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to the information an applicant seeks, including by administrative release of information that has been compiled from documents or a database (see [3.2]).

3.209 An applicant can seek internal or IC review of a decision not to provide access in the form requested by the applicant where all documents to which the request relate have not been provided (s 53A(c)).

Information stored in electronic form

3.210 Section 17 requires an agency to produce a written document of information that is stored electronically and not in a discrete written form, if it does not appear from the request that the applicant wishes to be provided with a computer tape or disk on which the information is recorded.[90] Examples include a transcript of a sound recording, a written compilation of information held across various agency databases, or the production of a statistical report from an agency's dataset. The obligation to produce a written document arises if:

- the agency could produce a written document containing the information by using a 'computer or other equipment that is ordinarily available' to the agency for retrieving or collating stored information (s 17(1)(c)(i)), or making a transcript from a sound recording (s 17(1)(c)(ii)), and
- producing a written document would not substantially and unreasonably divert the resources of the agency from its other operations (s 17(2)).

If those conditions are met, the FOI Act applies as if the applicant had requested access to the written document and it was already in the agency's possession.

3.211 The reference in s 17 to information recorded on a 'computer tape or disk' should be taken to include information recorded in an email or on electronic storage media.

3.212 In *Collection Point Pty Ltd v Commissioner of Taxation* the Full Federal Court held that the two conditions specified in [3.210] are distinct and to be applied sequentially.[91] That is, a computer may not be ordinarily available to an agency even though it could be obtained without an unreasonable diversion of agency resources; and, conversely, an agency may encounter an unreasonable diversion of resources to produce a written document using a computer that is ordinarily available.

3.213 The Federal Court further held that the reference in s 17(1)(c)(i) to a 'computer or other equipment that is ordinarily available' means 'a functioning computer system including software, that can produce the requested document without the aid of additional components which are not themselves ordinarily available … [T]he computer or other equipment … must be capable of functioning independently to collate or retrieve stored information and to produce the requested document.'[92] This will be a question of fact in the individual case, and may require consideration of 'the agency's ordinary or usual conduct and operations'.[93] For example, new software may be ordinarily available to an agency that routinely commissions or otherwise obtains such software, but not to an agency that does not routinely do such things. Similarly, where additional hardware and/or software

[90] For discussion of s 17 not applying because the applicant requested an edited copy of an agency's database rather than a new document containing information from the database, see *Diamond and Australian Curriculum, Assessment and Reporting Authority* [2013] AICmr 57 [19]–[22].

[91] [2013] FCAFC 67 [39]-[40].

[92] [2013] FCAFC 67 [43]-[44].

[93] [2013] FCAFC 67 [48].

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adaption or creation is required in order to produce a document that is intelligible, such work may go beyond what s 17 obliges.[94]

3.214 Applying that test, the Federal Court in *Collection Point* held that the Australian Taxation Office (ATO) did not ordinarily have the required software to satisfy the applicant's request to produce a document containing consolidated details of persons listed in two unclaimed money registers maintained electronically by the ATO. A new computer program would have to be produced by the ATO to transfer the information from the database into a discrete written format. Accordingly, as new software was necessary to produce the requested document, ATO was not able to do so by the use of a computer that was ordinarily available to it, and therefore the obligation under s 17(1) did not arise.[95]

3.215 Having regard to the current strong policy emphasis on digitisation of Commonwealth records, agencies are encouraged to develop guidelines and procedures for the efficient storage and retrieval of information held on servers, hard disks, portable drives and mobile devices. Agencies are encouraged to consult with applicants about administrative release on a flexible and agreed basis of information extracted from databases.

3.216 The provisions set out at s 17 of the Act apply only to agencies. Ministers and their officers must, however, have regard to s 20 (discussed above at [3.205]) when considering the form of access to be given.

Charges for alternative forms of access

3.217 If an agency or minister decides to provide a document in a form different to that requested by the applicant, the charge payable cannot exceed the charge that would have applied if access had been given in the form the applicant requested (s 20(4)).

Protections when access to documents is given

3.218 The FOI Act provides protection from civil action and criminal prosecution for those involved in giving access to documents under the Act. These protections are designed to ensure that potential legal action does not impede the Act's operation.

Actions for defamation, breach of confidence or infringement of copyright

3.219 Section 90 of the FOI Act provides that no action for defamation or breach of confidence or infringement of copyright lies against the Commonwealth, a minister, an agency or an agency officer solely on the ground of having given access, or having authorised access, to a document. The protection applies only in the context of the operation of the FOI Act and requires a decision maker to act in good faith with a genuine belief that publication or access is either required or permitted under the Act. Similar protection applying in particular situations (noted below) is given by s 91.

3.220 The protection afforded by ss 90 and 91 extend to:

- giving access in response to an FOI request under the Act (s 90(1)(b))
- publishing information under s 11C (disclosure log) and as part of the IPS (s 90(1)(a))

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[94] *Stephen Cox and Australian Federal Police* [2015] AICmr 45.

[95] [2013] FCAFC 67 [53].

- publishing or giving access to a document 'in the belief that the publication or access is required or permitted otherwise than under this Act (whether or not under an express legislative power)' (s 90(1)(c))
- showing a document to a third party in the course of consultation under s 26A, 27 or 27A (s 91(1C)).

3.221 If a document is disclosed in any of the ways mentioned in [3.220], protections in respect of that disclosure also extend to the person who supplied the document to the agency or minister (s 90(2)). If consultation under ss 26A, 27 or 27A occurs, protection extends to the author of the document and to any other person because of that author or other person having shown the document (s 91(1C)).

3.222 Disclosure of a document to a person under the FOI Act (whether to an applicant or during consultation) does not, for the purpose of the law of defamation or copyright, constitute an authorisation or approval to republish the document or to do an act comprised within the copyright in the document (s 91(2)). That is, an FOI applicant who disseminates defamatory or copyright material in any document received following an FOI Act request has no FOI Act protection against an action for defamation or breach of copyright.

3.223 A decision maker who is aware that a document released under the FOI Act contains defamatory material is encouraged to draw this to the applicant's attention. Similarly, an agency or minister may advise an applicant that copyright permission may be needed from another party for any reuse of the material. A statement such as the following could be used:

> To the extent that copyright in some of this material is owned by a third party, you may need to seek their permission before you can reuse or disseminate that material.

3.224 For further guidance on agency copyright notices in connection with the IPS and the disclosure log, see Parts 13 and 14 of these Guidelines.

Offences

3.225 Section 92 operates in a similar way to s 90 to provide that neither a minister nor a person authorising access to a document, or being involved in providing access, is guilty of a criminal offence by reason only of that action. For example, where a secrecy provision in other legislation would otherwise prohibit the disclosure of a document, s 92 will relieve any minister or authorised officer of an agency from criminal liability if they authorise or give access under the FOI Act.[96] This immunity extends to disclosures for the purposes of undertaking consultation under s 26A, 27 or 27A of the FOI Act (s 92(2)). To benefit from the immunity, the minister or authorised officer must act in good faith with a genuine belief that disclosure is required or permitted under the FOI Act.

[96] Secrecy provisions that are listed in Schedule 3 of the FOI Act or are expressed to be applicable for the purposes of s 38 of the FOI Act operate as an exemption under s 38 — see Part 5 of these Guidelines.

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Part 4 —
Charges for providing access

Version 1.8, February 2021

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4.1 An agency or minister may impose a charge in respect of a request for access to a document or for providing access to a document, under s 29 of the FOI Act. The charge must be assessed in accordance with the *Freedom of Information (Charges) Regulations 2019* (Charges Regulations).

4.2 The Information Commissioner has published guidance and advice that helps decision makers identify the steps in calculating a charge. The guidance is available at https://www.oaic.gov.au/freedom-of-information/guidance-and-advice/calculating-and-imposing-charges-for-foi-access-requests/

Guiding principles

4.3 Under s 8 of the Charges Regulations, an agency or minister has a discretion to impose or not impose a charge, or impose a charge that is lower than the applicable charge. In exercising that discretion, the agency or minister should take account of the 'lowest reasonable cost' objective stated in the objects of the FOI Act (s 3(4)):

> *… functions and powers given by this Act are to be performed and exercised, as far as possible, to facilitate and promote public access to information, promptly and at the lowest reasonable cost.*[1]

4.4 Agencies and ministers should interpret the 'lowest reasonable cost' objective broadly in imposing any charge under the FOI Act. That is, an agency or minister should have regard to the lowest reasonable cost to the applicant, to the agency or minister, and the Commonwealth as a whole. Where the cost of calculating and collecting a charge might exceed the cost to the agency of processing the request, it may generally be more appropriate not to impose a charge.[2]

4.5 Further, an agency or minister should keep in mind that under s 55D(1) of the FOI Act, if an applicant applies for Information Commissioner review (IC review) of a decision to impose a charge, the agency or minister bears the onus, and therefore bears the cost, of establishing that:

a. its decision in relation to the FOI request is justified, or

b. the Information Commissioner should make a decision adverse to the IC review applicant.

Ultimately, the amount of any charge imposed should be:

- determined bearing the objects of the FOI Act in mind
- reasonable, taking into account all relevant factors
- proportionate to the cost of making a decision and providing access, as well as any general public interest supporting release of the requested documents (see s 29(5)(b) of the FOI Act).

4.6 The objects of the FOI Act provide the basis for the following principles relevant to charges under the FOI Act:

- A charge must not be used to unnecessarily delay access or to discourage an applicant from exercising the right of access conferred by the FOI Act.

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[1] An assessment of charges based on the maximum rates outlined in Schedule 1 to the Charges Regulations can be consistent with the 'lowest reasonable cost' objective: see *McBeth and Australian Agency for International Development* [2012] AICmr 24 [15].

[2] *Australian Associated Press Pty Ltd and Department of Immigration and Border Protection* [2015] AICmr 65 [31] and *Emmanuel Freudenthal and Department of Foreign Affairs and Trade (Freedom of information)* [2019] AICmr 15 [46].

- A charge should fairly reflect the work involved in providing access to documents.
- Charges are discretionary and should be justified on a case by case basis.
- Agencies should encourage administrative access at no charge, where appropriate.
- Agencies should assist applicants to frame FOI requests (s 15(3) of the FOI Act).
- Agencies should draw an applicant's attention to opportunities to obtain free access to a document or information outside the FOI Act (s 3A(2)(b)).
- A decision to impose a charge should be transparent.

4.7 An agency should ensure that the notice to an applicant of a charge fully explains and justifies the charge. Implicit in the 'lowest reasonable cost' objective is the requirement for sound record keeping so that an agency's documents can be readily identified and found when an FOI request is received (see [4.29] below).

Charges framework

The FOI Act and the Charges Regulations

4.8 The FOI Act and Charges Regulations set out the process when an agency or minister decides to impose a charge for processing an FOI request or for providing access to a document to which a request relates.

4.9 If an agency or minister decides to impose a charge, the agency or minister must provide the applicant with a written notice outlining the preliminary assessment of the charge and all the matters listed in s 29(1) of the FOI Act (see [4.55] below).[3]

4.10 In notifying an applicant of a charge or estimated charge, the agency or minister may require the applicant to pay a deposit (see [4.84] below). Where an applicant receives a notice of preliminary assessment advising that a charge is payable, and does not object to the estimated charge, they may decide to pay a deposit or the full estimated charge. An applicant may also object to the estimated charge *and* pay the deposit or full estimated charge to progress a decision on the FOI request while the charge is disputed (see [4.12] and [4.63]–[4.65] below).[4]

4.11 Where the applicant objects to the estimated charge, they may contend that the charge has been wrongly assessed, or should be reduced or not imposed (s 29(1)(f)). The application must:

- be made in writing (s 29(1)(f))
- be made within 30 days of receiving the notice or such further period as the agency or minister allows (s 29(1)(f))
- set out the applicant's reasons for contending that the charge has been wrongly assessed or should otherwise be reduced or not imposed (s 29(1)(f)(ii)).

4.12 An applicant may, in objecting to the estimated charge:

- postpone payment of the deposit or estimated charge until the agency makes a decision on the amount of charge payable, or
- pay the deposit or the estimated charge pending a decision on reduction or waiver of the estimated charge. This action requires the agency to continue processing the FOI request while considering the application for reduction or waiver of the charge. If the agency or

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[3] For further information about the steps required to estimate and notify a charge, see https://www.oaic.gov.au/freedom-of-information/guidance-and-advice/calculating-and-imposing-charges-for-foi-access-requests/

[4] *Justin Warren and Department of Human Services (Freedom of information)* [2018] AICmr 16 [35]–[40].

minister decides to reduce or waive the charge, the deposit should be reduced or refunded.

4.13 If the applicant does not respond in writing to the agency or minister's notice of the preliminary assessment of the charge within 30 days, or such other period allowed by the agency or minister, the FOI request is taken to have been withdrawn (s 29(2)).

4.14 On receiving the applicant's reasons for contesting the charge, the agency or minister must, within 30 days, or earlier if practicable (s 29(6)), provide a written notice of decision to the applicant as to whether the charge will be imposed, reduced or waived. In making its decision, the agency or minister must take into account whether payment of the charge will cause financial hardship, or whether giving access without charge or at a reduced charge, will be in the public interest (ss 29(4)–(5)) (see [4.95]–[4.113] below).[5]

4.15 Where the agency or minister does not provide its decision to the applicant within 30 days, the agency is taken to have made a decision to impose the charge specified in the notice of preliminary assessment (s 29(7)).

4.16 If the decision is to impose or reduce the charge, the notice of the charge decision must also set out the reasons for the decision (s 29(8)) and:

- the applicant's right to seek internal review or IC review of the decision
- the applicant's right to complain to the Information Commissioner
- the procedure for exercising these rights (s 29(9)).

4.17 Where the agency or minister is deemed to have affirmed the preliminary assessment of the charge under s 29(7), or deemed to have affirmed the original decision under s 54D, the agency or minister continues to have an obligation to provide a statement of reasons. This obligation to provide a statement of reasons continues until any IC review of the deemed decision is finalised.

4.18 Other relevant provisions in the FOI Act and Charges Regulations concerning the imposition of charges are summarised in Table 1.

Table 1: Charges – summary of main legislative provisions

Legislative provision	Operation
Section 6 of the Charges Regulations	Charges for making a decision on a request for access to a document are set out in Part 1 of Schedule 1 of the Charges Regulations. Charges for providing access to a document are set out in Part 2 of Schedule 2.
Section 7 of the Charges Regulations	There is no charge for providing access to an applicant's personal information, or for providing access outside the statutory processing period, unless the Information Commissioner has extended that period under s 15AB of the FOI Act or the applicant has agreed to extend the time under s 15AA (see [4.47]–[4.48] below).
Section 8 of the Charges Regulations	An agency or minister may decide that an applicant is liable to pay a charge in respect of a request for access to a document, or in respect of the provision of access to a document.

[5] For further information about the steps required to process an application for reduction or waiver of a charge, after an applicant contests a charge, see https://www.oaic.gov.au/freedom-of-information/guidance-and-advice/calculating-and-imposing-charges-for-foi-access-requests/

Legislative provision	Operation
Section 9 of the Charges Regulations	In issuing a notice of a charge under s 29 of the FOI Act, an agency or minister may provide an estimate (based on Schedule 1 of the Charges Regulations) if the agency or minister has not taken all steps necessary to make a decision on the request.
Section 10 of the Charges Regulations	After taking all steps necessary to make a decision on a request, an agency or minister: • must adjust an estimated charge to a lower amount where the actual amount of the charge is lower than the estimated amount (s 10(2)); or • may adjust an estimated charge to a higher amount (s 10(3)).
Section 11A of the FOI Act and s 11 of the Charges Regulations	An applicant must pay the required charge before being given access to a document, except if the charge relates to an officer supervising inspection, or in hearing or viewing the document.
Section 12 of the Charges Regulations	An agency or minister may require an applicant to pay a deposit of $20 for an estimated charge of between $25 and $100, or 25 percent of the estimated charge if greater than $100.
Section 31 of the FOI Act	If an applicant is notified during the statutory processing period that a charge is payable, the processing period is extended until the applicant pays the charge or is notified by the agency following a review that no charge is payable.

Charges are discretionary

4.19 Agencies and ministers have a discretion:

- not to impose a charge for the staff time and resources expended in processing an FOI request (s 8 of the Charges Regulations), independently of an applicant contending that a charge be reduced or waived
- to impose a charge lower than the charge specified in the Charges Regulations (s 8)
- to reduce or waive a charge after an applicant contests a charge (s 29(4)) (see [4.95]–[4.114] below).

4.20 Agencies and ministers should be guided by the 'lowest reasonable cost' objective in s 3 of the FOI Act in deciding whether a charge specified in the Charges Regulations is warranted; there is no obligation on an agency to charge for access. Agencies and ministers may need to balance a number of factors in reaching decisions concerning access to documents and related charges. The overall impact of charges in recovering costs to government does not, of itself, justify imposing a charge for an individual request.[6] Further, imposing a charge can deter members of the public from seeking access to documents and can delay access.

4.21 It is suggested that agencies develop internal guidance to assist staff to decide whether it is appropriate to impose a charge in relation to an FOI request. Situations in which it may not be appropriate include when a request has been outstanding for a long period of time (for example, when the request has been the subject of an IC review).

Charges that may be imposed

[6] *Australian Associated Press Pty Ltd and Department of Foreign Affairs and Trade (Freedom of information)* [2017] AICmr 131 [30] and *Australian Associated Press Pty Ltd and Department of Foreign Affairs and Trade* [2018] AICmr 13 [34].

4.22 The charges that may be imposed by an agency or minister with respect to a request for access to a document are specified in Schedule 1 of the Charges Regulations. While the decision to impose a charge is discretionary, calculation of the charge must be in accordance with the amounts specified in Schedule 1 of the Charges Regulations. Part 1 of Schedule 1 specifies charges related to making a decision on a request and Part 2 specifies charges for giving access to a document. The charges are listed in Table 2 below.

4.23 There is no charge for making:

- a request to an agency or minister for access to a document under Part III of the FOI Act
- an application for amendment or annotation of a personal record under Part V of the FOI Act
- an application for internal review of a decision under Part VI of the FOI Act
- an application for review by the Information Commissioner under Part VII of the FOI Act
- a complaint to the Information Commissioner under Part VIIB of the FOI Act.

4.24 An agency or minister cannot impose a charge:

- for giving access to an individual's own personal information (s 7(1) of the Charges Regulations)
- if it fails to make a decision on the request within the statutory processing period – the statutory period includes any extensions of time under ss 15(6), 15(8), 15AA and 15AB, but not s 15AC of the FOI Act (ss 7(2) and (3) of the Charges Regulations); s 12(3)(b) of the Charges Regulations provides that the agency or Minister must refund any deposit paid in these circumstances
- for making an internal review decision.[7]

This is discussed further at [4.43]–[4.49].

Table 2: Charges listed in Schedule 1 of the Charges Regulations

Activity item	Charge	Schedule 1
Search and retrieval: time spent searching for or retrieving a document	$15 per hour	Part 1, Item 1
Decision making: time spent deciding to grant or refuse a ***request***, including examining documents, consulting other parties, making deletions, or notifying any interim or final decision on the request	First five hours: Nil Subsequent hours: $20 per hour	Part 1, Item 4
Electronic production: provision of information not available in a discrete form in a document by using a computer or other equipment ordinarily used for retrieving or collating stored information	An amount not exceeding the actual cost ***incurred*** in producing a document or copy	Part 1, Item 2 Part 2, Items 4, 5 and 7

[7] On internal review, an agency or minister can only impose a charge for *providing access* to a document using the charges listed under Part 2 of Schedule 1. This is because s 4(1) the FOI Act defines 'request' as a request for access to a document under s 15(1) of the FOI Act. Charges under the Charges Regulations only apply with respect to 'a request for access to a document' (s 6). As a result, charges cannot be imposed with respect to an application for internal review under s 54 (or s 54A) of the FOI Act.

Transcript: preparing a transcript from a sound recording, a ***document*** written in shorthand or similar codified form	$4.40 per page of transcript	Part 1, Item 3 Part 2, Item 8
Photocopy: a ***photocopy*** of a written document	$0.10 per page	Part 2, Item 3
Other copies: a ***copy*** of a written document other than a photocopy	$4.40 per page	Part 2, Item 3
Replay: replaying a sound or film tape	An amount not exceeding the actual cost ***incurred*** in replaying	Part 2, Item 6
Inspection: ***supervision*** by an agency officer of an applicant's inspection of documents or the hearing or viewing of an audio or visual recording	$6.25 per half hour (or part thereof)	Part 2, Items 1 and 2
Delivery: posting or delivering a copy of a document at the ***applicant's*** request	Cost of postage or delivery	Part 2, Item 9

Charge at hourly rate

4.25 The Charges Regulations set out an hourly rate that applies regardless of the classification or designation of the officer who undertakes the work (s 94(2)(b) of the FOI Act) for:

- search or retrieval ($15 per hour)
- decision making ($20 per hour).

4.26 The Charges Regulations do not specify a method for charging for part of an hour of search or retrieval or decision-making time. If such a charge is to be imposed, it should be calculated on a proportionate basis, for example, 30 minutes work should be charged at 50 percent of the hourly rate.

Charge for search or retrieval time

4.27 An agency or minister can charge for 'the time spent … in searching for, or retrieving, the document' (Charges Regulations, Schedule 1, Part 1, Item 1). This encompasses time spent:

- consulting relevant officers to determine if a document exists
- searching a digital database or hardcopy file index for the location of a document
- searching a digital or hardcopy file to locate a document
- physically locating a digital or hardcopy document and removing it from a file.

4.28 An underlying assumption in calculating search or retrieval time is that the agency or minister maintains a high quality record system. Search or retrieval time is to be calculated on the basis that a document will be found in the place indicated in the agency or minister's filing system (s 5(2)(a) of the Charges Regulations) or, if no such indication is given, in the place that reasonably should have been indicated in the filing system (s 5(2)(b)). The 'filing system' of an agency or minister should be taken to include central registries as well as other authorised systems used to record the location of documents.

4.29 Time spent by an officer searching for a document that is not where it ought to be, or that is not listed in the official filing system, cannot be charged to an applicant.[8] In summary,

[8] *Fingal Head Community Association Inc and Department of Infrastructure and Regional Development* [2014] AICmr 70 [19] and *Ben Butler and Australian Securities and Investments Commission (Freedom of information)* [2017] AICmr 18 [16].

applicants cannot be disadvantaged by poor or inefficient record keeping by agencies or ministers.

