁷ 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.¹⁸

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.¹⁹

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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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>.

¹⁸ FOI Guidelines at [6.229] – [6.233].

¹⁹ FOI Guidelines at [6.238] (footnote omitted).

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.





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

**Decision and reasons for decision of
Rocelle Ago, Assistant Commissioner Freedom of Information
Delegate of the Australian Information Commissioner for the purposes of s 55K of
the Freedom of Information Act 1982**

Applicant	@
Respondent	@
Decision date	@ 2024
Reference	MR__/_
Catchwords	Freedom of Information — Whether a practical refusal reason exists — Whether work involved in processing the request would substantially and unreasonably interfere with the performance of the Agency’s functions — (CTH) <i>Freedom of Information Act 1982</i> ss 24, 24AA, and 24AB

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)]. I substitute my decision that a practical refusal reason does not exist. The [Department/ Respondent] must process the applicant’s request and notify the applicant of its decision.¹
- Within 30 days of this decision:
 - 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.

¹ On the question of the processing deadlines that now apply, see *Fletcher and Prime Minister of Australia* [2013] AICmr 11 at [33] – [38].

Key points

3. 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. [set out revised request if there is one].
7. [set out reviewable decision + R's position].
8. [set out A's position].
9. The issue[s] to be decided in this Information Commissioner review (IC review) [is/are] whether the work involved in processing the applicant's request would substantially and unreasonably divert the resources of the [agency] from its other operations.
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.²
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 FOI Act³
 - 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.

Whether the [agency] was entitled to refuse access for a practical refusal reason (s 24)

12. Section 24 of the FOI Act sets out the requirements an agency or Minister must satisfy to refuse access to documents because of a practical refusal reason. In deciding on this issue, I am required to consider:

² FOI Act s 55D(1).

³ Sections 24, 24AA, and 24AB as 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.

- whether a request consultation process has been undertaken in accordance with s 24AB of the FOI Act, and if so
- whether I am satisfied that the work involved in processing the applicant's request would 'substantially' divert the resources of the agency from its other operations, and
- 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.⁶

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

13. For a request consultation process to have been undertaken for the purposes of s 24(1)(a) of the FOI Act, the applicant must have been notified in accordance with s 24AB(2) of the FOI Act. If the applicant contacts the relevant contact person, then the agency must 'take reasonable steps to assist the applicant to revise the request so that the practical refusal reason no longer exists' (s 24AB(3)). What constitutes 'reasonable steps' is informed by s 24AB(4)⁷ and the FOI Guidelines,⁸ but it must be considered on a case-by-case basis.⁹
14. [summarise parties' subs if not in Annexure].
15. [...].

Whether a practical refusal reason exists (s 24AA(1)(a)(i))

16. In determining whether a practical refusal reason exists for the purposes of s 24AA(1)(a)(i) I must first consider whether I am satisfied that the diversion of the [agency's] resources from its other operations would be substantial. If I am satisfied that it would be, I must then consider if that substantial diversion would be 'unreasonable'.¹⁰
17. In answering this question I have had regard to the relevant mandatory factors listed in s 24AA(2) of the FOI Act but I have not considered the factors set out in s 24AA(3) of the FOI Act.¹¹

Whether the work involved in processing the request would substantially divert the resources of [agency] from its other operations

18. [summarise parties' subs if not in Annexure].
19. [...].

⁶ See 'ACW' and Australian National Maritime Museum (Freedom of information) [2023] AICmr 4 at [10] as set out in Annexure A.

⁷ FOI Act.

⁸ At [3.133].

⁹ Justin Warren and Department of Human Services (Freedom of information) [2019] AICmr 22 at [32].

¹⁰ See 'ACW' and Australian National Maritime Museum (Freedom of information) [2023] AICmr 4 at [10] as set out in Annexure A.

¹¹ As set out in Annexure A.

Whether the work involved in processing the request would unreasonably divert the resources of the [agency] from its other operations

20. [summarise parties' subs if not in Annexure].
21. [...].