4.30 Decision making time does not include time spent by agency officers, other than the decision maker, discussing and reviewing between themselves the results of search or retrieval activities. It is assumed that the decision maker has the skills and experience needed to make a decision on the request.

Charge for decision making time

4.31 An agency or minister can charge for the time spent by the decision maker:[9]

> … in deciding whether to grant, refuse or defer access to the document or to grant access to a copy of the document with deletions, including the time spent:
>
> a. examining the document
>
> b. consulting with any person or body
>
> c. making a copy with deletion
>
> d. notifying any interim or final decision on the request (Charges Regulations, Schedule 1, Part 1, Item 4(d)).

4.32 Item 4 further provides there is no charge for the first five hours of decision-making time.

4.33 Other actions not specifically listed in Part 1, Item 4 can also be included in the charge for decision making. Examples include the time spent by an agency preparing a schedule of documents or a recommendation for the authorised decision maker. On the other hand, the time of other officers the decision maker consults in the course of making a decision will not ordinarily fall within that definition, because the authorised decision maker is expected to have the necessary skills and understanding to decide access issues.

4.34 An underlying assumption in calculating decision making time is that the officers involved in this process are skilled and efficient. For example, it is assumed that an officer who is deciding whether an exemption applies has appropriate knowledge of the FOI Act and the scope of the exemption provisions.

Charge for actual costs incurred by agency

4.35 An agency or minister can impose a charge that does not exceed the actual cost incurred by the agency or minister in:

- producing a document containing information that is not available in a discrete form in documents of an agency by using a computer or other equipment ordinarily used for retrieving or collating stored information to make a decision on a request (Charges Regulations, Schedule 1, Part 1, Item 2)
- applying deletions to a document produced using a computer or other equipment in response to a request for information that is not available in a discrete form in a document of the agency or minister (Schedule 1, Part 2, Item 4)
- producing a computer tape or disk (Schedule 1, Part 2, Item 5)
- arranging for an applicant to hear a recording or view a stored image (Schedule 1, Part 2, Item 6)
- producing a copy of a recording, film or videotape (Schedule 1, Part 2, Item 7)

[9] Charges Regulations, Schedule 1, Part 1, Item 4.

- posting or delivering a document to an applicant, as requested by the applicant (Schedule 1, Part 2, Item 9).

4.36 Item 2 of Part 1 of Schedule 1 provides for a charge for the actual cost of using a computer or other equipment to produce a document containing information that is not available in a discrete form in documents of an agency.[10] This item may include staff costs incurred in writing a computer program to generate the information sought, but does not permit an agency to charge for staff costs for search or retrieval (to ascertain whether the requested information is available in a discrete form in documents of the agency), because search and retrieval costs are limited to an hourly rate of $15 per hour under Item 1 of Part 1 of Schedule 1.

4.37 Digital technology has greatly reduced the cost of producing and copying electronically stored documents, recordings and visual images. This should be reflected in an agency's decision making in relation to considering if or how charges should apply. Agencies and ministers should, as far as practicable, use the latest technology to give applicants access to documents promptly and at the lowest reasonable cost.

4.38 An agency or minister must keep a full and accurate record of actual costs incurred to enable the Information Commissioner, when undertaking an IC review, to examine whether a charge is justified.

Charge for access in an alternative form

4.39 An applicant who requests access in a particular form is entitled to receive it in that form, unless any of the exceptions in s 20(3) of the FOI Act apply (see Part 3 of these Guidelines). If an alternative form of access is given in accordance with s 20(3), a higher charge cannot be imposed than if access had been given in the form requested by the applicant (s 20(4)).

4.40 If access to a document can be provided in two or more forms and an applicant does not specify a particular form of access, the charge imposed cannot be higher than if access was given in the form to which the lowest charge applies.

Charge for access to exempt document

4.41 It is open to an agency or minister, in response to an FOI request, to provide access to a document to which the applicant is not entitled under the FOI Act. For example, an agency can provide access to a document for which an exemption claim can be made (s 3A(2)(b) of the FOI Act). If access is given in response to a request, the Charges Regulations apply as though the applicant was entitled to be given access (s 94(3) of the FOI Act), noting that it is always open to an agency or minister to use their discretion not to impose a charge.

Exceptions to imposition of charges

Applicant's personal information

4.42 No charge is payable if an applicant is seeking access to a document that contains their own personal information (s 7(1) of the Charges Regulations). The same rule applies under Australian Privacy Principle 12 of the *Privacy Act 1988* (Privacy Act), which requires an entity that holds personal information about an individual to give the individual access to the information on request, and further provides that the entity cannot impose a charge for providing access.[11]

4.43 Section 4(1) of the FOI Act says that 'personal information' has the same meaning as in the Privacy Act, which provides in s 6:

[10] For example, installing a computer program that can create a single document containing information from different data sets.

[11] See Chapter 12 of the Information Commissioner's APP Guidelines at oaic.gov.au

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.

4.44 In essence, personal information is information about an identified or identifiable individual. The information may also be publicly known. (See Part 6 of these Guidelines for further discussion of the definition of 'personal information'.)

4.45 A document that contains the personal information of an applicant can fall within this exception even if the document also contains non-personal information. An example is given in the decision of *'CN' and Australian Customs and Border Protection Service*, where the Information Commissioner found that no charge could be imposed in relation to a request for CCTV footage that clearly identified the applicant.[12] If the personal information forms a small part of a document and an agency or minister can reasonably be expected to expend extra time or resources providing access to the entire document, it may be appropriate for the agency or minister to impose a charge for providing access to the portion of the document that does not contain personal information.[13] Before doing so, the agency or minister should consult the applicant about narrowing the scope of the request to that part of the document that contains only the applicant's personal information.

Decision not made within statutory time limit

4.46 Section 15(5)(b) of the FOI Act provides that an applicant is to be notified of a decision on a request not later than 30 days after the agency or minister received the request. This period can be extended by:

- an agency or minister to facilitate consultation with an affected third party, foreign government or organisation (ss 15(6) and (8))
- agreement with the applicant (s 15AA), or
- the Information Commissioner (s 15AB).

4.47 If an applicant is not notified of a decision on a request within the statutory time limit (including any extension of time listed above), the agency or minister cannot impose a charge for providing access, even if the applicant was earlier notified that a charge was payable (ss 7(2) and (3) of the Charges Regulations). If the applicant paid a deposit it must be refunded (s 12(3)).

4.48 If an agency or minister fails to make a decision within the applicable statutory time limit, resulting in a deemed access refusal decision, the Information Commissioner may grant an extension of time under s 15AC on the agency or minister's application. In these circumstances, the agency or minister must proceed to make an actual decision but cannot impose a charge because the decision is still regarded as out of time for charging purposes (ss 7(2) and (3)).

Decision making time

4.49 There is no charge for the first five hours of time spent making a decision (Charges Regulations, Schedule 1, Part 1, Item 4). There is no equivalent provision for searching or retrieving documents.

The Goods and Services Tax

[12] [2014] AICmr 87 [12]–[13].

[13] *'CK' and Department of Human Services* [2014] AICmr 93.

4.50 The Goods and Services Tax (GST) is not payable on FOI charges. Section 81-10 of *A New Tax System (Goods and Services Tax) Act 1999* provides that GST applies to payments of Australian taxes, fees and charges, *except* those involving a fee or a charge paid to an Australian government agency if the fee or charge relates to 'recording information; copying information; modifying information; allowing access to information; receiving information, processing information and searching for information'.

Charging procedures

4.51 Agencies may develop and publish on their website their own internal procedures for imposing charges, consistent with the FOI Act, the Charges Regulations and these Guidelines. This will assist the public understand the agency's approach to imposing charges, and the supporting evidence the agency requires from applicants who apply for a reduction or waiver of a charge.

4.52 Agencies should give applicants an early indication of the likely cost of processing their request and an opportunity to modify or withdraw the request if they wish. The option of providing administrative access to information without payment of a charge can also be discussed with an applicant.[14]

4.53 Agencies should assist applicants to identify the specific documents they are seeking to enable them to focus their request on the documents required and minimise potential charges.[15] This approach will also help agencies avoid unnecessarily expending resources searching for and retrieving documents the applicant does not want. Where the information requested is freely available elsewhere (such as on the agency's website or in a publicly released report), agencies should draw the applicant's attention to the location of this information and check whether this satisfies the applicant's request (see [4.6] above).

Making a decision to impose a charge

Notifying a charge

4.54 Section 29(1) of the FOI Act provides that an applicant must be given a notice in writing when an agency or minister decides the applicant is liable to pay a charge set out in Schedule 1 of the Charges Regulations. The notice must specify:

a. that the applicant is liable to pay a charge

b. the agency or minister's preliminary assessment of the charge and the basis for the calculation

c. the applicant's right to contend that the charge has been wrongly assessed or should be reduced or not imposed

d. that the agency or minister, in considering any contention, must take into account whether payment of the charge would cause financial hardship to the applicant or the person on whose behalf the application was made, and whether giving access to the document would be in the public interest

e. the amount of any deposit payable by the applicant (see also s 12(1) of the Charges Regulations)

f. the applicant's obligation to notify in writing within 30 days that they:

i) agree to pay the charge

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[14] *Australian Pain Management Association and Department of Health* [2014] AICmr 49 [35]. See also the discussion of administrative access in Part 3 of these Guidelines.

[15] This is reflected in s 3(4) of the FOI Act, which provides that the functions and powers given under the FOI Act are to be performed or exercised, as far as possible, to facilitate and promote public access to information, promptly and at the lowest reasonable cost.

ii) dispute the charge, including seeking waiver or reduction, or

iii) withdraw the FOI request

g. that the FOI request will be taken to have been withdrawn if the applicant fails to respond within 30 days (or such further period as the agency or Minister allows).

4.55 To assist an applicant, an agency or minister may include other information in a notice, for example, that:

- the agency or minister, in deciding whether to not impose or reduce a charge, can take into account matters other than financial hardship and the public interest in disclosure (s 29(5))
- a deposit paid by an applicant is not refundable unless the agency or minister decides not to impose the charge or fails to make a decision on the applicant's FOI request within the statutory time limit, including any extension (s 12(3) of the Charges Regulations)
- the applicant is not entitled to access any document until all charges are paid (s 11A(1)(b) of the FOI Act and s 11(1) of the Charges Regulations). This rule does not apply to a supervision charge unless the applicant has received an estimate of the charge (s 11(2) of the Charges Regulations).

4.56 Agencies and ministers could include payment options in the preliminary assessment notice to enable efficient payment by applicants in the event that they do not wish to contest the charge. Applicants must agree to pay the charge and/or contest the charge within 30 days (s 29(1)(f)). Notification of agreement to pay the charge does not need to take a specific form. The OAIC recommends that agencies and ministers adopt a flexible approach and accept payment of the charge as agreement to pay the charge. This approach minimises delay and promotes the objects of the FOI Act, which include facilitating and promoting public access to information, promptly and at the lowest reasonable cost.

Disputing a preliminary estimate of a charge

4.57 The assessment notice must also inform applicants that they can still contest the preliminary costs assessment even if they have paid (an option that allows processing of the FOI request to continue while the charge is being contested). The preliminary assessment notice is not itself a reviewable decision. To contest the preliminary costs assessment an applicant must, within 30 days, apply in writing to the agency or minister for the charge to be corrected, reduced or not imposed (s 29(1)(f)(ii). After receiving the applicant's written application, the agency or minister has a discretion to reduce or not impose the charge or to maintain the charge. The agency or minister must consider the applicant's views and notify the applicant about its final decision on the amount of charge payable within 30 days (s 29(6)). This is a reviewable decision.

Applicant's right to seek review and/or make complaint

4.58 If the agency or minister decides not to exercise its discretion to reduce or not impose a charge (an access refusal decision under s 53A(e) of the FOI Act), the applicant may seek review of the decision (but only *after* disputing a preliminary estimate of a charge issued under s 29(1) of the FOI Act) by applying for:

- internal review by the agency or minister (s 54), or
- IC review (s 54L).

An applicant may apply for IC review of either:

- a decision on internal review of an access refusal decision about a charge (s 54C), or

- an access refusal decision about a charge under s 29 (without first seeking internal review).

4.59 The Information Commissioner is of the view that it is usually better for an applicant to seek internal review of an agency or minister's decision before applying for IC review. Internal review can be quicker than external review and enables an agency to take a fresh look at its original decision.

4.60 An applicant may also make a written complaint to the Information Commissioner under s 70 of the FOI Act. However, as noted at [11.4] of the FOI Guidelines, the Commissioner is of the view that making a complaint is not appropriate when IC review is available, unless there is a special reason to undertake an investigation and the matter can be dealt with more appropriately and effectively that way.

4.61 However, an applicant cannot seek IC review of a preliminary estimate of a charge issued under s 29(1) until they have notified the agency or minister, in writing, of one of the three things in s 29(1)(f) and the agency has made a decision on the amount of the charge payable under s 29(6), or the agency or minister has not notified the applicant of a decision under s 29(6) on the amount of the charge payable within 30 days (when the agency or minister is deemed to have made a decision that the amount of charge payable is the amount of the preliminary estimate of the charge).

4.62 For more information about:

- applying for internal review, see Part 9 of these Guidelines
- applying for IC review, see Part 10 of these Guidelines
- making a complaint to the Information Commissioner, see Part 11 of these Guidelines.

Payment of a charge while seeking internal or IC review of charges decision

4.63 An applicant may apply to the agency or minister for a charge to be corrected, reduced or not imposed *and* also pay the charge (or deposit) so that the agency or minister continues processing the FOI request while a decision on the charge is made.

4.64 Payment of the charge does not necessarily indicate the applicant agrees with the imposition or calculation of the charge, nor does it prevent the applicant from seeking internal review or IC review of the charge (regardless of whether the applicant has sought internal review).[16] An FOI applicant may apply for internal review or IC review either before[17] or after[18] paying the charge as long as the application is made within the relevant statutory timeframe after the charges decision is made under s 29:

- 30 days for internal review (s 54C) or
- 60 days for IC review (s 54S).

4.65 If the decision to impose the charge is overturned on either internal or IC review, the agency is required to refund the amount paid by the applicant (s 12(3)(a) of the Charges Regulations and s 55N of the FOI Act).

Estimating a charge

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[16] *Justin Warren and Department of Human Services (Freedom of information)* [2018] AICmr 16 [35], [39]–[40]. See also *Justin Warren and Department of Human Services (No 2) (Freedom of information)* [2018] AICmr 17 [17]–[19].

[17] See *Justin Warren and Department of Human Services (No 2) (Freedom of information)* [2018] AICmr 17.

[18] See *Justin Warren and Department of Human Services (Freedom of information)* [2018] AICmr 16.

4.66 The notice to an applicant under s 29(1) of an agency or minister's preliminary assessment of a charge can include an estimated charge, if all steps necessary to make a decision on the request have not yet been taken (ss 9(1), (2) and (3) of the Charges Regulations). In practice, the preliminary assessment may be based on two elements:

- a charge (based on Part 1 of Schedule 1 of the Charges Regulations) for work already done by the agency or minister, for example, search and retrieval of documents
- an estimated charge for work still to be done.

4.67 An estimate based on work still to be done can relate to any item listed in Schedule 1 of the Charges Regulations, for example:

- a charge for further action that may be required to make a decision; such as search or retrieval, examination of documents, and consultation with affected third parties
- a charge for providing access other than by personal inspection; such as photocopying, postage and supervision of an applicant by agency personnel while inspecting, hearing or viewing a document.

4.68 An estimated charge must be as fair and accurate as possible. An agency or minister should be mindful not to set an unreasonably high estimate which may hinder or deter the applicant from pursuing their FOI request because this is not in keeping with the objects of the FOI Act to facilitate and promote access at the lowest reasonable cost.

4.69 Furthermore, as discussed at [4.29]-[4.30] above, the estimate should be based on an assumption that the agency or minister maintains a well-organised record keeping system that enables easy identification and location of documents.

4.70 It is wise for an agency or minister, in estimating a charge, to be guided by previous experience dealing with FOI requests of a similar nature. Where the agency or minister has not dealt with FOI requests of a similar nature, it is recommended that the agency or minister obtain an estimate of the processing time by sampling the documents at issue.

Charges calculators

4.71 A commonly used tool for estimating charges under s 29 is a 'charges calculator'. Calculators come in different forms, but often contain a number of predetermined parameters based on assumptions about how long an FOI request should take to process.

4.72 A charges calculator cannot produce an accurate estimate without accurate inputs and caution is required when using such a resource. Some documents may contain complex material which may justify longer processing times, while others may be quite straightforward and require significantly less time to review.

4.73 A common parameter included in a charges calculator is that examining relevant pages for decision making will take five minutes per page, and for exempt material, an additional five minutes per page is needed for review. However, unless the document at issue is particularly complex, it may be difficult for an agency or minister to adequately justify an estimate that it will take 10 minutes to process each page of the relevant documents.[19]

Sampling

4.74 Where a decision is made to use a charges calculator to estimate a charge, the agency or minister should examine a sample of the relevant documents and adjust the parameters of the charges calculator accordingly.

4.75 Generally, where a large number of documents have been identified in response to an FOI request and the agency or minister decides it is appropriate to impose a charge, there is an

[19] *'GD' and Department of the Prime Minister and Cabinet* [2015] AICmr 46 [21].

expectation that the agency or minister will obtain an accurate estimate by sampling a reasonable selection of the relevant documents.

4.76 A representative sample of at least 10 percent of the documents is generally considered an appropriate sample size to assess processing time.[20] This provides the agency or minister with an indication of the time that may be required to make a decision on the request. However where the request involves a large number of documents, a smaller sample size may be appropriate. In all cases, a representative sample is required.

4.77 Agencies and ministers should assess the amount of time it will take to search for and/or retrieve the documents held in the representative sample, as well as the amount of time it will take to examine, consider any exemptions that may apply, and prepare a decision for those documents. The figures derived from the representative sample should then be used to calculate the total processing time for the documents within the scope of the applicant's request. See Part 3 of these Guidelines for further discussion of sampling in the context of practical refusals under s 24AA(1)(a) of the FOI Act.

Adjusting an estimated charge

4.78 After making a decision on an FOI request where a charge was estimated under s 9 of the Charges Regulations, an agency or minister is required to calculate the final charge based on the actual time taken to process the request, using the applicable charges in Schedule 1 (s 10(1)). The new charge may be different to the estimated charge. If the new charge is less than the amount already paid by an applicant, a refund of the difference *must* be made (s 10(5)(a)). If the new charge is higher than the amount already paid, that payment will be treated as a deposit on account of the charge (s 10(5)(b)).

4.79 The 2019 Charges Regulations introduce new provisions allowing for adjustment of an estimated charge after the FOI request has been processed — see ss 10(2) and (3).

4.80 Section 10(2) provides that if the estimate of the charge is *more* than the actual amount the applicant is liable to pay (when all the work has been done on the request), the agency or minister *must* decrease the charge payable to reflect the actual cost of processing the request. For example, if the initial request is for a large number of documents and the estimated charge is therefore high, but the applicant then reduces the scope of the request which reduces actual processing costs, the agency or minister *must* reduce the charge to the actual cost of processing the request.

4.81 Section 10(3) provides that if the estimate of the charge is *less* than the actual amount the applicant is liable to pay (when all work has been done on the request), the agency or minister *may* increase the charge payable to the actual amount of the charge. However, an agency or minister cannot increase the charge under s 10 if the agency or minister decides to refuse access to the requested document (s 10(3)(b)). For example, if a request is for access to two documents and a decision is made to refuse access to one document, a charge increased under s 10 can only include the cost of processing the document to which access was given. Similarly, if a decision is made to refuse access to parts of a document, an increased charge under s 10 can only include the cost of processing that part of the document to which access has been granted.

4.82 Consistent with the objects of the FOI Act, situations where it may be appropriate for an agency or minister to exercise the discretion not to increase the charge under s 10(3) include:

- where the amount payable is substantially higher than the estimated charge

[20] For example, in *Tager and Department of the Environment* [2014] AICmr 59 [24], a 10 percent sample of the documents was used to estimate the cost of processing the applicant's request.

- where the charge was underestimated due to agency error or poor record keeping or
- inefficient FOI processing practices mean that accessing documents or processing the request takes longer than anticipated.

4.83 It is open to an agency or minister, when processing an FOI request, to give interim advice to an applicant that a charge may be higher than the estimated charge and the reasons why it may be higher; it is good administrative practice to do so. The applicant can be invited to revise either the scope of the request or the preferred form of access, with a view to reducing the charge.

Deposits

4.84 An agency or minister, in notifying an applicant under s 29(1) of the FOI Act of a liability to pay a charge or estimated charge, may require the applicant to pay a deposit (s 29(1)(e) of the FOI Act, s 12(1) of the Charges Regulations). The deposit cannot be higher than $20 if the notified charge is between $25 and $100, or 25 percent of a notified charge that exceeds $100 (s 12(2)). The agency or minister can defer work on the applicant's request until the deposit is paid or a decision is made not to impose the charge following an application by the applicant (s 31(2)).

Refunds of deposits

4.85 A deposit paid by an applicant does not have to be wholly or partly refunded unless the agency or minister:

- decides to reduce (to an amount lower than the deposit paid) or not impose a charge following an application by the applicant under s 29(4) (see also s 12(3)(a) of the Charges Regulations)
- fails to make a decision on the applicant's FOI request within the statutory time limit, including any extension (s 12(3)(b)), or
- sets a final charge, after making a decision on the FOI request, that is lower than the amount already paid as a deposit (s 10(5)(a)).

4.86 Section 10(3)(b) of the Charges Regulations provides that an agency or minister cannot increase a charge for a document if access is refused. It is open to the agency or minister to refund a deposit paid for access to a document if access is refused in full.

4.87 The agency should refund the deposit in the same way the deposit was paid (for example, direct credit into a bank account). The FOI Act does not provide for the issuing of a 'credit note' to offset potential charges for future FOI requests.

Collecting a charge generally

4.88 Section 3(4) of the FOI Act provides that functions and powers given under the FOI Act are to be performed and exercised, as far as possible, to facilitate and promote public access to information, promptly and at the lowest reasonable cost. In keeping with this object, the method of payment required by an agency should facilitate prompt access to documents.[21] Requiring payment of a charge by cheque or money order, without giving the option of electronic payment, does not facilitate and promote access to documents at the lowest reasonable cost and is therefore inconsistent with the objects of the FOI Act.