Finding

22. I find that [agency] [has / has not] established that a practical refusal reason exists for the purposes of s 24(1)(b) of the FOI Act because [...]. The [agency] [was/ was not] authorised under s 24(1)(b) of the FOI Act to refuse access to the documents in accordance with the request.

Rocelle Ago

Assistant Commissioner Freedom of Information

Delegate of the Australian Information Commissioner for the purposes of s 55K of the *Freedom of Information Act 1982*

[date]

Annexure 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.¹²

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

¹² FOI Guidelines at [3.127], [3.129], [3.132], and [3.133].

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:

- (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.¹³

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'.¹⁴ Moreover, a decision maker's 'satisfaction' as to

¹³ *'ACW' and Australian National Maritime Museum [2023] AICmr 4* at [10].

¹⁴ *Briginshaw v Briginshaw [1938] HCA 34; (1938) 60 CLR 336* at 361 (Dixon J)

the existence of a practical refusal reason cannot be arbitrary or capricious; it must be formed ‘according to law and not humour’.¹⁵

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’.¹⁶

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
- 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.¹⁷

¹⁵ *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).

¹⁶ 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 Forgie DP in the context of s 24AA(1).

¹⁷ FOI Guidelines at [3.116] – [3.117] (footnote omitted).

Review rights

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Updated June 2023

Conducting an IC review: Identification of systemic and significant issues

The identification of systemic and significant issues can occur through 4 stages:

- Intake
- Senior assessment: pre-commencement of review
- Senior assessment: post-commencement of review, including review of documents at issue prior to allocation
- IC Review: Case management

The table below sets out the considerations taken at each stage to enable identification of systemic and significant issues and the potential actions and next steps.

IC reviews involving systemic and significant issues are assigned case category 5.

This worksheet should be read in conjunction with IC Review Case Categories ([D2020/000377](#)) and Conducting an IC review: Assessments worksheets: [D2019/002542](#).

Stages	Considerations	Actions/next steps
<ul style="list-style-type: none"> • Intake 	<ul style="list-style-type: none"> • Applications made by parliamentarians • IC review applications relating to Ministers (Respondents or subject matter) • Exemptions: ss 4(1) (whether documents are official documents of a minister/party/political), 25 (Neither confirm nor deny), 33 (National Security), 34 (Cabinet), 46 (Contempt of Parliament), 47B (Commonwealth/State relations), 47D (Financial interests or property interests of the Commonwealth), 47H (Research), 47J (The Economy) • Whether request relate to official documents of a minister, senior officials' diaries, electronic communications, incoming government briefs • Whether request relates to ongoing public debate or highly publicised investigations • Whether exemptions relate to waiver of legal professional • Whether request relates to a <i>Public Interest Disclosure</i> 	<ul style="list-style-type: none"> • Identify appropriate category under 'sensitivity' • Identify relevant exemptions under 'Assessor note' • Add relevant cross-references • If deemed access refusal, proceed with preliminary inquiries process. • For all other matters, proceed to Mail Assessment.

Stages	Considerations	Actions/next steps
<ul style="list-style-type: none"> Senior assessment: pre-commencement of review 	<ul style="list-style-type: none"> In accordance with intake considerations Whether novel issues raised or whether it can be a lead case to address systemic issues Whether there is an application currently before the OAIC for a vexatious applicant declaration to be made in relation to the IC review applicant or an investigation into a complaint 	<ul style="list-style-type: none"> Note in assessment Insert relevant cross-references
<ul style="list-style-type: none"> Senior assessment: post-commencement of review, including review of documents at issue prior to allocation 	<ul style="list-style-type: none"> In accordance with senior assessment: pre-review of documents considerations Whether respondent’s decision or ability to make a revised decision is affected by consultation with other government agencies 	<ul style="list-style-type: none"> Note in assessment Insert relevant cross-references
<ul style="list-style-type: none"> IC Review: Case management 	<ul style="list-style-type: none"> In accordance with intake considerations Whether respondent’s decision or ability to make a revised decision is affected by consultation with other government agencies 	<ul style="list-style-type: none">



Australian Government
Office of the Australian Information Commissioner



Conducting IC reviews: Assessments

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