4.89 Further, requiring payment by cheque involves additional handling to process and clear funds; it can also attract fees. Cheques usually take at least three business days to clear and this delays the provision of prompt access to documents. Payment by electronic funds transfer, credit or debit card, or online payment (for example, BPAY) is faster, more efficient and less

[21] *'ND' and Department of Human Services (Freedom of information)* [2017] AICmr 119 [25].

costly for both the applicant and the agency and gives best effect to the FOI Act object of facilitating and promoting access to information, promptly and at the lowest reasonable cost.

4.90 If an applicant is liable to pay a charge, the charge must be paid before access to documents can be given (s 11A(1)(b) of the FOI Act and s 11(1) of the Charges Regulations). An exception applies if the charge is for supervising an applicant's personal inspection of documents or hearing or viewing an audio or visual recording (s 11(2)). Payment of the charge cannot be required in advance of inspection or viewing, unless the agency or minister has made a decision under ss 9(1)(c), (2) and (3)(c) of the Charges Regulations estimating the probable length of the period of inspection or viewing.

4.91 The Information Commissioner is of the view that a charge assessed by an agency under the Charges Regulations is not a debt due to the Commonwealth that can be recovered by the agency. Although the FOI Act states that an agency may decide 'that an applicant is liable to pay a charge' and an applicant may signify agreement to pay the charge (s 29(1)), other elements necessary to create a debt due to the Commonwealth are absent. For example, neither the FOI Act nor the Charges Regulations state that an assessed charge is a debt due to the Commonwealth, nor do they confer jurisdiction on any court to enforce a debt. Further, an assessed charge is not necessarily a settled amount and the FOI Act provides its own limited mechanism to ensure assessed charges are paid before access is granted.

Collecting the remainder of a charge where deposit paid

4.92 The FOI Act does not set a time limit for an applicant to pay the remaining balance of a charge after a decision is made on the FOI request. If the applicant fails to pay the remainder of a charge after being notified of a decision on the request, or cannot be contacted, the request could be on hand indefinitely. This is because s 11 of the Charges Regulations provides that any charge in respect of the request must be paid before access can be given to documents. If the applicant does not pay the charge, the requested documents cannot be released and there is no mechanism in the FOI Act to finalise the request. Further, as noted at [4.92], a charge assessed by an agency under the Charges Regulations lacks many features of a debt due to the Commonwealth that can be recovered by an agency.

4.93 Good administrative practice would have the agency or minister ask the applicant to respond within a specified timeframe after receiving written notice of a decision and reasons with respect to the request by doing one of the following:

- paying the balance of the charge
- seeking internal review or IC review, or
- withdrawing the FOI request.

4.94 The agency should advise the applicant that if they do not receive the remaining balance within the specified timeframe, the FOI request will be taken to have been withdrawn. While the FOI Act does not specify a timeframe for the applicant's response, noting that an applicant has 60 days in which to seek IC review of a decision relating to the imposition of a charge or the amount of a charge, 60 days can be regarded as a reasonable period.

Correction, reduction or waiver of charges

4.95 As outlined in [4.11]–[4.13] above, after receiving a preliminary estimate of the charge under s 29(1), it is open to the applicant to apply for reduction or waiver of the charge. Where the applicant contends that the charge has been wrongly assessed, the central issue to be considered is whether relevant provisions of the FOI Act and the Charges Regulations have

been correctly understood and applied.[22] If an applicant contends that a charge should be reduced or waived, the agency or minister has a general discretion to decide that question. Two matters set out under s 29(5) of the FOI Act must be considered:

a. whether payment of the charge, or part of it, would cause financial hardship to the applicant or to a person on whose behalf the application was made, and

b. whether giving access to the document in question is in the general public interest or in the interest of a substantial section of the public.

4.96 In addition to considering these two matters, an agency or minister may consider any other relevant matter and, in particular, should give genuine consideration to any contention or submission made by an applicant as to why a charge should be reduced or not imposed. An agency or minister cannot fetter the discretion conferred by s 29(4) of the FOI Act by adopting a rule that confines the matters that can be considered or the circumstances in which a charge will be reduced or not imposed. For example, where the applicant agreed to pay a charge in a previous FOI request, an agency or minister cannot rely on this fact to impose a charge for all subsequent FOI requests by the same applicant without considering the merits of each request for reduction or waiver.[23]

4.97 Moreover, an agency or minister should always consider whether disclosure of a document will advance the objects of the FOI Act, even if the applicant has not expressly framed a submission on that basis. The objects of the FOI Act include promoting better informed decision making, and increasing scrutiny, discussion, comment and review of the Government's activities (s 3).

4.98 Section 29(5) mandates what a decision maker must take into account when determining whether to reduce or not impose a charge. The section does not require the applicant to establish both financial hardship *and* that the giving of access to the document is in the general public interest or in the interest of a substantial section of the public.

4.99 An agency or minister is also entitled to consider matters that weigh against those relied on by an applicant. For example, an agency may decide it is appropriate to impose an FOI charge where:

- the applicant can be expected to derive a commercial or personal benefit or advantage from being given access and it is reasonable to expect the applicant to meet all or part of the charge[24]
- the documents are primarily of interest only to the applicant and are not of general public interest or of interest to a substantial section of the public[25]
- the information in the documents has already been published by an agency and the documents do not add to the public record
- the applicant has requested access to a substantial volume of documents and significant work will be required to process the request.

4.100 An agency or minister may decide not to impose a charge wholly or in part, but where the charge is only partially reduced, it should fully explain and justify the reduced charge (s 29(8)). If an agency or minister accepts that disclosure of a document will be in the general public

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[22] For example, see *Tager and Department of the Environment* [2014] AICmr 59 and *'DL' and Department of Immigration and Border Protection* [2014] AICmr 119.

[23] *Australian Associated Press Pty Ltd and Department of Immigration and Border Protection* [2015] AICmr 65.

[24] However, the fact that the document might form the basis of a journalistic article is not enough to demonstrate that the applicant can be expected to derive a commercial or personal benefit from being given access to the documents, because not all articles researched will be written or published: see *Australian Associated Press Pty Ltd and Department of Immigration and Border Protection* [2015] AICmr 65.

[25] For example, see *Tennant and Australian Broadcasting Corporation* [2014] AATA 452.

interest or that there will be financial hardship to the applicant, it may be difficult for it to justify why a charge has been reduced instead of not imposed.[26] This is discussed further below.

Financial hardship

4.101 Whether payment of a charge will cause financial hardship to an applicant is primarily concerned with the applicant's financial circumstances and the amount of the estimated charge. Financial hardship means more than an applicant having to meet a charge from his or her own resources. The decision in *'AY' and Australian Broadcasting Corporation*[27] referred to the definition of financial hardship in guidelines issued by the Department of Finance for the purpose of debt waiver decisions:

> Financial hardship exists when payment of the debt would leave you unable to provide food, accommodation, clothing, medical treatment, education or other necessities for yourself or your family, or other people for whom you are responsible.

4.102 Different hardship considerations may apply if the request is made by an incorporated body or an unincorporated association.[28] The mere fact that costs for FOI requests have not been budgeted for has been held to be a commercial decision, rather than a matter of a lack of funds.[29]

4.103 An applicant relying on this ground will ordinarily be expected to provide some evidence of financial hardship.[30] For example, the applicant may rely on (and provide evidence of) receipt of a pension or income support payment, or provide evidence of income, debts or assets. However, an agency should be cautious about conducting an intrusive inquiry into an applicant's personal financial circumstances. Agencies need to have regard to the objects of the Privacy Act, which include minimising the collection of personal information to that required for the particular function or activity. For example, in this case, to make a decision whether to waive or reduce a charge.

4.104 Where an applicant demonstrates that payment of the charge will cause financial hardship, it may be difficult for the agency to justify why the imposition of a charge would be appropriate.[31]

Public interest

4.105 The FOI Act requires an agency or minister to consider 'whether the giving of access to the document in question is in the general public interest or in the interest of a substantial section

[26] See *MacTiernan and Secretary, Department of Infrastructure and Regional Development (Freedom of Information)* [2015] AATA 584; *Australian Associated Press Pty Ltd and Department of Immigration and Border Protection* [2015] AICmr 65 and *'CK' 'and Department of Human Services* [2014] AICmr 83.

[27] [2014] AICmr 7 [20]. The definition has been retained in Finance guidelines that replace those referred to in the decision, see https://www.finance.gov.au/resource-management/discretionary-financial-assistance/waiver-debt-mechanism/information-applicants/

[28] *Australian Pain Management Association and Department of Health* [2014] AICmr 49.

[29] *Australian Associated Press Pty Ltd and Department of Immigration and Border Protection* [2015] AICmr 65.

[30] For example, see *'CK' and Department of Human Services* [2014] AICmr 83 [13]-[14]; *'AY' and Australian Broadcasting Corporation* [2014] AICmr 7 [18]–[24] and *'DL' and Department of Immigration and Border Protection* [2014] AICmr 119 [21]-[25].

[31] For example, in *'CK' and Department of Human Services* [2014] AICmr 83, the Acting Freedom of Information Commissioner was satisfied that payment of a charge would cause financial hardship to the applicant and decided that the charge should be waived in full.

of the public' (s 29(5)(b)).[32] This test is different to, and can be distinguished from, public interest considerations that may arise under other provisions of the FOI Act.

4.106 Specifically, the public interest in s 29(5)(b) is different to the public interest test in s 11A(5) that applies to conditionally exempt documents. Nor will s 29(5)(b) be satisfied only by a contention that it is in the public interest for an individual with a special interest in a document to be granted access to it, or that an underlying premise of the FOI Act is that transparency is in the public interest.

4.107 An applicant relying on s 29(5)(b) should identify or specify the 'general public interest' or the 'substantial section of the public' that will benefit from this disclosure (s 29(1)(f)(ii)). This may require consideration of both the content of the documents requested and the context in which their public release would occur. Matters to be considered include whether the information in the documents is already publicly available, the nature and currency of the topic of public interest to which the documents relate, and the way in which a public benefit may flow from the release of the documents.[33]

4.108 There is no presumption that the public interest test is satisfied by reason only that the applicant is a Member of Parliament, a journalist, or a community or non-profit organisation. It is necessary to go beyond the status of the applicant and to look at all the circumstances. The fact that a media organisation may derive commercial benefit from publication of a story based on an FOI request is a relevant consideration, but it is not by itself a basis for declining to reduce or waive a charge.[34] Nor is an applicant required to show that they will publish the document,[35] although the applicant may be expected to draw a link between being granted access to the documents and a derivative benefit to either the general public interest or a substantial section of the public.

4.109 The 'public interest' is a broad concept that cannot be exhaustively defined. When considering the public interest, it is important that the agency or minister direct its attention to the advancement of the interests or welfare of the public, and this will depend on each particular set of circumstances.[36] Further, the public interest is not a static concept confined or defined by strict reference points.[37] The following examples nevertheless illustrate circumstances in which the giving of access may be in the general public interest or in the interest of a substantial section of the public:

- The document relates to a matter of public debate, or to a policy issue under discussion within an agency, and disclosure will assist public comment on, or participation in, the debate or discussion.[38] For example, the regulation of firearms in the context of the Australian economy and public safety (*Jon Patty and Attorney-General's Department*

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[32] This question is considered in a number of IC review and AAT decisions. See, for example, *MacTiernan and Secretary, Department of Infrastructure and Regional Development (Freedom of Information)* [2015] AATA 584; *Australian Associated Press Pty Ltd and Department of Immigration and Border Protection* [2016] AICmr 54; *Rita Lahoud and Department of Education and Training* [2016] AICmr 5; *Australian Associated Press Pty Ltd and Department of Immigration and Border* Protection [2015] AICmr 65 and *'DL' and Department of Immigration and Border Protection* [2014] AICmr 119.

[33] *Tennant and Australian Broadcasting Corporation* [2014] AATA 452 [21].

[34] *Australian Associated Press Pty Ltd and Department of Immigration and Border Protection* [2015] AICmr 65.

[35] *Australian Associated Press Pty Ltd and Department of Immigration and Border Protection* [2015] AICmr 65 [22].

[36] *McKinnon v Secretary, Department of Treasury* [2005] FCAFC 142 [9].

[37] *Wood; Secretary, Department of Prime Minister and Cabinet and (Freedom of Information)* [2015] AATA 945 [54].

[38] Such as Australia's humanitarian refugee resettlement program and deaths in immigration detention: see *Australian Associated Press Pty Ltd and Department of Immigration and Border Protection* [2015] AICmr 65 and *Australian Associated Press Pty Ltd and Department of Immigration and Border Protection* [2014] AICmr 100.

(Freedom of information) [2018] AICmr 28 [29]); coal mining by an Australian business in Papua New Guinea (*Australian Associated Press Pty Ltd and Department of Foreign Affairs and Trade (Freedom of information*) [2018] AICmr 13 [32]) and ASIC's regulation of major corporate financial institutions (*Ben Butler and Australian Securities and Investments Commission (Freedom of information*) [2017] AICmr 18 [28]–[29]).

- The document relates to an agency decision that has been a topic of public interest or discussion, and disclosure of the document will better inform the public as to why or how the decision was made, including highlighting any problems or flaws that occurred in the decision making process.[39]
- The document will add to the public record on an important and recurring aspect of agency decision making.[40]
- The document is to be used for research that is to be published widely or that complements research being undertaken in an agency or elsewhere in the research community.[41]
- The document is to be used by a community or non-profit organisation in preparing a submission to a parliamentary or government inquiry, for example, on a law reform, social justice, civil liberty, financial regulation, or environmental or heritage protection issue.[42]
- The document is to be used by a member of Parliament in parliamentary or public debate on an issue of public interest or general interest in the member's electorate.[43]
- The document is to be used by a journalist to prepare a story for publication that is likely to be of general public interest.[44]

4.110 In applying these and related examples, an agency or minister may also consider whether the range or volume of documents requested by an applicant can be considered reasonably necessary for the purpose of contributing to public discussion or analysis of an issue.

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[39] Such as the use of Commonwealth resources and expenditure of public funds: see *MacTiernan and Secretary, Department of Infrastructure and Regional Development (Freedom of information)* [2015] AATA 584; *Australian Associated Press Pty Ltd and Department of Immigration and Border Protection* [2016] AICmr 54; *Tasmanian Special Timbers Alliance Inc and Department of the Environment and Energy (Freedom of information)* [2017] AICmr 124 and *Australian Associated Press Pty Ltd and Department of Foreign Affairs and Trade (Freedom of information)* [2017] AICmr 131.

[40] Such as the expenditure of taxpayer money by contractors funded to provide overseas development assistance on behalf of the Australian Government: see *Emmanuel Freudenthal and Department of Foreign Affairs and Trade (Freedom of Information)* [2019] AICmr 15 [40]. Note also *'CF' and Department of Finance* [2014] AICmr 73 and *'CW' and Department of Finance* [2014] AICmr 99 on the issue of debt waiver. See also *Australian Associated Press Pty Ltd and Department of Foreign Affairs and Trade (Freedom of information)* [2017] AICmr 131 [33] regarding how 'taxpayer money is being spent in the … context of international travel for overseas visitors or delegations'.

[41] See *McBeth and Australian Agency for International Development* [2012] AICmr 24 and *Knapp and Australian Securities and Investments Commission* [2014] AICmr 58.

[42] See *Fingal Head Community Association Inc and Department of Infrastructure and Regional Development* [2014] AICmr 70 and *Australian Pain Management Association and Department of Health* [2014] AICmr 49.

[43] See *MacTiernan and Secretary, Department of Infrastructure and Regional Development (Freedom of Information)* [2015] AATA 584 and *Fletcher and Department of Broadband, Communications and the Digital Economy (No. 3)* [2012] AICmr 15.

[44] See *Australian Associated Press Pty Ltd and Department of Immigration and Border Protection* [2015] AICmr 65; *Australian Associated Press Pty Ltd and Department of Immigration and Border Protection* [2016] AICmr 54; *Australian Associated Press Pty Ltd and Department of Foreign Affairs and Trade (Freedom of information)* [2017] AICmr 131 and *Australian Associated Press Pty Ltd and Department of Foreign Affairs and Trade (Freedom of information)* [2018] AICmr 13.

4.111 The AAT decision of *MacTiernan and Secretary, Department of Infrastructure and Regional Development (Freedom of Information)*[45] explains that an agency should compare the number of documents within the scope of an FOI request and the cost of processing against the subject matter of the request when deciding whether to exercise its discretion to waive a charge on public interest grounds.[46] The decision in *Tasmanian Special Timbers Alliance Inc and Department of the Environment and Energy (Freedom of information)*[47] applied the balancing exercise in *MacTiernan* to decide whether the discretion to waive a charge on public interest grounds should be exercised.[48] To apply the *MacTiernan* balancing exercise, it is not necessary for the subject matter of the FOI request to be readily quantifiable in financial terms.[49]

4.112 Where an agency accepts that giving access to the document in question would be in the general public interest but decides not to waive the charge, the agency should adequately justify why it is appropriate for the charge to be imposed in the circumstances. The agency or minister should also consider whether imposing the charge would be at odds with the 'lowest reasonable cost' objective in s 3 of the FOI Act.[50]

4.113 An agency or minister cannot exercise the discretion in s 29(4) solely on the basis that, if the charge is not paid in full, the applicant would not be meeting the reasonable cost of processing their FOI application.[51] Nor should an agency or minister take into account whether an applicant may use a document in a manner that may lead to misinterpretation or misunderstanding in public debate.[52]

Other grounds for reduction or waiver

4.114 An agency or minister has a general discretion to reduce or not impose a charge, and this discretion is not limited to financial hardship or public interest grounds. The following non-exhaustive list of examples illustrates circumstances in which it may be appropriate to reduce or not impose a charge:

- The cost of calculating and collecting a charge might exceed the cost to the agency of processing the request.[53]

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[45] [2015] AATA 584 [30].
[46] The Tribunal compared the number of documents identified (88 documents, comprising 498 pages) and the cost of processing the FOI request ($2,291.36) against the subject of the FOI request (a proposed $1 billion (plus) government (taxpayer) funded infrastructure project) and found that giving access to the documents in question would be in the general public interest or at the very least, in the interest of a substantial section of the public.
[47] [2017] AICmr 124 [33]–[34].
[48] The Information Commissioner compared the number of documents identified (510 documents, comprising 2,035 pages) and the cost of processing the FOI request ($3,154) against the subject of the FOI request (departmental oversight of significant grants, including a $2.2 million dollar grant to a non-profit organisation) and found that giving access to the documents in question would be in the general public interest.
[49] See *'MR' and Department of Infrastructure and Regional Development (Freedom of information)* [2017] AICmr 102 [35]–[36]; *David Albuquerque and Department of Foreign Affairs and Trade (Freedom of information)* [2017] AICmr 67 [24] and *'KW' and Department of Foreign Affairs and Trade (Freedom of information)* [2017] AICmr 21 [25]–[28].
[50] This consideration is particularly relevant 'where the charge was based on an inefficient records management system and therefore the charge would transfer the cost of that inefficiency to the FOI applicant': *Ben Butler and Australian Securities and Investments Commission (Freedom of information)* [2017] AICmr 18 [30].
[51] *Baljurda Comprehensive Consulting Pty Ltd and the Australian Agency for International Development* [2011] AICmr 8 [28].
[52] *Real Health Care Reform Pty Ltd and Department of Health and Ageing* [2013] AICmr 60 [28].
[53] *Australian Associated Press Pty Ltd and Department of Immigration and Border Protection* [2015] AICmr 65 [31].

- A member of Parliament has requested access on behalf of a constituent to a document containing personal information, for which the constituent would not have been required to pay a charge.
- The applicant needs the document for a pending court or tribunal hearing.
- Giving access to the document could assure the agency that it has accorded procedural fairness to the applicant in an administrative proceeding the agency is conducting.
- The document is required for research purposes for which no commercial benefit will flow to the applicant.[54]
- Reduction or waiver of the charge would enhance the agency-client relationship.
- The agency was able to identify and retrieve the document easily and at minimal cost.
- The Information Commissioner or AAT has decided in similar circumstances that charges should not be imposed.

4.115 It may also be appropriate to reduce or waive a charge if the applicant responds to a charge notice by revising the terms of their request so that it requires less work to process.[55] However, where an agency or minister decides only to reduce rather than waive a charge in these circumstances, it will generally be appropriate to provide the applicant with a re-calculated charge estimate before making a final decision about the charge. Given the object of the FOI Act to provide prompt access at the lowest reasonable cost, agencies should be particularly careful to justify imposing a charge where it has previously been decided that a practical refusal reason exists, but either through consultation or on IC review, the practical refusal reason no longer exists or is found not to exist.[56]

Agencies may retain charges collected

4.116 Charges imposed under the FOI Act are prescribed as a received amount for the purposes of s 27 of the *Public Governance, Performance and Accountability Rule 2014*. Agencies may retain such charges under s 74(1) of the *Public Governance, Performance and Accountability Act 2013*. For further details see Resource Management Guide No. 307: Retainable receipts, dated December 2017, which is available on the Department of Finance's website at www.finance.gov.au.

Review of decision to charge

4.117 A decision under the FOI Act declining to reduce a charge or not impose a charge is an access refusal decision and therefore subject to internal review, IC review and review by the AAT (ss 54, 54L and 57A). Each is a merit review process, in which the review authority will review whether the charge was correctly assessed, whether the charge should be reduced or waived on financial hardship or public interest grounds, or more generally whether the discretion to impose the charge should be exercised differently. For further guidance on internal review and review by the Information Commissioner, see Parts 9 and 10 of these Guidelines.

Notifying the internal review applicant of an affirmed charges decision

4.118 The FOI Act does not set a time limit for an applicant to respond after the applicant has contested a charge and the agency has carried out an internal review. If the applicant fails to pay the new or reaffirmed charge or cannot be contacted, the request could be on hand indefinitely.

[54] *Knapp and Australian Securities and Investments Commission* [2014] AICmr 58 [41].
[55] *Rita Lahoud and Department of Education and Training* [2016] AICmr 5 [32]-[33].
[56] *Rita Lahoud and Department of Education and Training* [2016] AICmr 5 [38].

4.119 Good administrative practice would have the agency ask the applicant to respond to the written notice of an internal review decision (s 54C(4)) within a specified timeframe by doing one of the following:

- paying the charge or any deposit specified by the agency
- seeking an IC review of the charge, or
- withdrawing the FOI request.

4.120 The agency should advise the applicant that if they do not receive a response within the specified timeframe, the FOI request will be taken to have been withdrawn. While the FOI Act does not specify a timeframe for the applicant's response, 60 days can be regarded as a reasonable period because this is the time period during which the applicant can apply for IC review.

Part 5 — Exemptions

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Part 5 — Exemptions

Introduction

5.1 Part 5 of the FOI Guidelines sets out the exemptions in Division 2 of Part IV of the FOI Act and explains the criteria that must exist before refusing access to a document in response to an FOI request.

5.2 It is important to recognise that agencies and ministers retain a discretion to provide access to a document where the law permits, even if the document meets the criteria for one of the exemptions in Division 2 of Part IV (s 3A). In each case, agencies and ministers should consider whether an exempt document can be released, to allow access wherever possible. Sections 90, 91 and 92 of the FOI Act provide protection against civil and criminal liability when documents are disclosed or published in good faith in the belief that publication or disclosure is required or permitted under the FOI Act or otherwise than under the FOI Act (whether or not under an express legislative power).

5.3 As noted in *'ACV' and Tertiary Education Quality and Standards Agency*,[1] agencies [and ministers] are not legally bound to refuse access if a document is exempt and may consider disclosure of a document if this is not otherwise legally prohibited. Such an approach is consistent with the pro-access parliamentary intention underpinning the FOI Act.

5.4 Where an FOI request for a document has been made and any required charges have been paid, an agency or minister must give access to the document unless the document at that time is an exempt document (s 11A). An exempt document is:

(a) a document of an agency which is exempt from the operation of the FOI Act in whole or in part (see Part 2 of these Guidelines)

(b) an official document of a minister that contains some matter not relating to the affairs of an agency or a Department of State (see Part 2) or

(c) exempt for the purposes of Part IV of the FOI Act — that is, it meets the criteria for an exemption provision (s 4(1)).

5.5 An agency or minister can withhold access to a document under Part IV only if the document is exempt at the time the FOI request is determined. A document that was exempt at one point in time may not necessarily be exempt at a later time because circumstances may have changed.

5.6 A 'document' includes any part of a document that is relevant to the terms of the FOI request. Consequently, a decision maker should consider whether it is practicable to delete exempt matter and provide the balance of the document to the FOI applicant. If it is practicable to delete the exempt matter and prepare a meaningful non-exempt copy, an agency or minister must do so (s 22).

5.7 Where the FOI applicant seeks access only to that part of a document that does not contain exempt matter, and the exempt matter can be easily separated from the

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[1] *'ACV' and Tertiary Education Quality and Standards Agency (Freedom of information)* [2023] AICmr 3 [89] and [90].

remainder of the document, it is practicable to treat the exempt matter as outside the scope of the FOI request.

5.8 The decision maker must provide a statement of reasons under s 26 if any aspect of an FOI request is refused or if access is deferred (see Part 3 of these Guidelines).

Documents exempt under Part IV

5.9 Exempt documents under Part IV of the FOI Act fall into 2 categories:

- exempt under Division 2
- conditionally exempt under Division 3, where access to the document must be given unless disclosure would, on balance, be contrary to the public interest (s 11A(5)).

5.10 Exempt documents in Division 2 of Part IV are:

- documents affecting national security, defence or international relations (s 33)
- Cabinet documents (s 34)
- documents affecting enforcement of law and protection of public safety (s 37)
- documents to which secrecy provisions of enactments apply (s 38)
- documents subject to legal professional privilege (s 42)
- documents containing material obtained in confidence (s 45)
- Parliamentary Budget Office documents (s 45A)
- documents disclosure of which would be contempt of Parliament or in contempt of court (s 46)
- documents disclosing trade secrets or commercially valuable information (s 47)
- electoral rolls and related documents (s 47A).

5.11 The exemptions in Division 2 of Part IV are not subject to an overriding public interest test. If a document meets the criteria to establish a particular exemption, it is exempt. There is no additional obligation to weigh competing public interests to determine if the document should be released.

5.12 By contrast, an agency or minister cannot refuse access to a document that is conditionally exempt under Division 3, Part IV without first applying a public interest test (s 11A(5)) (see Part 6 of these Guidelines).

5.13 Table 1 is extracted from s 31A of the FOI Act and summarises how the FOI Act applies to exempt and conditionally exempt documents.

Table 1: Access to exempt and conditionally exempt documents

Item	If ...	then ...	because of ...
1	a document is an exempt document under Division 2 (exemptions) or under paragraph (b) or (c) of the definition of ***exempt document*** in s 4(1) (s 7 or an official document of a minister that contains some matter not relating to agency affairs)	access to the document is not required to be given	s 11A(4)
2	a document is a conditionally exempt document under Division 3 (public interest conditional exemptions)	access to the document is required to be given, unless it would be contrary to the public interest	s 11A(5) (see also s 11B (public interest factors))
3	a document is an exempt document as mentioned in item 1, and also a conditionally exempt document under Division 3	access to the document is not required to be given	ss 11A(4) and (6), and s 32 (interpretation)
4	access to a document is refused because it contains exempt matter, and the exempt matter can be deleted	(a) an edited copy deleting the exempt matter must be prepared (if reasonably practicable); and (b) access to the edited copy must be given	s 22
5	a document is an exempt document because of any provision of this Act	access to the document may be given apart from under this Act	s 3A (objects – information or documents otherwise accessible)

Commonly used terms

5.14 Certain expressions in the FOI Act are common to several exemptions and conditional exemptions. They are explained below.

Would or could reasonably be expected to

5.15 The test 'would or could reasonably be expected' appears in the following exemptions and conditional exemptions:

- national security, defence or international relations (s 33(a))
- public safety and law enforcement (ss 37(1)-(2))
- commercially valuable information (s 47(1)(b))
- Commonwealth-State relations (s 47B)

- certain operations of agencies (ss 47E(a)-(d))
- business affairs (ss 47G(1)(a)-(b)).

5.16 The test requires the decision maker to assess the likelihood of the predicted or forecast event, effect or damage occurring after disclosure of a document.[2]

5.17 The use of the word 'could' in this qualification is less stringent than 'would' and requires analysis of the reasonable expectation rather than certainty of an event, effect or damage occurring. It may be a reasonable expectation that an effect has occurred, is presently occurring, or could occur in the future.[3]

5.18 The mere risk, allegation, possibility, or chance of prejudice does not qualify as a reasonable expectation.[4] There must, based on reasonable grounds, be at least a real, significant or material possibility of prejudice.[5]

Prejudice

5.19 Some exemptions and conditional exemptions[6] require the decision maker to assess whether the potential disclosure of a document would be prejudicial. The FOI Act does not define prejudice. The Macquarie Dictionary definition of 'prejudice' requires:

(a) disadvantage resulting from some judgement or action of another

(b) resulting injury or detriment.

5.20 A prejudicial effect is one which would cause a bias or change to the expected results leading to detrimental or disadvantageous outcomes. There is no need to establish a 'substantial adverse effect' and proof of prejudice is sufficient.[7]

Documents affecting national security, defence or international relations (s 33)

5.21 Section 33 exempts from disclosure documents that affect Australia's national security, defence or international relations. The exemption comprises 2 distinct categories of documents. A document is exempt if disclosure:

(a) would, or could reasonably be expected to, cause damage to the Commonwealth's security, defence or international relations or

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2 The test 'would or could reasonably be expected' has been discussed in various decisions. For example see *Bell and Secretary, Department of Health (Freedom of information)* [2015] AATA 494 [37]; *Xenophon and Secretary, Department of Defence (Freedom of information)* [2019] AATA 3667 [98]–[103].

3 *Re Maksimovic and Australian Customs Service* [2009] AATA 28 [28].

4 *Re News Corporation Limited v National Companies and Securities Commission* [1984] FCA 400; (1984) 5 FCR 88; per Fox and Woodward JJ; *Re Maher and Attorney-General's Department* [1985] AATA 180 [41]; (1985) 7 ALD 731 at 742.

5 *Chemical Trustee Limited and Ors and Commissioner of Taxation and Chief Executive Officer, AUSTRAC (Joined Party)* [2013] AATA 623 [79].

6 Sections 37(1)(a), 37(2)(a), 37(2)(c), 47E(a), 47E(b) and 47G(1)(b).

7 See *Re James and Ors and Australian National University* [1984] AATA 501; (1984) 6 ALD 687, per President Hall on the operation of s 32 of the FOI Act.

(b) would divulge information or matter communicated in confidence to the Commonwealth by a foreign government, an agency of a foreign government or an international organisation.

5.22 In claiming the exemption, decision makers must examine the content of each document within the scope of the FOI request and come to a conclusion about whether disclosure of that content would cause, or could reasonably be expected to cause, the damage specified in s 33(a)(i)–(iii). The context of each document is also relevant because, while the information in the document may not itself cause harm, in combination with other known information it may contribute to a complete picture which results in harm (the 'mosaic theory'). See [5.43] – [5.44] below for more detail on the mosaic theory.

5.23 The classification markings on a document (such as 'secret' or 'confidential') are not of themselves conclusive of whether the exemption applies (see also [5.45] – [5.50] below in relation to information communicated in confidence).[8]

Would, or could reasonably be expected to, cause damage to the Commonwealth's security, defence or international relations (s 33(a))

Reasonably expected

5.24 The term 'reasonably expected' is explained in greater detail at [5.15] – [5.18] above. There must be 'real' and 'substantial' grounds for expecting the damage to occur which can be supported by evidence or reasoning.[9] A mere allegation or possibility of damage is insufficient to meet the 'reasonable expectation' test.[10] Davies J said in *Re Maher and Attorney-General's Department* that 'there must be a cause and effect that can be reasonably anticipated':

> But if it can be reasonably anticipated that disclosure of the document would lessen the confidence which another country would place on the Government of Australia, that is a sufficient ground for a finding that the disclosure of the document could reasonably be expected to damage international relations. Trust and confidence are intangible aspects of international relations.[11]

Damage

5.25 'Damage' for the purposes of this exemption is not confined to loss or damage in monetary terms. The relevant damage may be intangible, such as inhibiting future negotiations between the Australian Government and a foreign

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8 *Re Anderson and Department of Special Minister of State* [1984] AATA 478; *Aldred and Department of Foreign Affairs and Trade* [1990] AATA 833.

9 *Attorney-General's Department and Australian Iron and Steel Pty Ltd v* Cockcroft [1986] FCA 35; (1986) 10 FCR 180.

10 See *Re O'Donovan and Attorney-General's Department* [1985] AATA 330; *Re Maher and Attorney-General's Department* [1985] AATA 180; *Rex Patrick and Department of Defence (Freedom of information)* [2021] AICmr 39 [30].

11 *Re Maher and Attorney-General's Department* [1985] AATA 180 [41]. Also see *Xenophon and Secretary, Department of Defence (Freedom of information)* [2019] AATA 3667.

government, or the future flow of confidential information from a foreign government or agency.[12]

5.26 In determining whether damage is likely to result from disclosure of a document it is relevant to consider whether the content of the document is already in the public domain. If the content of a document is already in the public domain, it is unlikely that disclosure under the FOI Act will cause damage. Deputy President Britten-Jones observed in *Patrick and Secretary, Department of Prime Minister and Cabinet (Freedom of information)* that:

> I accept the contention from both parties that it is critical to consider the disclosure of the Disputed Material in the context of … information … that is publicly available. If the information in the Disputed Material is largely similar to the publicly available information then that will be an important factor in my consideration as to whether the Disputed Material would, or could reasonably be expected to, cause damage to the defence of the Commonwealth. It is axiomatic that if the Disputed Material discloses information that is already publicly available then it would not have, or could not reasonably be expected to have, the required causative effect. However, I accept the Secretary's submission that the Disputed Material must be seen in its context and that the information in the Disputed Material is not all of the same character.[13]

5.27 In some circumstances, such as the deliberate leak of official records, the fact that the information is in the public domain does not diminish the damage that may be done to Australia by further releasing that information. There is a difference between a document being leaked or accidentally released and a document being formally released by an Australian Government entity.

5.28 In determining whether damage is likely to result from disclosure of the document in question, a decision maker could have regard to the relationships between individuals representing respective governments.[14] A dispute between individuals may have sufficient ramifications to affect relations between governments. It is not a necessary consequence in all cases, but a matter of degree to be determined on the facts of each particular case.[15]

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

5.29 To establish an exemption on the basis of s 33(a)(i) a decision maker needs to establish that disclosure of the document:

- would, or could reasonably be expected to, cause damage
- to the security of the Commonwealth.

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12 See the FOI Guidelines applied in *'SA' and Department of Home Affairs (Freedom of information)* [2020] AICmr 17 [13]–[26].

13 *Patrick and Secretary, Department of Prime Minister and Cabinet (Freedom of information)* [2020] AATA 4964 [48].

14 See *Re Laurence William Maher and Attorney-General's Department* [1985] AATA 180 and *Re Aldred and Department of Foreign Affairs and Trade* [1990] AATA 833.

15 See *Arnold v Queensland* [1987] FCA 148; (1987) 73 ALR 607.

5.30 The term 'security of the Commonwealth' broadly refers to:

(a) the protection of Australia and its population from activities that are hostile to, or subversive of, the Commonwealth's interests

(b) the security of any communications system or cryptographic system of any country used for defence or the conduct of the Commonwealth's international relations (see definition in s 4(5)).

5.31 A decision maker must be satisfied that disclosure of the information under consideration would, or could reasonably be expected to, cause damage to the security of the Commonwealth.

5.32 The meaning of 'damage' has 3 aspects:

i. that of safety, protection or defence from something that is regarded as a danger. The Administrative Appeals Tribunal (AAT) has given financial difficulty, attack, theft and political or military takeover as examples.

ii. the means that may be employed either to bring about or to protect against danger of that sort. Examples of those means are espionage, theft, infiltration and sabotage.

iii. the organisations or personnel providing safety or protection from the relevant danger are the focus of the third aspect.[16]

5.33 The claim has been upheld in the following situations:

(a) Where release of a document would prevent a security organisation from obtaining information about those engaged in espionage, it could reasonably be expected to cause damage to national security.[17]

(b) The disclosure of a defence instruction on the Army's tactical response to terrorism and procedures for assistance in dealing with terrorism would pose a significant risk to security by revealing Australia's tactics and capabilities.[18]

(c) Documents revealing, or which would assist in revealing, the identity of an ASIO informant were found to be exempt under a similar provision in the Archives Act.[19]

5.34 It is well accepted that securing classified government information forms part of the security of the Commonwealth.[20] The assessment that s 33(a)(i) requires must be conducted at the time the decision is made and in the environment that exists at that time.[21] Where a request is received for classified government information, the documents must be considered both individually and collectively.

Defence of the Commonwealth (s 33(a)(ii))

5.35 To establish an exemption on the basis of s 33(a)(ii) a decision maker needs

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16 As per Forgie DP in *Prinn and Department of Defence (Freedom of Information)* [2016] AATA 445 [65].

17 *Re Slater and Cox* (*Director-General of Australian Archives)* [1988] AATA 110.intangible

18 *Re Hocking and Department of Defence* [1987] AATA 602.

19 *Re Throssell and Australian Archives* [1987] AATA 453.

20 *Aldred and Department of Foreign Affairs and Trade* [1990] AATA 833.

21 *Prinn and Department of Defence (Freedom of Information)* [2016] AATA 445 [66].

to establish that disclosure of the document:

- would, or could reasonably be expected to, cause damage
- to the defence of the Commonwealth.

5.36 The FOI Act does not define 'defence of the Commonwealth'. Previous AAT decisions indicate that the term includes:

- meeting Australia's international obligations
- ensuring the proper conduct of international defence relations
- deterring and preventing foreign incursions into Australian territory
- protecting the Defence Force from hindrance or activities which would prejudice its effectiveness.[22]

5.37 Damage to the defence of the Commonwealth is not necessarily confined to monetary damage (see [5.25] above). However, in all cases, there must be evidence upon which the expectation could reasonably be based.

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

5.38 To establish an exemption on the basis of s 33(a)(iii) a decision maker needs to establish that disclosure of the document:

- would, or could reasonably be expected to, cause damage
- to the international relations of the Commonwealth.

5.39 The phrase 'international relations' has been interpreted as meaning the ability of the Australian Government to maintain good working relations with other governments and international organisations and to protect the flow of confidential information between them.[23] The exemption is not confined to relations at the formal diplomatic or ministerial level. It also covers relations between Australian Government agencies and agencies of other countries.[24]

5.40 The mere fact that a government has expressed concern about disclosure is not enough to satisfy the exemption, but the phrase does encompass intangible or speculative damage, such as loss of trust and confidence in the Australian Government or one of its agencies.[25] The expectation of damage to international relations must be reasonable in all the circumstances, having regard to the nature of the information; the circumstances in which it was communicated; and the nature and extent of the relationship.[26] There must also be real and substantial grounds for the exemption that are supported by evidence.[27] These grounds are not fixed in

[22] See for example, *Re Dunn and the Department of Defence* [2004] AATA 1040.

[23] *Re McKnight and Australian Archives* [1992] AATA 225; (1992) 28 ALD 95.

[24] *Re Haneef and Australian Federal Police* [2009] AATA 51; (2009) 49 AAR 395.

[25] *Re Maher and Attorney-General's Department* [1985] AATA 180 as applied in *Maksimovic and Attorney-General's Department* [2008] AATA 1089. See also *Kellie Tranter and Department of Home Affairs (Freedom of information)* [2019] AICmr 44 [28].

[26] *Re Slater and Cox (Director-General of Australian Archives)* [1988] AATA 110.

[27] Whittaker and Secretary, Department of Foreign Affairs and Trade [2004] AATA 817 [48].

advance, but vary according to the circumstances of each case.[28]

5.41 However, the AAT has accepted evidence of a long-standing convention and practice of confidentiality with respect to correspondence between the Australian Government and the Queen.[29] This convention preserves the effective functioning of the relationship between the Commonwealth of Australia and the Monarch, including relations with the Queen personally and members of the Royal Household, including the Queen's private secretary. In these circumstances, the AAT found that disclosure of letters between Australian Prime Ministers and the Queen could reasonably be expected to damage the international relations of the Commonwealth.[30]

5.42 For example, disclosure of a document may diminish the confidence which another country would have in Australia as a reliable recipient of its confidential information, making that country or its agencies less willing to cooperate with Australian agencies in future.[31] On the other hand, the disclosure of ordinary business communications between health regulatory agencies revealing no more than the fact of consultation will not, of itself, destroy trust and confidence between agencies.[32]

The mosaic theory

5.43 When evaluating the potential harmful effects of disclosing documents that affect Australia's national security, defence or international relations, decision makers may take into account not only the contents of the document but also the intelligence technique known as the 'mosaic theory'. This theory holds that individually harmless pieces of information, when combined with other pieces of information, can generate a composite — a mosaic — that can damage Australia's national security, defence or international relations.[33] Therefore, decision makers may need to consider other sources of information when considering this exemption.

5.44 The mosaic theory does not relieve decision makers from evaluating whether there are real and substantial grounds for the expectation that the claimed

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28 See, for example, the grounds considered in *Nick Xenophon and Department of Health (Freedom of information)* [2018] AICmr 20 [20]-[24] and *Secretary, Department of Prime Minister and Cabinet and Summers (Freedom of information)* [2019] AATA 5537 in relation to correspondence between the Australian Government and the Queen in which the AAT found that disclosure of letters between Australian Prime Ministers and the Queen could reasonably be expected to damage the international relations of the Commonwealth.

29 *Secretary, Department of Prime Minister and Cabinet and Summers (Freedom of information)* [2019] AATA 5537 [100].

30 *Secretary, Department of Prime Minister and Cabinet and Summers (Freedom of information)* [2019] AATA 5537 [97].

31 *Re Maksimovic and Attorney-General's Department* [2008] AATA 1089. See also *O'Sullivan and Department of Foreign Affairs and Trade* [2013] AICmr 36 [13]; *'AA' and Bureau of Meteorology* [2013] AICmr 46 [27]–[29] and *Secretary, Department of Prime Minister and Cabinet and Summers (Freedom of information)* [2019] AATA 5537 [116]–[119].

32 *Re Public Interest Advocacy Centre and Department of Community Services and Health and Searle Australia Pty Ltd (No 2)* [1991] AATA 723.

33 *Re McKnight and Australian Archives* [1992] AATA 225; (1992) 28 ALD 95.

effects will result from disclosure.[34]

Information communicated in confidence (s 33(b))

5.45 Section 33(b) exempts information communicated in confidence to the Australian Government or an Australian Government agency by another government or one of its authorities, or by an international organisation.[35] One example is the confidential exchange of police information or information received in confidence from a foreign defence force agency.[36]

5.46 The test is whether information is communicated in confidence between the communicator and the agency to which the communication is made — it is not a matter of determining whether the information is of itself confidential in nature.[37] Information is communicated in confidence by or on behalf of another government or authority, if it was communicated and received under an express or implied understanding that the communication would be kept confidential.[38] Whether the information is, in fact, confidential in character and whether it was communicated in circumstances importing an obligation of confidence are relevant considerations.[39] They may assist the decision maker determine whether, on the balance of probabilities, the information was communicated in confidence.[40]

5.47 The relevant time for the test of confidentiality is the time of communication of the information, not the time of the FOI request.[41] The exemption will still apply even if the document is no longer confidential.[42] However, as noted at [5.2] — [5.3] above, agencies and ministers are not legally bound to refuse access if a document is exempt and may consider disclosure, if this is not otherwise legally prohibited. Such an approach is permitted by s 3A and is consistent with the pro-access parliamentary intention underpinning the FOI Act.[43]

5.48 An agreement to treat documents as confidential does not need to be

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34 It is a question of fact whether the disclosure of the information, alone or in conjunction with other material, could reasonably be expected to result in the claimed effect, *Re Nitas and Minister for Immigration and Multicultural Affairs* [2001] AATA 392.

35 This exemption is distinct from the s 45 'material obtained in confidence' exemption. Section 33(b) applies only to information communicated to the Australian Government in confidence by, or on behalf of a foreign government, authority of a foreign government or an international organisation.

36 *'W' and the Australian Federal Police* [2013] AICmr 39 [17]-[20]. See the application of the FOI Guidelines in *Friends of the Earth Australia and Food Standards Australia New Zealand (Freedom of information)* [2018] AICmr 69 [32]–[65].

37 *Secretary, Department of the Prime Minister and Cabinet v Haneef* (2010) 52 AAR 360; [2010] FCA 928 [11]; [2010] 52 AAR 360.

38 *Re Maher and Attorney-General's Department* [1985] AATA 180. In *Luchanskiy and Secretary, Department of Immigration and Border Protection (Freedom of information)* [2016] AATA 184 at [32], Frost DP accepted that a communication from Interpol was exempt under s 33(b) on the basis that the redacted information was 'the type' of information seen regularly by the experienced FOI decision maker.

39 For an example of the application of these considerations, see *Friends of the Earth Australia and Food Standards Australia New Zealand (Freedom of information)* [2018] AICmr 69 [32]–[65].

40 *Re Environment Centre NT Inc and Department of the Environment, Sport and Territories* [1994] AATA 301.

41 *'FM' and Department of Foreign Affairs and Trade* [2015] AICmr 31 [24].

42 *Secretary, Department of Foreign Affairs v Whittaker* [2005] FCAFC 15 [25]; (2005) 143 FCR 15.

43 *'ACV' and Tertiary Education Quality and Standards Agency (Freedom of information)* [2023] AICmr 3 [89] and [90].

formal. A general understanding that communications of a particular nature will be treated in confidence will suffice. The understanding of confidentiality may be inferred from the circumstances in which the communication occurred, including the relationship between the parties and the nature of the information communicated.[44]

5.49 Section 4(10) of the FOI Act confirms that the exemption applies to any documents communicated pursuant to any treaty or formal instrument on the reciprocal protection of classified information between the Australian Government and a foreign government (and their respective agencies) or an international organisation.

5.50 Information communicated by an Australian Government agency to a foreign government may also fall under s 33(b) if it restates information the foreign government previously communicated to the agency in confidence.[45]

Classification markings

5.51 Classification markings on a document (such as secret or confidential) are not in themselves conclusive of a confidential communication. An agency still needs to produce evidence supporting the claim that information was communicated in confidence by a foreign entity. The decision maker must make an independent assessment of that claim in light of the available evidence. Similarly, even where a foreign government or agency has identified a document as secret or confidential, the decision maker is still required to make an independent assessment that the information was communicated in confidence.[46]

Consulting foreign entities

5.52 The standard statutory timeframe for making a decision on an FOI request is 30 days (see Part 3). When a document may be exempt under ss 33(a)(iii) or 33(b), a decision maker may decide to extend the timeframe for making a decision by 30 days to consult the foreign government or authority or international organisation to assist them decide whether the document is exempt (ss 15(7)-(8)). This decision must be in writing and the FOI applicant must be notified as soon as practicable (ss 15(7)-(8)(b)). Although the decision maker should consider any views expressed during consultation, the final decision whether to grant access to the document lies with the decision maker.

5.53 The form of consultation with a foreign government, authority or organisation will depend on the nature of the relationship between the Australian Government entity and the foreign entity. For example, there may be agreed procedures for consultation, or informal communication between officers may suffice. If the agency is not the primary point of contact for the matter requiring consultation, it should seek the assistance of the agency with that responsibility. In some cases, the appropriate action may be to transfer the request, either in full or in part to that other agency.

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44 *Re Maher and Attorney-General's Department* [1986] AATA 16; *Refugee Advice & Casework Service and Department of Foreign Affairs and Trade (Freedom of information)* [2023] AICmr 16 [26]–[28].

45 *Mentink and Australian Federal Police* [2014] AICmr 64 [33]–[34].

46 *Re Anderson and Department of Special Minister of State* [1984] AATA 478.

5.54 If consultation is undertaken, the decision maker should seek information from the foreign entity for the purpose of establishing whether the grounds for an exemption are met. This information may be used to support and explain a claim for an exemption in a statement of reasons to the FOI applicant. It will not be appropriate for the agency to suggest to a foreign entity that the exemption applies and for the foreign entity to simply agree with that proposition. The foreign entity must explain, from its perspective, whether the requisite damage would result from disclosure of the requested document. In all cases, the person consulted should have authority to speak for the foreign entity.

Refusal to confirm or deny existence of a document

5.55 In some instances, the act of confirming or denying that a document exists can cause harm. For example, knowing that an agency possesses a copy of a particular document, coupled with the knowledge that the document could originate from only one source, might disclose a confidential source resulting in the effective loss of important information.

5.56 Section 25 of the FOI Act provides that agencies do not need to give information about the existence of documents in another document, such as a s 26 notice, if including that information would cause the latter to be exempt on the grounds set out in ss 33, 37(1) or 45A. (See [5.95] – [5.133] below for further guidance on the application of s 37(1), and [5.203] – [5.209] for guidance on s 45A.) The agency may instead give the FOI applicant notice in writing that it neither confirms nor denies the existence of the document, but if the document existed, it would be exempt under ss 33, 37(1) or 45A.

5.57 Because use of this section has the effect of refusing an FOI request for access to a document without providing reasons, s 25 should be reserved strictly for cases where the content of the document requires it. Further information about refusing to confirm or deny the existence of a document under s 25 can be found in Part 3 of these Guidelines.

5.58 Section 26(2) also provides that there is no requirement to include information in a notice that, were it contained in a document, would make that document exempt (see Part 3).[47]

Evidence from Inspector-General of Intelligence and Security

5.59 Where the Information Commissioner is conducting a review of a decision refusing access to a document under s 33, before deciding that the document is not exempt, the Information Commissioner must ask the Inspector-General of Intelligence and Security (IGIS) to give evidence on the criteria under s 33 (ss 55ZA–55ZD).

5.60 For IC reviews that commenced before 12 August 2023,[48] this requirement

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[47] See also *Secretary Department of Health and Ageing v iNova Pharmaceuticals (Australia) Pty Limited* [2010] FCA 1442; (2010) 191 FCR 573; 276 ALR 712; 120 ALD 439 for discussion of ss 25 and 26 in relation to decisions that do not provide information as to the existence of documents.

[48] An IC review commences when a notice under s 54Z of the FOI Act is sent to the respondent (or the person who made the request in the case of an access grant decision).

applies to all documents said to be exempt under s 33 (national security, defence, international relations, or divulge information communicated in confidence).[49]

5.61 For IC reviews that commenced on or after 12 August 2023, the requirement for the Inspector-General to give evidence only arises if the documents are said to be exempt under s 33, the documents are not documents of the Inspector-General, and only if the documents relate directly or indirectly to:

1. the performance of the functions or duties, or the exercise of the powers, of a body mentioned in paragraph (a) of the definition of ***intelligence agency*** in ss 3(1) of the *Inspector-*General *of Intelligence and Security Act 1986*[50] or
2. the performance of an ***intelligence function*** (within the meaning of the *Inspector-General of Intelligence and Security Act 1986*) of a body mentioned in paragraph (b) of that definition.[51]

5.62 These provisions are designed to assist the Information Commissioner by giving access to independent expert advice from the IGIS to determine whether damage could result from disclosure of a document which is claimed to be exempt under s 33. For more information about Information Commissioner reviews, see Part 10 of these Guidelines.

Cabinet documents (s 34)

5.63 The Cabinet documents exemption in s 34 of the FOI Act is designed to protect the confidentiality of Cabinet processes and to ensure that the principle of collective ministerial responsibility (fundamental to the Cabinet system) is not undermined. Like the other exemptions in Division 2 of Part IV, this exemption is not subject to the public interest test. The public interest is implicit in the purpose of the exemption itself.

5.64 'Cabinet' for the purposes of s 34 means the Cabinet and includes a committee of the Cabinet as set out in s 4(1) of the FOI Act. A 'committee of the

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[49] See s 7 of the *Acts Interpretation Act 1901*.

[50] **Intelligence agency** is defined in s 3(1) of the *Inspector-General of Intelligence and Security Act 1986* to mean the Australian Security Intelligence Organisation, the Australian Secret Intelligence Service, the Defence Signals Directorate, the Defence Imagery and Geospatial Organisation, the Defence Intelligence Organisation, the Office of National Assessments and the 2 agencies that have an intelligence function – the Australian Criminal Intelligence Commission and the Australian Federal Police. Section s 3(1) of the *Inspector-General of Intelligence and Security Act 1986* specifies the intelligence functions for both these agencies.

[51] **Intelligence functions** for the Australian Criminal Intelligence Commission means:

(i) the collection, correlation, analysis, production and dissemination of intelligence obtained by ACIC from the execution of a network activity warrant; or

(ii) the performance of a function, or the exercise of a power, conferred on a law enforcement officer of ACIC by the network activity warrant provisions of the *Surveillance Devices Act 2004*; or

Intelligence functions for the Australian Federal Police means:

(i) the collection, correlation, analysis, production and dissemination of intelligence obtained by the Australian Federal Police from the execution of a network activity warrant; or

(ii) the performance of a function, or the exercise of a power, conferred on a law enforcement officer of the Australian Federal Police by the network activity warrant provisions of the *Surveillance Devices Act 2004*.

Cabinet' is not defined in the FOI Act. Cabinet does not include informal meetings of ministers outside the Cabinet.

5.65 In *Patrick and Secretary, Department of Prime Minister and Cabinet (Freedom of Information)* [2021] AATA 2719 ('Patrick'), White J set out the factors his Honour considered in deciding whether Minutes and notes of the 'National Cabinet', established in March 2020, were exempt under s 34 of the FOI Act on the basis that National Cabinet was a 'committee of the Cabinet'. The factors considered include the way National Cabinet was established, its composition, historical precedent, the discretion and control available to the Prime Minister with respect to National Cabinet, the way National Cabinet operated and its relationship with the Cabinet, as well as collective responsibility and solidarity within the National Cabinet. In Patrick, his Honour found that the National Cabinet, which consisted of the Prime Minister and State and Territory Premiers and Chief Ministers, did not constitute 'a committee of the Cabinet' for the purposes of s 34 of the FOI Act.

5.66 Cabinet notebooks are expressly excluded from the operation of the FOI Act (see the definition of 'document' in s 4(1)).

5.67 Further information about the treatment of Cabinet-related material can be found in the Cabinet Handbook.[52]

Documents included in exemption

5.68 The Cabinet documents exemption applies to the following classes of documents:

- (a) Documents that:
  - (i) have been submitted to Cabinet
  - (ii) are or were proposed by a minister to be submitted to Cabinet
  - (iii) were proposed to be submitted but were not submitted to Cabinet and were brought into existence for the dominant purpose of submission for the consideration of Cabinet (s 34(1)(a))
- (b) official records of the Cabinet (s 34(1)(b))
- (c) documents prepared for the dominant purpose of briefing a minister on a Cabinet submission (s 34(1)(c))
- (d) drafts of a Cabinet submission, official records of the Cabinet or a briefing prepared for a minister on a Cabinet submission (s 34(1)(d)).

5.69 The exemption also applies to full or partial copies of the categories of documents listed at [5.68] above as well as a document that contains an extract from those categories (s 34(2)).

5.70 Any document containing information which, if disclosed, would reveal a Cabinet deliberation or decision is exempt, unless the deliberation or decision has

[52] Available at www.pmc.gov.au. The Department of the Prime Minister and Cabinet (PM&C) asks that agencies consult the PM&C FOI Coordinator (at foi@pmc.gov.au) on any Cabinet-related material identified within the scope of an FOI request.

been officially disclosed (s 34(3)). The words 'officially disclosed' are not defined in the FOI Act and should be given their ordinary meaning. A key element is the official character of the disclosure. Disclosure will commonly be as a result of specific authorisation by the Cabinet itself, and may be undertaken by the Prime Minister, the Cabinet Secretary, or a responsible minister. An announcement made in confidence to a limited audience is not an official disclosure for this purpose. The AAT has explained that the qualification in s 34(3) does not come into play if the deliberation or decision has been officially disclosed. Rather, it comes into play when the existence of the deliberation or decision has been officially disclosed.[53]

5.71 Agencies should also be aware that there is no requirement to provide access to an edited copy of a document that is exempt under s 34(1). Such a document is exempt because of what it is: a Cabinet submission, an official record of the Cabinet, or one of the other prescribed document types in s 34(1). The edited copy would still be of the same type as the original document, and would still be exempt.[54] However, the exemptions under ss 34(2) and 34(3) are different. For those exemptions, the document is exempt only 'to the extent that' it satisfies the requirements of the provision. This means that it will often be possible to edit a copy of the document so that access to that edited copy would be required to be given.[55]

Documents created for the dominant purpose of submission to Cabinet (s 34(1)(a))

5.72 To be exempt under s 34(1)(a), a document must:

- have been created for the dominant purpose of being submitted for Cabinet's consideration and
- have been submitted to Cabinet for its consideration or have been proposed by a sponsoring minister to be submitted.

Documents in this class may be Cabinet submissions or attachments to Cabinet submissions.

5.73 For example, if, at the time a report is brought into existence there was no intention of submitting it to Cabinet, but it is later decided to submit it to Cabinet, the report will not be covered by s 34(1)(a) because it will not have been brought into existence for the dominant purpose of being submitted to the Cabinet. It may, however, still be exempt under s 34(3) if its disclosure would reveal a Cabinet deliberation or decision.

5.74 The use of the word 'consideration' rather than 'deliberation' in s 34(1)(a) indicates that the Cabinet exemption extends to a document prepared simply to

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53 Per Forgie DP in *Secretary, Department of Prime Minister and Cabinet and Secretary, Department of Infrastructure and Regional Development and Sanderson (Party Joined)* [2015] AATA 361 [77]. Disclosing the substance of the deliberation or decision discloses its existence. Forgie DP noted at [77] that disclosure of its existence, however, does not require disclosure of the substance. Forgie DP also noted at [80] that a media release can constitute an official disclosure of the existence of Cabinet's deliberations when the media release discloses the 'existence' of Cabinet deliberation.

54 *Philip Morris Ltd and Department of Finance* [2014] AICmr 27 [34].

55 *Philip Morris Ltd and Department of Finance* [2014] AICmr 27 [36].

inform Cabinet, the contents of which are intended merely to be noted by Cabinet.[56]

5.75 Whether a document has been prepared for the dominant purpose of submission to Cabinet is a question of fact. The relevant time for determining the purpose is the time the document was created.[57] The purpose will ordinarily be that of the maker of the document, except where it was commissioned by another individual.[58]

5.76 A 'dominant purpose' is a purpose 'which was the ruling, prevailing, or most influential purpose.'[59]

5.77 Relevant considerations when determining whether the 'dominant purpose' test has been satisfied include:

(a) submissions or evidence from the agency or minister about the circumstances surrounding the creation of the document[60]

(b) examination of the contents of the document over which the exemption is claimed,[61] including consideration as to whom the document is addressed and whether it references a particular Cabinet submission or matters considered by Cabinet[62] and

(c) any other available information relating to the purpose of the creation of the document.[63]

Official record of the Cabinet (s 34(1)(b))

5.78 A document will be exempt from disclosure under s 34(b) if it is an official

56 See *Secretary, Department of Prime Minister and Cabinet and Secretary, Department of Infrastructure and Regional Development and Sanderson (Party Joined)* [2015] AATA 361 [54]–[56], citing *Re Toomer and Department of Agriculture, Fisheries and Forestry and Ors* [2003] AATA 1301; (2003) 78 ALD 645.

57 *Re Fisse and Secretary, Department of the Treasury* [2008] AATA 288; (2008) 101 ALD 424; 48 AAR 131. See application of the FOI Guidelines in *Justin Warren and Services Australia (Freedom of information)* [2019] AICmr70 [29]–[38].

58 *Rex Patrick and Department of the Prime Minister and Cabinet (No. 2) (Freedom of information)* [2022] AICmr 66 [6]; *Michael Sergent and Department of the Prime Minister and Cabinet (Freedom of information)* [2022] AICmr 67 [7]; *William Summers and Department of the Prime Minister and Cabinet (No. 2) (Freedom of information)* [2022] AICmr 68 [6]; *'ACD' and Department of the Prime Minister and Cabinet (Freedom of information)* [2022] AICmr 69 [6].

59 *Secretary, Department of Prime Minister and Cabinet and Secretary, Department of Infrastructure and Regional Development and Sanderson (Party Joined)* [2015] AATA 361 [62]; *Justin Warren and Services Australia (Freedom of information)* [2019] AICmr 70 [31].

60 *Nick Xenophon and Department of Defence* [2016] AICmr 14 [22]–[23]; *Secretary, Department of Prime Minister and Cabinet and Secretary, Department of Infrastructure and Regional Development and Sanderson (Party Joined)* [2015] AATA 361.

61 Section 55U(3) of the FOI Act provides that if the Information Commissioner is not satisfied by evidence on affidavit or otherwise that the document is an exempt document under s 34, the information Commissioner may require the document to be produced for inspection.

62 *'JZ' and Department of the Prime Minister and Cabinet* [2016] AICmr 78 [23]; *Nick Xenophon and Department of Defence* [2016] AICmr 14 [26] and *Philip Morris Ltd and IP Australia* [2014] AICmr 28 [12].

63 For example, in *Nick Xenophon and Department of Defence* [2016] AICmr 14 [15]–[16] regard was had to media statements relating to the document at issue. See also *Justin Warren and Services Australia (Freedom of information)* [2019] AICmr 70 [32].

record of the Cabinet.

5.79 The term 'official record of the Cabinet' in s 34(1)(b) is not defined. The document must be an official record of the Cabinet itself, such as a Cabinet Minute. A document must relate, tell or set down matters concerning Cabinet and its functions in a form that is meant to preserve that relating, telling or setting down for an appreciable time.[64]

Cabinet briefings (s 34(1)(c))

5.80 A document that is brought into existence for the dominant purpose of briefing a minister on a submission to Cabinet within the meaning of s 34(1)(a) is an exempt document (s 34(1)(c)). The briefing purpose must have been the dominant purpose at the time of the document's creation (see [5.72] – [5.77] for further information about the dominant purpose test).

Draft Cabinet documents (s 34(1)(d))

5.81 Section 34(1)(d) provides that a draft of a Cabinet submission, an official record of the Cabinet or a Cabinet briefing is exempt.

5.82 Relevant considerations in determining whether s 34(1)(d) applies include examination of the contents of the document at issue, consideration of how the document at issue relates to the document claimed to be exempt under ss 34(1)(a), (b) or (c),[65] and consideration of submissions from the agency or minister about the role of the document in the Cabinet process.[66]

Copies and extracts (s 34(2))

5.83 A document is exempt from disclosure to the extent that it is a copy or part of, or contains an extract from, a document that is itself exempt from disclosure for one of the reasons specified in s 34(1) (see s 34(2)). In practice, this means a document that comprises or contains a copy of, or part of, an extract from a Cabinet submission, a Cabinet briefing or an official record of the Cabinet is exempt from disclosure. A copy or extract should be a quotation from, or exact reproduction of, the Cabinet submission, official record of the Cabinet or the Cabinet briefing.

5.84 A document that refers to a Cabinet meeting date or Cabinet document reference number could be considered to contain an extract from a Cabinet document for the purposes for s 34(2) in certain circumstances.[67] It may therefore

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64 *Re Toomer and Department of Agriculture, Fisheries and Forestry and Ors* [2003] AATA 1301 [74].

65 See *'JZ' and Department of the Prime Minister and Cabinet* [2016] AICmr 78 [17]-[19]; *Philip Morris Ltd and IP Australia* [2014] AICmr 28 [14]-[19]; *Philip Morris Ltd and Department of Finance* [2014] AICmr 27 [17]–[18].

66 *Greenpeace Australia Pacific and Department of Industry* [2014] AICmr 140 [35]-[36]; *Philip Morris Ltd and Department of Finance* [2014] AICmr 27 [15]–[16].

67 For example, the context of the reference to the Cabinet meeting date is relevant. In *Dreyfus and Attorney-General (Commonwealth of Australia) (Freedom of information)* [2015] AATA 995; (2015) 68 AAR 207 [55] and [60] Jagot J was of the view that without additional information, details that a meeting had been scheduled between the Attorney-General and the Prime Minister 'cannot, on any view, amount to a Cabinet document as defined in s 34. It cannot "reveal a Cabinet deliberation or decision" even by any

be deleted from an edited copy of the document where this is reasonably practicable (s 22). Although such information is generally not sensitive, s 34 does not require a decision maker to be satisfied that disclosure would cause damage. It is enough that the document in question quotes any information from a document described in s 34(1).[68]

5.85 However, agencies and ministers should be mindful of the exceptions under ss 34(4)-(6) that may apply (see [5.91] – [5.94] for further information about the exceptions to s 34). Even if a document is found to contain an extract from a Cabinet document, if the information in the document is purely factual it is the case that unless disclosure of the information would reveal a Cabinet deliberation or decision that has not been officially disclosed, the document cannot be exempt under s 34(2).[69]

5.86 As a result, Cabinet meeting dates and Cabinet document reference numbers included in diaries may not be exempt, although they may be an extract or part of a document to which s 34(1) applies. This is because a diary is a record of day-to-day content and the information in it will generally be considered to be purely factual in nature and without further content will not reveal a Cabinet deliberation or decision that has not been officially disclosed.[70]

5.87 Decision makers will need to give detailed consideration to whether coordination comments come within the scope of the exemption in s 34 of the FOI Act. Normal practice is that such comments are drafted separately from the submission to which they relate by the agencies making the comments. Agencies' coordination comments are then incorporated into the submission which is submitted to Cabinet for consideration. The AAT has held that a document comprising a copy of coordination comments which were later incorporated into a Cabinet submission was exempt under the previous version of s 34(2) on the basis that it was an extract from the minister's Cabinet submission.[71]

Documents disclosing a deliberation or decision of Cabinet (s 34(3))

5.88 Section 34(3) exempts documents to the extent that their disclosure would reveal any deliberation or decision of the Cabinet unless the existence of the deliberation or decision has been officially disclosed ('officially disclosed' is discussed below at [5.94]).

5.89 'Deliberation' in this context has been interpreted as active debate in Cabinet, or the weighing up of alternatives, with a view to reaching a decision on a matter (but not necessarily arriving at one). In *Re Toomer*, Deputy President Forgie analysed earlier consideration of 'deliberation' and concluded:

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process of the building of a mosaic by reference to date and published announcements.' See also, *Rex Patrick and Department of Defence (Freedom of Information)* [2019] AICmr 19 [19]–[20].

68 See *Philip Morris Ltd and Department of Finance* [2014] AICmr 27 [54]–[57]; and *Philip Morris Ltd and IP Australia* [2014] AICmr 28 [22].

69 For example, see *Rex Patrick and Department of Defence (Freedom of information)* [2019] AICmr 19 [19]–[24] in the context of electronic calendars.

70 *Rex Patrick and Department of Defence (Freedom of Information)* [2019] AICmr 19 [19]–[20].

71 *Re McKinnon and Department of Prime Minister and Cabinet* [2007] AATA 1969; 46 AAR 136.

> … Taking its [Cabinet's] deliberations first, this means that information that is in documentary form and that discloses that Cabinet has considered or discussed a matter, exchanged information about a matter or discussed strategies. In short, its deliberations are its thinking processes, be they directed to gathering information, analysing information or discussing strategies. They remain its deliberations whether or not a decision is reached. [Cabinet's] decisions are its conclusions as to the courses of action that it adopts be they conclusions as to its final strategy on a matter or its conclusions as to the manner in which a matter is to proceed.[72]

5.90 Consideration must be given to whether the information in the documents would reveal 'any deliberation or decision of the Cabinet'. An agency or minister cannot contend that s 34(3) applies simply because the information in the documents reveals the subject matter of Cabinet discussions.[73]

Documents excluded from exemption (ss 34(4), 34(5) and 34(6))

5.91 There are 3 exceptions or qualifications to the Cabinet exemption under s 34:

- a document is not exempt merely because it is attached to a Cabinet submission, record or briefing (s 34(4))
- the document by which a Cabinet decision is officially published is not itself exempt (s 34(5))
- purely factual material in a Cabinet submission, record or briefing is not exempt unless its disclosure would reveal a Cabinet deliberation or decision and the existence of the deliberation or decision has not been officially disclosed (s 34(6)).

Purely factual material (s 34(6))

5.92 Section 34(6) provides that, in a document to which ss 34(1), 34(2) or 34(3) applies, information is not exempt if it is purely factual material unless:

(a) the disclosure of the information would reveal a deliberation or decision of the Cabinet and

(b) the existence of that deliberation or decision has not been officially disclosed.

5.93 Purely factual material includes material such as statistical data, surveys and factual studies. A conclusion involving opinion or judgement is not purely factual. For example, a projection or prediction of a future event would not usually be considered purely factual.[74]

Officially disclosed (ss 34(3) and 34(6))

5.94 The Cabinet documents exemption twice refers to the existence of a deliberation or decision of the Cabinet being 'officially disclosed': ss 34(3) and

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72 *Re Toomer and Department of Agriculture, Fisheries and Forestry and Ors* [2003] AATA 1301; (2003) 78 ALD 645 [88].

73 *Justin Warren and Services Australia (Freedom of information)* [2019] AICmr 70 [61] and [65] and *Josh Taylor and Minister for Communications and the Arts (Freedom of information)* [2017] AICmr 9 [43] – [48].

74 'Purely factual matter' and 'deliberative matter' are also referred to in s 47C (see Part 6).

34(6)(b). This can refer to disclosure orally as well as by a written statement — for example, an oral announcement by a minister about a Cabinet decision.[75] The disclosure may be a general public disclosure (for example, a statement in a consultation paper published on a Departmental website)[76] or a disclosure to a limited audience on the understanding that it is not a confidential communication.[77] The disclosure must be 'official' — for example, authorised by Cabinet or made by a person (such as a minister) acting within the scope of their role or functions.

Documents affecting law enforcement and public safety (s 37)

5.95 This exemption applies to documents which, if released, would or could reasonably be expected to affect law enforcement or public safety in any of the following ways:

- prejudice the conduct of an investigation of a breach, or possible breach, of the law (s 37(1)(a))
- prejudice the conduct of an investigation of a failure, or possible failure, to comply with a taxation law (s 37(1)(a))
- prejudice the enforcement, or the proper administration, of the law in a particular instance (s 37(1)(a))
- reveal the existence or identity of a confidential source of information, or the non-existence of a confidential source of information, in relation to the enforcement or administration of the law (s 37(1)(b))
- endanger the life or physical safety of any person (s 37(1)(c))
- prejudice the fair trial of a person, or the impartial adjudication of a particular case (s 37(2)(a))
- disclose lawful methods or procedures for investigating, preventing, detecting or dealing with breaches of the law where disclosure of those methods would be reasonably likely to reduce their effectiveness (s 37(2)(b))
- prejudice the maintenance or enforcement of lawful methods for the protection of public safety (see ss 37(2)(c)).

5.96 For the purposes of the exemption, 'law' means a law of the Commonwealth or of a State or a Territory (s 37(3)). It encompasses both criminal and civil law.

5.97 Section 37 concerns the investigative or compliance activities of an agency and the enforcement or administration of the law, including the protection of public safety. It is not concerned with an agency's own obligations to comply with the law.

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[75] The phrase used prior to the 2010 FOI Act amendments was 'officially published'. This was taken to mean publication by a written document in *Re Toomer and Department of Agriculture, Fisheries and Forestry* [2003] AATA 1301; (2003) 78 ALD 645 [101].

[76] *Philip Morris Ltd and Department of Finance* [2014] AICmr 27 [30].

[77] *Re Toomer and Department of Agriculture, Fisheries and Forestry* [2003] AATA 1301; (2003) 78 ALD 645 [101].

The exemption applies, therefore, where an agency has a function connected with investigating breaches of the law, its enforcement or administration.

5.98 To be exempt under ss 37(1)(a) or 37(1)(b), the document in question should have a connection with the criminal law or the processes of upholding or enforcing civil law or administering a law.[78] This is not confined to court action or court processes, but extends to the work of agencies in administering legislative schemes and requirements, monitoring compliance, and investigating breaches. The exemption does not depend on the nature of the document or the purpose for which it was brought into existence. A document will be exempt if its disclosure would or could reasonably be expected to have one or more of the consequences set out in the categories listed above at [5.95].

5.99 In applying this exemption, a decision maker should examine the circumstances surrounding the creation of the document and the possible consequences of its release. The adverse consequences need not result only from disclosure of a particular document. The decision maker may also consider whether disclosure, in combination with information already available to the applicant would, or could reasonably be expected to result in any of the specified consequences.

Withholding information about the existence of documents

5.100 Section 25 permits an agency to give to an FOI applicant a notice that neither confirms nor denies the existence of a document if information as to its existence would, if it were included in a document, make the document exempt under s 37(1) (see [5.55] – [5.58] and Part 3 of these Guidelines).

Reasonable expectation

5.101 In the context of s 37, as elsewhere in the FOI Act, the mere risk or possibility of prejudice to an investigation is not a sufficient basis for a reasonable expectation of prejudice. However, the use of the word ‘could’ in the reasonable expectation qualification, as distinct from ‘would’, is less stringent. The reasonable expectation refers to activities that might reasonably be expected to have occurred, be presently occurring, or could occur in the future (see [5.15] – [5.16] above).[79]

Investigation of a breach of law (s 37(1)(a))

5.102 Section 37(1)(a) applies to documents only where there is a current or pending investigation and release of the document would, or could reasonably be expected to, prejudice the conduct of that investigation. Because of the phrase ‘in a particular instance’ it is not sufficient that prejudice will occur to other or future investigations: it must relate to the particular investigation at hand.[80] In other words, the exemption does not apply if the prejudice is about investigations in general.

5.103 The exemption is concerned with the conduct of an investigation. For

[78] *Re Gold and Australian Federal Police and National Crime Authority* [1994] AATA 382; (1994) 37 ALD 168, citing Young CJ in *Accident Compensation Commission v Croom* (1991) 2 VR 322 [324].

[79] *Re Maksimovic and Australian Customs Service* [2009] AATA 28.

[80] *Re Murtagh and Federal Commissioner of Taxation* [1984] AATA 249; (1984) 54 ALR 313; (1984) 6 ALD 112; (1984) 1 AAR 419; 15 ATR 787.

example, it would apply where disclosure would forewarn the FOI applicant about the direction of the investigation, as well as the evidence and resources available to the investigating body — putting the investigation in jeopardy.[81] The section will not apply if the investigation is being conducted by an overseas agency and does not relate to a breach of Australian law.[82]

5.104 Where the investigation is merely suspended or dormant rather than permanently closed, or where new information may revive an investigation, the exemption may apply. However, the expectation that an investigation may revive should be more than speculative or theoretical and be supported by evidence.[83]

5.105 Whether prejudice will occur is a question of fact to be determined on the evidence. The fact that a document is relevant to an investigation is not, however, sufficient.

5.106 It is clear from its terms that the exemption in s 37(1)(a) will not apply if disclosure would benefit rather than prejudice an investigation.

Disclosure of a confidential source (s 37(1)(b))

5.107 Section 37(1)(b) is intended to protect the identity of a confidential source of information connected with the administration or the enforcement of the law.[84] It is the source, rather than the information, which is confidential. The exemption is not limited to particular instances in the same way as s 37(1)(a).

5.108 The exemption applies where:

- the information in question may enable the agency responsible for enforcing or administering a law to enforce or administer it properly
- the person who supplies that information wishes their identity to be known only to those who need to know it for the purpose of enforcing or administering the law[85]
- the information was supplied on the understanding, express or implied, that the source's identity would remain confidential.[86]

5.109 Where a document contains information known only to a limited number of people and the confidential source is known to the FOI applicant, or where the

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81 *News Corporation v National Companies and Securities Commission* [1984] 5 FCR 88; [1984] FCA 400.

82 *Re Rees and Australian Federal Police* [1999] AATA 252 [89]; (1999) 57 ALD 686. See also *Linton Besser and Department of Employment* [2015] AICmr 67 [13]-[17].

83 *Re Doulman and CEO of Customs* [2003] AATA 883 and *Noonan and Australian Securities and Investments Commission* [2000] AATA 495.

84 For an example of the application of this part of the FOI Guidelines, see *'PD' and Australian Skills Quality Authority (Freedom of information)* [2018] AICmr 57 [10]–[21].

85 *Department of Health v Jephcott* [1985] FCA 370 [4]; (1985) 8 FCR 85.

86 See for example *'HC' and Department of Human Services (Freedom of Information)* [2015] AICmr 61 in which the Information Commissioner accepted that information was provided on the understanding that the source's identity would remain confidential and that the third party would have an expectation that their identity would not be disclosed. See also *'HP' and Department of Immigration and Border Protection (Freedom of Information)* [2015] AICmr 77; and *The Guardian Australia and Department of Climate Change, Energy, the Environment and Water (Freedom of information)* [2022] AICmr 70.

document has identifying features such as handwriting, disclosure is more likely to identify the confidential source.[87]

5.110 Section 37(1)(b) can also apply to protect information which would allow the FOI applicant to ascertain the existence or non-existence (rather than the identity) of a confidential source of information.[88]

5.111 The 'mosaic theory' might apply in some cases (see [5.43] – [5.44] above).[89] That is, the disclosure of the information in question will lead to it being linked to already available information and thus disclose the identity of the confidential source.[90]

5.112 Section 37(2A) confirms that a person is a confidential source of information in relation to the enforcement or administration of the law if that person is receiving or has received, protection under a program conducted under the auspices of the Australian Federal Police, or the police force of a State or Territory. This provision does not limit the operation of s 37(1)(b) in relation to any other persons.[91]

Scope of confidentiality

5.113 Section 37(1)(b) protects the identity of a person who has supplied information on the understanding that their identity would remain confidential. The scope of confidentiality depends on the facts of each case.

5.114 This exemption does not apply if the FOI applicant is aware of the relationship between the agency and the person who supplied the information to the agency, and the FOI applicant is included in the understanding of confidence between the agency and the other person. For example, the exemption did not apply to information disclosed to an agency by an FOI applicant's financial broker who was interviewed by the agency. The FOI applicant was considered to be included in the relationship of confidence between the broker and the agency. The AAT stated that if the FOI applicant was not privy to the confidence, he was entitled to be.[92]

5.115 It is not essential that the confidential source provide the information under an express agreement. Often an implied undertaking of confidentiality can be made out from the circumstances of a particular case.[93] For example, the source may have supplied the information under the reasonable expectation that their identity would be kept confidential. In some cases, confidentiality can be inferred from the

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87 See *'HR' and Department of Immigration and Border Protection* [2015] AICmr 80 [13].

88 *Re Jephcott and Department of Community Services* [1986] AATA 248 and *The Sun-Herald Newspaper and the Australian Federal Police* [2014] AICmr 52 [24].

89 For an example, see *Besser and Attorney-General's Department* [2013] AICmr 12 [16].

90 *Re Petroulias and Others v Commissioner of Taxation* [2006] AATA 333; (2006) 62 ATR 1175.

91 See *Jorgensen v Australian Securities & Investments Commission* (2004) 208 ALR 73; [2004] FCA 143 [67]-[68] and the Explanatory Memorandum to the *Law and Justice Legislation Amendment Bill 1994* at 148.

92 *Re Lander and Australian Taxation Office* [1985] AATA 296.

93 *Department of Health v Jephcott* [1985] FCA 370 [11]; (1985) 8 FCR 85.

practice of the agency to receive similar types of information in confidence.[94] Two examples are a telephone hotline set up to receive certain types of information from members of the public which is expressly promoted as confidential; or information received from a person who would reasonably expect that their identity would not be made known to anyone other than those involved in administering and enforcing the law.[95] Nevertheless, the understanding or representation that information will be received confidentially must not be vague or devoid of context.

5.116 The exemption applies independently of whether it was objectively reasonable or in the public interest for the person to supply information on a confidential basis. It is sufficient that the person supplied the information on the basis that their identity would be confidential.[96]

Enforcement or administration of the law

5.117 The phrase 'the enforcement or the proper administration of the law' in s 37(1)(a) is not confined to the enforcement or administration of statutory provisions or of the criminal law. It requires only that a document should have a connection with the criminal law or with the processes of upholding or enforcing civil law.[97] The term 'proper administration' is intended to exclude particular instances where a law is improperly administered.

Disclosure of identity

5.118 There must be a reasonable expectation that the contents of the documents in question will disclose the identity of the confidential source.[98] Where a person's identity is not apparent and the information is so general that it is unlikely to lead to identification of the confidential source, or it could have come from any one of several sources, this element of the exemption is not satisfied.

5.119 If other disclosures already make it possible to determine who the source is, an agency or minister cannot claim this exemption. This is because the necessary quality of confidence has already been lost.[99] On the other hand, the inadvertent or unauthorised leaking of a document does not diminish the quality of confidence attaching to it.[100]

5.120 A person's identity can sometimes be ascertained from a document even if they are not expressly mentioned in that document. For example, a person may be identified by distinctive handwriting in a handwritten letter, letterhead, or the nature of the information which may only be known to a limited number of

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94 See for example, *The Guardian Australia and Department of Climate Change, Energy, the Environment and Water (Freedom of information)* [2022] AICmr 70 [81]–[83].

95 *'X' and Australian Federal Police* [2013] AICmr 40 [20]-[23].

96 *Besser and Attorney-General's Department* [2013] AICmr 12 [12].

97 *Re Gold and Australian Federal Police and National Crime Authority* [1994] AATA 382; (1994) 37 ALD 168, citing Young CJ in *Accident Compensation Commission* v *Croom* [1991) 2 VR 322, 324.

98 *Re Rees and Australian Federal* Police (1999) 57 ALD 686; [1999] AATA 252.

99 *Re Chandra and Minister for Immigration and Ethnic Affairs* [1984] AATA 437; (1984) 6 ALN N257.

100 *Re Cullen and Australian Federal Police* [1991] AATA 671.

people.[101]

Endanger the life or physical safety of any person (s 37(1)(c))

5.121 Under s 37(1)(c) a document is exempt if its disclosure would, or could reasonably be expected to, make a person a potential target of violence by another individual or group. That is, whether release of the documents could be expected to create the risk, not whether the documents reflect an existing credible threat.[102] This exemption requires a reasonable apprehension of danger which will turn on the facts of each particular case. For example, the disclosure of the name of an officer connected with an investigation into threats made by the FOI applicant will not be sufficient.[103] A reasonable apprehension does not mean the risk has to be substantial, but evidence is necessary. For instance, intemperate language and previous bad behaviour, without more, does not necessarily support a reasonable apprehension.[104]

5.122 Some illustrations of the application of the exemption in the Commonwealth, Queensland and Victoria include the following:

- If release of the document might lead to abusive behavior in the form of insulting and offensive communications this will not be enough to make the document exempt. However, if the applicant has a documented history of abusing and threatening departmental staff including threats of serious physical harm this may be sufficient to make the document exempt.[105]
- A reasonable apprehension was shown in *Re Ford and Child Support Registrar.*[106] In that case, a third party gave extensive evidence about her fear of what would happen if the FOI applicant was given access to documents. The third party had been the main prosecution witness during the FOI applicant's criminal trial for which they were still in jail. She said he had written threatening letters to her and to her friends and she was scared of him. The AAT found there was a real and objective apprehension of harm and upheld the exemption.
- The Queensland Information Commissioner, in considering a similar provision in Queensland's former *Freedom of Information Act 1992*,[107] found that a threat of litigation against a person is not harassment which endangers a person's life or physical safety.[108]
- In considering a similar provision in Queensland's *Right to Information Act 2009*, the Queensland Information Commissioner found, based on

101 See *'X' and Australian Federal Police* [2013] AICmr 40 [22]; *'HR' and Department of Immigration and Border Protection* [2015] AICmr 80.

102 *'I' and Australian National University* [2012] AICmr 12 [15].

103 *Re Ervin Lajos Boehm and Department of Industry Technology and Commerce* [1985] AATA 60.

104 *Re Dykstra and Centrelink* [2002] AATA 659. On appeal to the Federal Court, the matter was remitted to the AAT. After considering further evidence, the AAT upheld the exemption (Re *Dykstra and Centrelink* [2003] AATA 202).

105 *'MM' and Department of Human Services (Freedom of information)* [2017] AICmr 92 [19]-[35]

106 *Re Ford and Child Support Registrar* [2006] AATA 283.

107 Now replaced by the *Right to Information Act 2009.*

108 *Re Murphy and Queensland Treasury* [1995] QICmr 23; (1995) 2 QAR 744.

evidence and subsequent reporting, that releasing information about suicides at specific locations would lead to an increase in the number of people attempting or completing acts of suicide at those locations.[109]

- Access to psychiatric reports provided to the Supreme Court was refused on the basis that disclosure could reasonably be expected to endanger the life or physical safety of other persons. In deciding to refuse access, the Queensland Information Commissioner considered factors such as the FOI applicant's history of violence and criminal activity, the fact the FOI applicant had been the subject of a forensic order which resulted in detention as an inpatient of a high security mental health unit and ongoing mental health issues as relevant in deciding that the FOI applicant's current state of mind was such that disclosure could reasonably be expected to endanger the life or physical safety of other people.
- The exemption was not satisfied under the corresponding provision in the Victorian *Freedom of Information Act 1982,* where evidence was produced that one of several institutions where animal experiments were conducted had received a bomb threat. It was held that danger to lives or physical safety was only considered to be a possibility, not a real chance.[110]

Prejudice to a fair or impartial trial (s 37(2)(a))

5.123 A document which, if disclosed would, or could reasonably be expected to, prejudice the fair trial of a person or the impartial adjudication of a particular case (s 37(2)(a)) is exempt. This aspect of the exemption operates in specific circumstances. It is necessary to identify which persons would be affected. 'Trial' refers to the judicial examination and determination of issues between parties with or without a jury.[111] The term 'prejudice' implies some adverse effect from disclosure. For example, the AAT refused to accept a claim under this section where, on the facts, disclosure of the documents to the FOI applicant could have actually facilitated the impartial adjudication of the matter.[112] The fact that documents are relevant to a case is not of itself sufficient to justify the exemption. Some causal link between the disclosure and the prejudice must be demonstrated.

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

5.124 Section 37(2)(b) exempts documents which, if released would, or could reasonably be expected to:

- disclose lawful methods or procedures for preventing, detecting, investigating or dealing with matters arising out of breaches of the law
- prejudice the effectiveness of those methods or procedures.[113]

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[109] *Courier-Mail and Queensland Police Service* (Unreported, Queensland Information Commissioner, 15 Feb 2013).

[110] *Re Binnie and Department of Agriculture and Rural Affairs* (1987) VAR 361.

[111] See Federal Court of Australia, *Glossary of Legal Terms* www.fedcourt.gov.au/digital-law-library/glossary-of-legal-terms.

[112] *Re O'Grady v Australian Federal Police* [1983] AATA 390.

[113] For an example of the application of this part of the FOI Guidelines, see *'RI' and Department of Home Affairs (Freedom of information)* [2019] AICmr 71 [12]–[25].

5.125 'Lawful methods and procedures' are not confined to criminal investigations and can, for example, extend to taxation investigations. The exemption focuses on an agency's methods and procedures for dealing with breaches of the law, where disclosure would, or could reasonably be expected to, adversely affect the effectiveness of those methods and procedures.

5.126 The word 'lawful' is intended to exclude unlawful methods and procedures, for example, methods involving illegal telephone interception or entrapment.

5.127 This exemption requires satisfaction of 2 factors. There must be a reasonable expectation that a document will disclose a method or procedure and a reasonable expectation or a real risk of prejudice to the effectiveness of that investigative method or procedure.[114] If the only result of disclosing the methods would be that those methods were no surprise to anyone, there could be no reasonable expectation of prejudice. However, where a method might be described as 'routine', but the way in which it is employed can reasonably be said to be 'unexpected', disclosure could prejudice the effectiveness of the method.[115]

5.128 The exemption will not apply to routine techniques and procedures that are already well known to the public or documents containing general information. For example, in *Re Russo v Australian Securities Commission*, the AAT rejected a s 37(2)(b) claim about the (then) Australian Securities Commission's method of allocating priority to matters, with the observation that disclosing such a method is akin to disclosing that the respondent uses pens, pencils, desks, chairs and filing cabinets in the investigation of possible breaches of the Corporations Law.[116] On the other hand, the AAT has held that authoritative knowledge of the particular law enforcement methods used (as opposed to the applicant's suspicion or deduction) would assist endeavours to evade them.[117] Where a method or procedure is legislatively prescribed, disclosure of the document would not disclose the method or procedure as it has already been disclosed by the legislation.[118]

5.129 The exemption may apply to methods and procedures that are neither obvious nor a matter of public notoriety, even if evidence of a particular method or procedure has been given in a proceeding before the courts.[119] For example, the AAT held that disclosure of examples of acceptable reasons for refusing to vote in a compulsory election from the Australian Electoral Commission's internal manual would reasonably be expected to prejudice the effectiveness of law enforcement procedures because people who failed to vote would be able to circumvent the procedures by submitting one of the acceptable reasons.[120] The exemption is more likely to apply where disclosure of a document would disclose covert, as opposed to

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114 *Re Anderson and Australian Federal Police* [1986] AATA 79; (1986) 4 AAR 414; (1986) 11 ALD 355; (1986) 11 ALN N239.

115 See *Hunt and Australian Federal Police* [2013] AICmr 66 [28].

116 *Re Russo v Australian Securities Commission* [1992] AATA 228; (1992) 28 ALD 354.

117 *Re Edelsten and Australian Federal Police* [1985] AATA 350, citing *Re Mickelberg and Australian Federal Police* (1984) 6 ALN N176.

118 *Stephen Waller and Department of Environment* [2014] AICmr 133 [17]-[18].

119 *Re T and Queensland Health* (1994) 1 QAR 386.

120 *Re Murphy and Australian Electoral Commission* [1994] AATA 149; (1994) 33 ALD 718.

overt or routine methods or procedures.[121]

Protection of public safety (s 37(2)(c))

5.130 Section 37(2)(c) exempts documents if disclosure would prejudice the maintenance or enforcement of lawful methods for the protection of public safety.

5.131 The terms 'lawful' and 'prejudice' apply to s 37(2)(c) in the same manner as described for s 37(2)(b) at [5.124] – [5.129] above.

5.132 The words 'public safety' do not extend beyond safety from violations of the law and breaches of the peace.[122] The AAT has observed that 'public safety' should not be confined to any particular situation, such as civil emergencies (bushfires, floods and the like) or court cases involving the enforcement of the law. The AAT also noted that considerations of public safety and lawful methods will be given much wider scope in times of war than in times of peace.[123]

5.133 *Re Hocking and Department of Defence* provides an example of the operation of s 37(2)(c).[124] The FOI applicant was denied access to a portion of an army manual dealing with the tactical response to terrorism and to Army procedures to meet requests for assistance in dealing with terrorism because if the relevant section of the manual was made public, there would be a significant risk to the security of the Commonwealth.

Documents to which secrecy provisions apply (s 38)

5.134 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)).

5.135 Section 38 is intended to preserve the operation of specific secrecy provisions in other legislation, including in cases where no other exemption or conditional exemption is available under the FOI Act. The primary purpose of secrecy provisions in legislation is to prohibit unauthorised disclosure of client information. Most secrecy provisions allow disclosure in certain circumstances, such as with the applicant's consent where the information relates to them, or where it is in the course of an officer's duty or performance of duties, or exercise of powers or functions, to disclose the information.[125]

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121 *Re Anderson and Australian Federal Police* [1986] AATA 79; (1986) 4 AAR 414; (1986) 11 ALD 355; (1986) 11 ALN N239.

122 *Re Thies and Department of Aviation* [1986] AATA 141; (1986) 9 ALD 454; (1986) 5 AAR 27.

123 *Re Parisi and Australian Federal Police* (*Qld*) [1987] AATA 395.

124 *Re Hocking and Department of Defence* [1987] AATA 602.

125 For an example of the application of this part of the FOI Guidelines, see *John Mullen and Aged Care Complaints Commissioner (Freedom of information)* [2017] AICmr 34 [11]–[27].

5.136 The effect of s 38(1A) is to limit the use of s 38 to the terms of the particular secrecy provision involved, and the exemption is only available to the extent that the secrecy provision prohibits disclosure.[126] Contrary to usual FOI practice, a decision maker contemplating an exemption under s 38 must consider the identity of the FOI applicant in relation to the document. This is because s 38(1A) permits disclosure of a document in cases where the prescribed secrecy provision does not prohibit disclosure to that person.[127]

5.137 Section 38 does not apply to documents in so far as they contain personal information about the FOI applicant (s 38(2)). The exception applies only to personal information about the FOI applicant and not to 'mixed personal information', that is, personal information about the FOI applicant which, if disclosed, would also reveal personal information about another individual. If the FOI applicant's personal information can be separated from any third-party personal information, the FOI applicant's personal information will not be exempt under s 38(1) and can be disclosed. The decision maker may consider providing access to an edited copy (s 22).

5.138 The application of s 38(2) was considered in the IC review decision *AFV and Services Australia (Freedom of information)* [2023] AICmr 125. In that decision, the Acting FOI Commissioner accepted Services Australia's submission that third party protected information could not be disclosed even when that information concerned the FOI applicant or could reasonably be assumed to be known to the FOI applicant. 'The test is not whether information already is, or may be, known to an FOI applicant, but how the relevant legislation applies to it.'[128] After considering the document, the Acting FOI Commissioner concluded that some of the information said to be exempt under s 38 was, on its face, not information about anybody other than the FOI applicant. Further, there were inconsistencies in the deletion of the same or similar material in parts of the document and in documents released in response to another FOI request. As a result, the Acting FOI Commissioner was satisfied that it was possible to separate the FOI applicant's personal information from information about another person; the exception in s 38(2) applied and the information was not exempt under s 38.

5.139 Section 38(3) contains a limited exception to s 38(2). Section 38 continues to apply in relation to a person's own personal information where that person requests access to a document for which disclosure is prohibited under s 503A of the *Migration Act 1958*, as affected by s 503D of that Act.

5.140 A number of secrecy provisions allow disclosure where it is in the course of an officer's duty or performance of duties, or exercise of powers or functions. What is in the course of an officer's duties should be interpreted broadly as to any routine

126 *NAAO v Secretary, Department of Immigration and Multicultural Affairs* [2002] FCA 292 [24]–[25]; (2002) 117 FCR 401; (2002) FCAFC 64.

127 *Re Young and Commissioner of Taxation* [2008] AATA 155; (2008) 100 ALD 372; 71 ATR 284 see also *'A' and Department of Health and Ageing* [2011] AICmr 4 [13]-[16].

128 *AFV and Services Australia (Freedom of information)* [2023] AICmr 125 [48]. See also *Re Collie and Deputy Commissioner of Taxation* [1997] AATA 713 and *e Richardson and Commissioner of Taxation* [2004] AATA 367 .

disclosures that may be linked to those duties or functions[129] but would generally not encompass the release of information under the FOI Act.

5.141 For example, in *Walker and Secretary, Department of Health (Freedom of information)* the AAT considered the application of s 38 to information relating to the status of medical General Practitioners. Subject to certain exceptions, s 130(1) of the *Health Insurance Act 1973* prohibits disclosure of information acquired in the performance or exercise of powers or functions under that Act. Section 130(1) of the *Health Insurance Act 1973* is listed in Schedule 3 of the FOI Act as a secrecy provision. The AAT explained that 38(1) makes the information exempt and 'no further enquiry is required or permissible'.[130]

5.142 Similarly, s 355-25 of Schedule 1 to the *Tax Administration Act 1953*, makes it an offence for a taxation officer to record or disclose 'protected information'. 'Protected information' is information relating to and identifying an entity acquired for a taxation law purpose. The effect of this provision on an FOI request for documents is to make a document containing the protected information of a person or entity, other than the person making the FOI request, an exempt document under s 38.

5.143 It may be that consent by a person or entity to disclosure of information protected by a secrecy provision is not a defence to the offence of disclosure. For example, in *'ADN' and the Australian Taxation Office* the Acting FOI Commissioner found that although a third party had consented to disclosure of their taxation information to the FOI applicant, that information remained protected information because consent is not a defence to the offence of disclosure in the *Taxation Administration Act 1953*.[131]

Documents subject to legal professional privilege (s 42)

5.144 Section 42(1) exempts a document if it is of such a nature that it would be privileged from production in legal proceedings on the ground of legal professional privilege.

5.145 To determine the application of this exemption, the decision maker needs to turn to common law concepts of privilege. The statutory test of client legal privilege under the *Evidence Act 1995* is not applicable and should not be taken into account.[132]

5.146 It is important that each aspect of the privilege, as discussed below, be addressed in the decision maker's statement of reasons.

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129 *Canadian Pacific Tobacco Co Ltd v Stapleton* [1952] HCA 32 [20]; (1952) 86 CLR 1, on the interpretation of 'course of duty' in the context of Commonwealth income tax law.

130 *Walker and Secretary, Department of Health (Freedom of information)* [2015] AATA 606 [32]. Constance DP did not accept Dr Walker's arguments that she must assess the information contained in the proposed document to determine whether it was exempt information.

131 *'ADN' and the Australian Taxation Office (Freedom of information)* [2023] AICmr 44 [66].

132 *Commonwealth of Australia v Dutton* [2000] FCA 1466 [2]; (2000) 102 FCR 168.

Whether a document attracts legal professional privilege

5.147 Legal professional privilege applies to some, but not all, communications between legal advisers and clients. It may also apply to some, but not all, communications between the client and their legal adviser and a third party, to enable the client to obtain legal advice or for use in litigation, either actual or within the reasonable contemplation of the client.[133]

5.148 The underlying policy basis for legal professional privilege is to promote full and frank disclosure between a lawyer and client to the benefit of the effective administration of justice. It is the purpose of the communication that is determinative.[134] Legal professional privilege protects documents which would reveal communications between a client and their lawyer made for the dominant purpose of giving or obtaining legal advice.[135] The information in a document is relevant and may assist in determining the purpose of the communication, but the information in itself is not determinative.

5.149 At common law, determining whether a communication is privileged requires a consideration of:

- whether there is a legal adviser-client relationship
- whether the communication was for the dominant purpose of giving or receiving legal advice, or for use in connection with actual or anticipated litigation
- whether the advice given is independent
- whether the advice given is confidential.[136]

Legal adviser-client relationship

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

5.151 The arrangement between the parties as to who should pay for the work done by the legal adviser is seldom material to the question of who the work is done

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[133] *Nickmar Pty Ltd v Preservatrice Skandia Insurance Ltd* (1985) 3 NSWLR 44; *Ritz Hotel v Charles of the Ritz (No 22)* (1988) 14 NSWLR 132; *Pratt Holdings Pty Ltd v Commissioner of Taxation* [2004] FCAFC 122; *Tabcorp Holdings Ltd v State of Victoria* [2013] VSC 302 [99]-[118].

[134] *Comcare v Foster* [2006] FCA 6 [22]–[40]; (2006) 42 AAR 434.

[135] *Esso Australia Resources Ltd v Federal Commissioner of Taxation* [1999] HCA 67 [80]; (1999) 201 CLR 49 at 73; *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* [2002] HCA 49 [9]–[10].

[136] *Grant v Downs* [1976] HCA 63; (1976) 135 CLR 674; *Waterford v Commonwealth of Australia* [1987] HCA 25; (1987) 163 CLR 54; and *Esso Australia Resources Ltd v Federal Commissioner of Taxation* [1999] HCA 67; (1999) 201 CLR 49. For examples of the application of these considerations see *'VO' and Northern Australia Infrastructure Facility (Freedom of information)* [2020] AICmr 47 [24]–[39]; *'VH' and Australian Taxation Office (Freedom of information)* [2020] AICmr 43 [22]–[36]; *and Clifford Chance Lawyers and National Competition Council (Freedom of information)* [2020] AICmr 26 [49]–[76].

for and to who the professional duties are owed.[137] In *Carey v Korda*[138] the Court held that the legal advice at issue was sought by receivers in relation to their power to care for, preserve and realise the assets of companies during receivership, not by the companies. As a result, only the receivers could engage lawyers for the purpose of obtaining legal advice on their liability when undertaking these tasks. Further, although costs agreements were directed to the companies in receivership, this was only for the purpose of paying invoices and each costs agreement clearly contemplated advice being given to the receivers in relation to the conduct of the receivership.

5.152 A similar issue arose in *Sean Butler and Australian Small Business and Family Enterprise Ombudsman*.[139] In that decision, the applicant, a director of companies and trusts for which receivers and managers had been appointed, argued that the legal advice was prepared for receivers acting in their capacity as receivers and managers of a group of companies that paid for the legal advice. The Assistant Commissioner, Freedom of Information, examined the documents and was satisfied that an independent legal adviser-client relationship existed between the lawyers and the receivers and managers and that the lawyers did not act for the companies in receivership or for their directors.[140]

Legal adviser-client relationship, independence and in-house lawyers

5.153 When legal advice is received from an independent external legal adviser, establishing the existence of the requisite legal adviser-client relationship is usually straightforward. A typical example in a government context is advice received by an agency from a law firm that is on an authorised list of panel firms (including the Australian Government Solicitor).

5.154 A legal adviser-client relationship can exist but may not be as readily established when advice is received from a lawyer who works within the agency, whether as an ongoing staff member of the agency or as a lawyer contracted to work within the agency to provide advice. Whether a true legal adviser-client relationship exists will be a question of fact to be determined based on the circumstances in which the advice was given. That is, there may be a privileged relationship applying to some but not all advice. The following factors are relevant to establishing whether a legal adviser-client relationship exists:

- the legal adviser must be acting in their capacity as a professional legal adviser
- the dominant purpose test must be satisfied
- the giving of the advice must be attended by the necessary degree of

137 *Pegrum v Fatharly* (1996) 14 WAR 92.
138 [2012] WASCA 228 [75] and [76].
139 *Sean Butler and Australian Small Business and Family Enterprise Ombudsman (Freedom of information)* [2023] AICmr 71.
140 *Sean Butler and Australian Small Business and Family Enterprise Ombudsman (Freedom of information)* [2023] AICmr 71 [24].

independence[141]

- the advice must be confidential
- the fact that the advice arose out of a statutory duty does not preclude the privilege from applying[142]
- whether the lawyer is subject to professional standards can be relevant.[143]

5.155 Having legal qualifications does not suffice in itself to establish that a privileged adviser-client relationship exists. The authorities to date prefer the view that whether an adviser holds a practising certificate is a relevant, but not decisive, factor.[144] Alternatively, a right to practise may be conferred by an Act (for example, ss 55B and 55E of the *Judiciary Act 1903*).

5.156 In the AAT case of *Ransley and Commissioner of Taxation (Freedom of information)* [2015] AATA 728, Tamberlin DP summarised the principles set out above at [5.154] and discussed that 'communications and information between an agency and its qualified legal advisers for the purpose of giving or receiving advice will be privileged whether the legal advisers are salaried officers [or not], provided they are consulted in a professional capacity in relation to a professional matter and the communications arise from the relationship of lawyer-client. There is no requirement that an in-house lawyer hold a practicing certificate provided the employee is acting independently in giving the advice.'[145]

5.157 An in-house lawyer has the necessary degree of independence as long as their personal loyalties, duties or interests do not influence the professional legal advice they give.[146]

5.158 In-house lawyers may perform a range of functions within an agency. The mere fact that advice is given by a lawyer is not sufficient to establish a legal adviser-client relationship.[147] In *'ACV' and Tertiary Education Quality and Standards Agency (Freedom of information)* [2023] AICmr 3, the Freedom of Information Commissioner considered whether an in-house legal adviser gave advice in their professional capacity as a legal adviser, or in some other capacity, in circumstances in which the

141 Generally, legal professional privilege may be claimed in legal proceedings in relation to advice sought from and given by an in-house lawyer, where the professional relationship between the lawyer and the agency seeking advice has the necessary quality of independence, see *Taggart and Civil Aviation Safety Authority (Freedom of information)* [2016] AATA 327 [32]. For a discussion of in-house lawyers in government agencies, see also *Bell and Secretary, Department of Health (Freedom of Information)* [2020] AATA 1436 [47]–[70].

142 *Waterford v Commonwealth of Australia* [1987] HCA 25 [9]; (1987) 163 CLR 54.

143 *Re Proudfoot and Human Rights and Equal Opportunity Commission* [1992] AATA 317 [14] which restates the principles of *Waterford v Commonwealth of Australia* [1987] HCA 25; (1987) 163 CLR 54.

144 *Aquila Coal Pty Ltd v Bowen Central Coal Pty Ltd* [2013] QSC 82 [23]. See also *Re McKinnon and Department of Foreign Affairs* [2004] AATA 1365 [51], referring to *Australian Hospital Care Pty Ltd v Duggan* (No. 2) [1999] VSC 131. Note a contrary ruling by Crispin J in *Vance v McCormack and the Commonwealth* [2004] ACTSC 78, reversed on appeal but on a different point.

145 *Ransley and Commissioner of Taxation (Freedom of information)* [2015] AATA 728 [13].

146 *Aquila Coal Pty Ltd v Bowen Central Coal Pty Ltd* [2013] QSC 82 [10], referring to *Telstra Corporation Ltd v Minister for Communications, Information Technology and the Arts (No 2)* [2007] FCA 1445 [35].

147 *'ACV' and Tertiary Education Quality and Standards Agency (Freedom of information)* [2023] AICmr 3 [66].

agency's Legal Group was responsible for the management of all complaints about the agency. The FOI Commissioner concluded that while some complaints may involve legal issues requiring legal advice (for example, complaints about the exercise of a statutory power or the performance of a statutory duty or function, or complaints involving potential legal liability), not all complaints about an agency will raise legal issues and the role of the Legal Group in such circumstances will generally be of an administrative nature.[148]

5.159 For the purpose of the privilege, 'advice' extends to professional advice as to what a party should prudently or sensibly do in the relevant legal context.[149] However, it does not apply to internal communication that is a routine part of an agency's administrative functions. The communication must relate to activities generally regarded as falling within a lawyer's professional functions.

For the dominant purpose of giving or receiving legal advice, or use in actual or anticipated litigation

5.160 Whether legal professional privilege attaches to a document depends on the purpose for which the communication in the document was created. The High Court has confirmed that the common law requires a dominant purpose test rather than a sole purpose test.[150] The communication may have been brought into existence for more than one purpose but will be privileged if the main purpose for its creation was for giving or receiving legal advice or for use in actual or anticipated litigation.

Legal advice privilege

5.161 The AAT has observed that 'a broad approach is to be taken as to what is included in the scope of the privilege' and that 'the obligation of the lawyer to advise, once retained, is "pervasive" and that it would be rarely that one could, in any particular case with a degree of confidence, say that communication between client and lawyer, where there is a retainer requiring legal advice and the directing of the legal advice, was not connected with the provision or requesting of legal advice.'[151]

5.162 The concept of legal advice, while broad, does not extend to advice that is purely commercial or of a public relations character.[152]

Litigation privilege

5.163 Litigation is 'anticipated' where there is 'a real prospect of litigation, as distinct from a mere possibility, but it does not have to be more likely than not'.[153]

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[148] *'ACV' and Tertiary Education Quality and Standards Agency (Freedom of information)* [2023] AICmr 3 [65]–[68].

[149] *AWB Limited v Honourable Terence Rhoderic Hudson Cole (No 5)* [2006] FCA 1237 [7].

[150] *Esso Australia Resources Ltd v Commissioner for Taxation* [1999] HCA 67; (1999) 201 CLR 49.

[151] As per Tamberlin DP QC in *Ransley and Commissioner of Taxation (Freedom of information)* [2015] AATA 728 [14].

[152] *AWB Limited v Honourable Terence Rhoderic Hudson Cole (No 5)* [2006] FCA 1234 [7].

[153] *Mitsubishi Electric Australia Pty Ltd v Victorian WorkCover Authority* [2002] VSCA 59 [17]–[20]; *Visy Industries Holdings Pty Limited v Australian Competition and Consumer Commission* [2007] FCAFC 147 [30]–[33];(2007) 161 FCR 122 [30].

5.164 The question of whether litigation privilege extends beyond the Courts to include Tribunals is unsettled.[154]

The scope of a claim of legal professional privilege over a document

5.165 In light of AAT authority, agencies and ministers should consider whether the entire contents of a document meets the dominant purpose test. If the entire contents of the document does not meet the test, agencies and ministers should, if reasonably practicable, consider giving the FOI +applicant access to material that is not of itself privileged (while remaining mindful of the consequence of unintended waiver of privilege (see below at [5.168] – [5.176]).[155] In considering whether it is reasonably practicable to prepare an edited copy of a privileged document under s 22 of the FOI Act so the edited document does not disclose exempt material, the decision maker should consider whether editing will leave only a skeleton of the former document that would convey little content or substance. In which case, the purpose of the FOI Act may not be served by disclosing an edited copy and the document should be exempt in full (see Part 3).

Confidentiality

5.166 Legal professional privilege applies to confidential communications — that is, communications known only to the client or to a select class of persons with a common interest in the matter.

5.167 Legal professional privilege can extend to documents containing information that is on the public record if disclosure would reveal confidential communications made for the dominant purpose of giving or receiving legal advice on the various issues covered by those documents.[156]

Waiver of privilege

5.168 Section 42(2) confirms that a document is not exempt if the person entitled to claim legal professional privilege waives the privilege.

5.169 Legal professional privilege is the client's privilege to assert or to waive, and the legal adviser cannot waive it except with the authority of the client.[157] In the context of an FOI request, the agency receiving the advice will usually be the 'client'

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[154] In *Ingot Capital Investments Pty Ltd v Macquarie Equity Capital Markets Ltd* [2006] NSWSC 530 [55], Bergin J held that litigation privilege did not apply in the AAT because AAT proceedings are not adversarial. In *'GF' and Department of the Treasury* [2015] AICmr 47 [19], the Privacy Commissioner did not accept that proceedings in the Superannuation Complaints Tribunal could attract litigation privilege. However, the following cases have held that the legal advice privilege is available in the AAT: *Waterford v Commonwealth* [1987] HCA 25; (1987) 163 CLR 54; *Farnaby and Military Rehabilitation and Compensation Commission* [2007] AATA 1792 [29], [31]; (2007) 97 ALD 788; *Re VCA and Australian Prudential Regulation Authority* [2008] AATA 580 [205].

[155] In *Taggart and Civil Aviation Safety Authority (Freedom of information)* [2016] AATA 327, Forgie DP decided that additional material that was not the substantive content of privileged emails, such as the email subject line, address block, salutation, classification, closing words and signature block was not privileged material and therefore not exempt under s 42.

[156] *Comcare v Foster* [2006] FCA 6 [29]; (2006) 150 FCR 301.

[157] *Re Haneef and the Australian Federal Police* [2009] AATA 51 [76]; (2009) 49 AAR 395, citing *Mann v Carnell* [1999] HCA 66; (1999) 201 CLR 1.

who needs to decide whether to assert or waive legal professional privilege. If the privilege is asserted, the agency will need to provide evidence to establish that the document is exempt from disclosure under s 42. This will be so even if the relevant FOI request is made to a different agency.

5.170 Waiver of privilege may be express or implied. For example, privilege may be waived in circumstances where:

- the communication in question has been widely distributed,
- the content of the legal advice in question has been disclosed or
- a person has publicly announced their reliance on the legal advice in question in a manner that discloses the substance of the legal advice.

5.171 The High Court has held that waiver of legal professional privilege will occur where the earlier disclosure is inconsistent with the confidentiality protected by the privilege.[158] This inconsistency test has been affirmed by the High Court as the appropriate test for determining whether privilege has been waived.[159] It is immaterial that the client did not intend to waive privilege.[160]

5.172 Not all disclosures to a wider group necessarily imply a waiver. If the document has been disclosed to a limited audience with a mutual interest in the contents of the document, it may not be inconsistent to continue to claim that the document is confidential and privileged. For example, the Federal Court (Collier J) found that the provision of an in-house legal advice to the Australian Information Commissioner to support a claim that a document is exempt from disclosure did not waive privilege with respect to that legal advice.[161] This was because the disclosure was to a statutory officer-holder in the context of an IC review and the document was disclosed on the express basis that it was to remain confidential and not be disclosed to the applicant. Further, the advice was conveyed in an email marked 'Sensitive: Legal'.

5.173 In *Joshua Badge and Department of Health and Aged Care (Freedom of information)*[162] the Acting Freedom of Information Commissioner found that legal professional privilege continued to apply in circumstances in which an agency sought advice from the Office of Parliamentary Counsel (OPC) in relation to the preparation of draft legislation. The Acting FOI Commissioner concluded that the agency sought legal advice from the OPC in its capacity as a professional adviser on legislative drafting and that a legal advisor-client relationship existed between the agency and the OPC at all times. Privilege was considered to extend to the agency's communications with third parties for the same dominant purpose.

5.174 Modern organisations often work in teams and several people may need to know about privileged communications, both in the requesting client organisation

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158 *Mann v Carnell* [1999] HCA 66; (1999) 201 CLR 1.

159 *Osland v Secretary to the Department of Justice* [2008] HCA 37; (2008) 234 CLR 275; 249 ALR 1; 82 ALJR 1288.

160 See *Michael Leichsenring and Department of Defence (Freedom of information)* [2019] AICmr 51 [30]–[31].

161 *Alpert v Secretary, Department of Defence* [2022] FCA 54.

162 [2023] AICmr 46 (13 June 2023) [70]–[75].

and in the firm of legal advisers. Similarly, a limited disclosure of the existence and effect of legal advice could be consistent with maintaining confidentiality in the actual terms of the advice. The Legal Services Directions 2017 issued by the Attorney-General require legal advices obtained by Australian Government agencies to be shared in particular circumstances, and complying with this requirement does not waive privilege.[163]

5.175 Whether a disclosure is inconsistent with maintaining confidentiality will depend on the particular context and circumstances of the matter, and will involve matters of fact and degree.[164] Relevant considerations include:

- the purpose of the disclosure
- whether the substance or effect of legal advice has been used for forensic or commercial purposes[165] or to disadvantage another person[166]
- the legal and practical consequences of a limited rather than complete disclosure[167]
- whether the communication merely refers to a person having taken and considered legal advice[168] or whether it discloses the gist or conclusion of legal advice[169]
- the nature of the matter in which the advice was sought.[170]

5.176 Agencies should take special care in dealing with documents for which they may wish to claim legal professional privilege to avoid unintentionally waiving that privilege. For example, disclosing privileged information more widely than necessary within an agency may be inconsistent with the maintenance of privilege.

The 'real harm' test

5.177 A 'real harm' criterion is not an element of the common law doctrine of legal professional privilege. Likewise, the test is not a feature of the FOI Act. Historically, government, through convention, has referenced the test as a relevant

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[163] *Judiciary Act 1903* s 55ZH(4). The Legal Services Directions are available at www.legislation.gov.au.

[164] *Osland v Secretary to the Department of Justice* [2008] HCA 37; *Doney and Department of Finance and Deregulation* [2012] AICmr 25 [23]–[27]; *Alpert v Secretary, Department of Defence* [2022] FCA 54 [82]–[91].

[165] *Bennett v Chief Executive Officer, Australian Customs Service* [2004] FCAFC 237; [2004] 140 FCR 101 per Gyles J (at [68]), Tamberlin J agreeing.

[166] *College of Law Limited v Australian National University* [2013] FCA 492 [24].

[167] *Secretary, Department of Justice v Osland* [2007] VSCA 96; (2007) 26 VAR 425 [45]–[49].

[168] *Ampolex Limited v Perpetual Trustee Co (Canberra) Ltd* [1996] HCA 15 per Kirby J [34].

[169] *Bennett v Chief Executive Officer, Australian Customs Service* [2004] FCAFC 237 per Gyles J (at [65]); *Goldberg v Ng* [1995] HCA 39; *Michael Leichsenring and Department of Defence (Freedom of information)* [2019] AICmr 51 [37] applying *Bennett v Chief Executive Officer of the Australian Customs Service* [2004] FCAFC 237 per Tamberlin J at [14]. Disclosure of the gist, conclusion, substance or effect of a privileged communication does not necessarily effect a waiver of legal professional privilege in respect of the advice as a whole. Whether it does or not in a particular case depends on whether, in the circumstances of that case, the requisite inconsistency exists between the disclosure on the one hand and the maintenance of confidentiality on the other.

[170] *College of Law Limited v Australian National University* [2013] FCA 492 [24].

discretionary factor in determining FOI requests.[171]

5.178 An agency's or minister's decision on the 'real harm' criterion is not an issue that can be addressed in an IC review for the reason that the Information Commissioner cannot decide that access is to be given to a document, so far as it contains exempt matter.[172]

5.179 In the IC review decision of *'ACV' and Tertiary Education Quality and Standards Agency (Freedom of information)* [2023] AICmr 3 [89]–[90] ('ACV'), the FOI Commissioner observed that agencies are not legally bound to refuse access to documents if they are exempt under the FOI Act (see s 3A). In *ACV* the contents of the relevant document were said to be 'anodyne' and disclose little more than what was disclosed to the applicant in the final version of correspondence sent to them. In such circumstances, the FOI Commissioner advised the agency to consider providing access to the document.

Copies or summary records

5.180 Records made by agency officers summarising communications which are themselves privileged also attract privilege. Privilege may also attach to a copy of an unprivileged document if the copy was made for the dominant purpose of obtaining legal advice or for use in legal proceedings.[173]

Exception for operational information

5.181 A document is not exempt under s 42(1) by reason only of the inclusion in that document of operational information of an agency (s 42(3)).

5.182 Agencies must publish their operational information under the Information Publication Scheme established by Part II, s 8 of the FOI Act. 'Operational information' is information held by an agency to assist the agency to perform or exercise its functions or powers in making decisions or recommendations affecting members of the public or any particular person or entity or class of persons or entities (s 8A). A document is not operational information if it is legal advice prepared for a specific case and not for wider or general use in the agency.[174] For further information about the definition of 'operational information' see Part 13 of these Guidelines.

Documents containing material obtained in confidence (s 45)

5.183 Section 45(1) provides that a document is an exempt document if its disclosure would found an action by a person (other than an agency or the Commonwealth) for

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[171] This view is in line with the advisory notice issued by the then Secretary of the Attorney-General's Department dated 2 March 1986 (the 'Brazil Direction'), following a Cabinet decision in June 1985. The phrase 'real harm' distinguishes between substantial prejudice to the agency's affairs and mere irritation, embarrassment or inconvenience to the agency.

[172] Section 55L(2) of the FOI Act.

[173] *Re Haneef and Australian Federal Police and Commonwealth Director of Public Prosecutions* [2010] AATA 514 [77].

[174] See *'AL' and Department of Defence* [2013] AICmr 72 [33]–[36] and *Hamden and Department of Human Services* [2013] AICmr 41 [19]–[21].

breach of confidence. In other words, the exemption is available where the person who provided the confidential information would be able to bring an action under the general law for breach of confidence to prevent disclosure, or to seek compensation for loss or damage arising from disclosure.[175]

5.184 The exemption in s 45(1) does not apply to a document that is conditionally exempt under s 47C(1) (deliberative matter), or would be conditionally exempt but for s 47C(2) or 47C(3), and that is prepared by a minister, ministerial staff or agency officers unless the obligation of confidence is owed to persons other than the minister, ministerial staff or agency officers. For more information about the s 47C conditional exemption see Part 6 of these Guidelines.

5.185 The exemption operates as a separate and independent protection for confidential relationships which may, but need not necessarily, also fall within the scope of other specific exemptions, for example, ss 47F (personal privacy) and 47G (business documents).[176]

Breach of confidence

5.186 A breach of confidence is the failure of a recipient to keep confidential, information which has been communicated in circumstances giving rise to an obligation of confidence.[177] The FOI Act expressly preserves confidentiality where that confidentiality would be actionable at common law or in equity.

5.187 The exemption in s 45 is restricted in scope to the disclosure of information that would found an action for breach of confidence. It does not apply to confidential information per se, or to the disclosure of confidential information that would found another type of action such as an action based on the tort of negligence or a breach of statutory duty.[178]

5.188 While the existence of either a statutory or contractual obligation of confidence may support the existence of an equitable obligation of confidence for the purpose of s 45, it is not of itself determinative. All 5 criteria (see [5.189] below) must also apply to the information. The existence of either a statutory or a contractual obligation of confidentiality should be considered in the context of

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175 See the Explanatory Memorandum, *Freedom of Information Bill 1992*; and *Re Kamminga and Australian National University* [1992] AATA 84; [1992] AATA 84 [22]–[23].

176 See the Explanatory Memorandum, *Freedom of Information Bill 1981.*

177 *Coco v AN Clark (Engineers) Ltd* [1969] 86 RPC 41 (on the test for breach of confidence).

178 *Francis and Australian Sports Anti-Doping Authority (Freedom of information)* [2019] AATA 12 [101]. See also, *Re Petroulias and Others and Commissioner of Taxation* [2006] AATA 333. *Johns v Australian Securities Commission* [1993] HCA 56 [14]; (1993) 178 CLR 408 [424] discusses the obligation of confidence in circumstances in which an agency obtains information in the exercise of compulsory powers. In such cases, the agency will generally be under a statutory duty to protect the confidentiality of that information. This is because a law that confers a power to obtain information for a purpose defines, expressly or impliedly, the purpose for which the information, once obtained, can be used or disclosed. The law imposes a duty not to disclose the information except for that purpose. The person obtaining the information in exercise of the statutory power must therefore treat the information obtained as confidential whether or not the information is otherwise of a confidential nature.

those 5 criteria.[179]

5.189 To found an action for breach of confidence (which means s 45 may be applied by an agency or minister), the following 5 criteria must be satisfied in relation to the information:

- it must be specifically identified
- it must have the necessary quality of confidentiality
- it must have been communicated and received on the basis of a mutual understanding of confidence[180]
- it must have been disclosed, or threatened to be disclosed, without authority
- unauthorised disclosure of the information has or will cause detriment.[181]

5.190 A breach of confidence will not arise, and the exemption will not apply, if the information to be disclosed is an 'iniquity' in the sense of a crime, civil wrong, or serious misdeed of public importance which ought to be disclosed to a third party with a real and direct interest in redressing such crime, wrong, or misdeed.[182]

Specifically identified

5.191 The alleged confidential information must be identified specifically. It is not sufficient for the information to be identified in global terms.[183] For example, where a document contains information that is claimed to be confidential, that information must be specifically identified either in terms of the subject matter or the type of information, or the relevant sentences or paragraphs in which that information appears.[184] Alternatively, if all of the document is claimed to be confidential, identification will be in terms of clearly identifying the relevant document.

Quality of confidentiality

5.192 For the information to have the quality of confidentiality it must be secret or only known to a limited group. Information that is common knowledge or in the public domain will not have the quality of confidentiality.[185] For example, information that is provided to an agency and copied to other organisations on a non-confidential or open basis may not

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179 *Patrick; Secretary, Department of Defence and* [2021] AATA 4627 [43]; see also *Francis and Australian Sports Anti-Doping Authority (Freedom of information)* [2019] AATA 12.

180 *'FT' and Civil Aviation Safety Authority* [2015] AICmr 37 [15]–[18].

181 *Corrs Pavey Whiting & Byrne v Collector of Customs (Vic)* [1987] FCA 266 [14]; (1987) 14 FCR 434; *Coco v AN Clark (Engineers) Ltd* [1969] 86 RPC 41; *Commonwealth v John Fairfax and Sons Ltd* [1980] HCA 44; (1980) 147 CLR 39; 32 ALR 485 (on the test for confidence in equity). For examples of the application of these criteria see *'VO' and Northern Australia Infrastructure Facility (Freedom of information)* [2020] AICmr 47 [40]–[72]; *'RG' and Department of the Prime Minister and Cabinet (Freedom of information)* [2019] AICmr 69 [12]–[48]; *Paul Farrell and Department of Home Affairs (No 4) (Freedom of information)* [2019] AICmr 40 [22]–[35]; *Paul Farrell and Department of Home Affairs (No.2) (Freedom of information)* [2019] AICmr 37 [9]–[32] and *Secretary Department of Veterans' Affairs and Burgess (Freedom of Information)* [2018] AATA 2897 [11]–[12].

182 *Corrs Pavey Whiting & Byrne v Collector of Customs (Vic)* [1987] FCA 266 [41]–[57]; (1987) 14 FCR 434.

183 *Corrs Pavey Whiting & Byrne v Collector of Customs (Vic)* [1987] FCA 266; (1987) 14 FCR 434.

184 See for example *'AFK' and Tertiary Education Quality and Standards Agency (Freedom of information)* [2023] AICmr 115 [29]–[30].

185 *Corrs Pavey Whiting & Byrne v Collector of Customs (Vic)* [1987] FCA 266 [14]; (1987) 14 FCR 434.

be considered confidential.

5.193 The quality of confidentiality may be lost over time if confidentiality is waived or the information enters the public domain. This can occur if the person whose confidential information it is discloses it. However, even if information has entered the public domain it may not have lost its confidential character unless it has become public knowledge such that, as a matter of common sense, the confidential character of the information has disappeared.[186] The obligation of confidence may also only relate to a limited time period.

Mutual understanding of confidence

5.194 The information must have been communicated and received on the basis of a mutual understanding of confidence. In other words, the agency or minister needs to have understood and accepted an obligation of confidence.[187] The mutual understanding must have existed at the time of the communication. For example, when a person gives information to an agency or a minister they may ask that it be kept confidential and if the agency or minister accepts the information on that basis the requirement for a mutual understanding of confidence will be met. However, if the agency or minister declines to accept the information on that basis (and communicates this to the person) the understanding of confidence will not be mutual.

5.195 A mutual understanding of confidence can exist even if a person is legally obliged to provide the information to the agency.[188] On the other hand, if an agency or minister has a statutory obligation to publish or release specified information, that obligation will outweigh any undertaking by the agency or minister to treat the information confidentially, and therefore is inconsistent with any mutual understanding of confidence.[189]

5.196 Whether the agency or minister accepted an obligation of confidence and is maintaining that obligation may be clear from an agency's or minister's actions.[190] For example, an agency or minister may mark a document as confidential, keep it separate from documents that are not confidential and ensure that the material is not disclosed to third parties without consent.

5.197 An obligation of confidentiality may be express or implied.[191] An express mutual understanding may occur where the person providing the information asks the agency or minister to keep the information confidential and the agency or minister assures them that they will. Agency practices may illustrate how an implied mutual understanding may arise. For example, if an agency has policies and procedures in place for dealing with commercial-in-confidence information and those policies and procedures are known by the business community, it may be implied that when a business provides such

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186 *Francis and Australian Sports Anti-Doping Authority (Freedom of information)* [2019] AATA 12 [124].

187 *Re Harts Pty Ltd and Tax Agents' Board (Qld)* [1994] AATA 349 [16]–[18].

188 *National Australia Bank Ltd and Australian Competition and Consumer Commission* [2013] AICmr 84 [23].

189 *Maritime Union of Australia and Department of Infrastructure and Regional Development* [2014] AICmr 35 [28]-[40].

190 *Corrs Pavey Whiting & Byrne v Collector of Customs (Vic)* [1987] FCA 266 [11]; (1987) 14 FCR 434.

191 See *Re Bunting and Minister Immigration and Multicultural and Indigenous Affairs* [2006] AATA 145.

information to that agency it will be on the basis of confidentiality.[192]

Unauthorised disclosure or threatened disclosure

5.198 The information must have been disclosed or been threatened to be disclosed without authority. The scope of the confidential relationship will often need to be considered to ascertain whether disclosure is authorised.

5.199 For example, the agency or minister may have told the person providing the information about the people to whom the information will usually be disclosed. The law may require disclosure to third parties in the performance of an agency's functions, which will amount to an authorised use or disclosure. Similarly, a person providing confidential information to an agency or minister may specifically permit the agency or minister to divulge the information to a limited group of people.

5.200 Compliance with a statutory requirement for disclosure of confidential information will not amount to an unauthorised use and will not breach confidentiality.[193]

Detriment

5.201 The fifth element for a breach of confidence action is that unauthorised disclosure of the information has, or will, cause detriment to the person who provided the confidential information.[194] Detriment takes many forms, such as threat to health or safety, financial loss, embarrassment, exposure to ridicule or public criticism. The element of detriment applies only to private persons and entities, not government.

5.202 The AAT has applied this element in numerous cases, but whether it must be established is uncertain.[195] The uncertainty arises because of an argument that an equitable breach of confidence operates upon the conscience (to respect the confidence) and not on the basis of damage caused.[196] Despite the uncertainty, it would be prudent to assume that establishing detriment is necessary.[197]

Parliamentary Budget Office documents (s 45A)

5.203 While both the Parliamentary Budget Officer and the Parliamentary Budget Office (PBO) are exempt agencies under the FOI Act (s 7(1) and Division 1 of Part I of Schedule 2, and s 68A of the *Parliamentary Service Act 1999*, documents related to the PBO may be held by other agencies. The PBO exemption in s 45A is designed to

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192 See *Re Bunting and Minister Immigration and Multicultural and Indigenous Affairs* [2006] AATA 145; *Re Minter Ellison and Australian Customs Service* [1989] AATA 66.

193 *Re Drabsch and Collector of Customs and Anor* [1990] AATA 265.

194 *Corrs Pavey Whiting & Byrne v Collector of Customs (Vic)* [1987] FCA 266; (1987) 14 FCR 434, referring to *Commonwealth v John Fairfax and Sons Ltd* [1980] HCA 44; (1980) 147 CLR 39; 32 ALR 485.

195 *Burgess; Secretary Department of Veterans' Affairs and (Freedom of Information)* [2018] AATA 2897; *Re Callejo and Department of Immigration and Citizenship* [2010] AATA 244; (2010) 51 AAR 308; *Petroulias and Others and Commissioner of Taxation* [2006] AATA 333; (2006) 62 ATR 1175.

196 *Re Callejo and Department of Immigration and Citizenship* [2010] AATA 244 discussing *Smith Kline & French Laboratories (Aust) Limited v Department of Community Services & Health* [1989] FCA 384; (1989) 89 ALR 366.

197 *Re B and Brisbane North Regional Health Authority* [1994] QICmr 1 [109], [111]; (1994) 1 QAR 279.

protect the confidentiality of documents in the context of FOI requests made by Senators and Members of the House of Representatives in relation to the budget, or for policy costings outside of the caretaker period of a general election.

Documents included in exemption

5.204 The PBO exemption applies to a document that:

(a) originates from the Parliamentary Budget Officer or the PBO and the document was prepared in response to, or otherwise relates to, a confidential request (s 45A(1)(a))

(b) was brought into existence for the dominant purpose of providing information to the Parliamentary Budget Officer or the PBO in relation to a confidential request (s 45A(1)(b))

(c) was provided to the Parliamentary Budget Officer or the PBO in response to a request for more information in relation to a confidential request (s 45A(1)(c))

(d) is a draft of any of the above type of documents (s 45A(1)(d)).

5.205 The exemption also applies to a full or partial copy of a document of a category listed at [5.204] above, as well as a document that contains an extract from a document of such a category (s 45A(2)). Like the exemption applying to Cabinet documents, documents exempt under s 45A(1) are not subject to s 22. That is, there is no requirement to provide access to an edited copy (see [5.71]).

5.206 A confidential request is defined in s 45A(8) to be a request made by a Senator or Member under s 64E(1)(a) or (c) of the *Parliamentary Service Act 1999* (PS Act) that includes a direction to treat the request or any other information relating to the request as confidential. This includes confidential requests to prepare a costing of a policy or a proposed policy under s 64H of the PS Act and confidential requests for information relating to the budget under s 64M of the PS Act.

5.207 Any document containing information which, if disclosed, would reveal that a confidential request has been made is exempt unless the confidential request has been disclosed by the Senator or Member who made the request (s 45A(3)).

Documents excluded from the exemption

5.208 There are 4 exceptions or qualifications to the general PBO document exemption rules:

- a document is not exempt merely because it is attached to a document that would be exempt under s 45A (s 45A(4))
- information that has been made publicly available by the Parliamentary Budget Officer in accordance with the PS Act is not exempt (s 45A(5))
- a document is not exempt if the information has been made publicly available by the Senator or Member who made the confidential request to which the document relates (s 45A(6))
- information in PBO documents which is purely factual material is not exempt unless its disclosure would reveal the existence of a confidential request and

the existence of the confidential request has not been disclosed by the Senator or Member (s 45A(7)).

5.209 The exemption applies to documents prepared by agencies for the 'dominant purpose' of providing information to the PBO relating to a confidential request. It does not apply to documents prepared or held by those agencies in the ordinary course of their business or activities. Agencies are reminded of their obligations under the *Australian Government Protocols Governing the Engagement between Commonwealth Bodies and the Parliamentary Budget Officer*[198] and the *Memorandum of Understanding (MOU) between the Parliamentary Budget Officer and the Heads of Commonwealth Bodies in relation to the Provision of Information and Documents*.[199]

Withholding information about the existence of documents

5.210 Section 25 permits an agency to give to an FOI applicant a notice that neither confirms nor denies the existence of a document if information as to its existence would, if it were included in a document, make the document exempt under s 45A (see [5.56] – [5.57] above and Part 3 of these Guidelines).

Documents disclosure of which would be contempt of the Parliament or contempt of court (s 46)

5.211 Section 46 provides that a document is exempt if public disclosure of the document would, apart from the FOI Act and any immunity of the Crown:

(a) be in contempt of court

(b) be contrary to an order or direction by a Royal Commission or by a tribunal or other person or body having power to take evidence on oath

(c) infringe the privileges of the Parliament of the Commonwealth or a State or of a House of such a Parliament or of the Legislative Assembly of the Northern Territory.

5.212 Both the Parliament and courts have powers to regulate their own proceedings which have traditionally been regarded as a necessary incident to their functions as organs of the state. The protection of the privileges of Parliament and the law of contempt of court are designed to allow these institutions to regulate their proceedings and to operate effectively without interference or obstruction. Over the years, Royal Commissions and tribunals have assumed similar but more limited powers.

5.213 This provision takes its scope from the principles of privilege and the general law of contempt of court. While these powers have wide application, FOI decision makers will usually encounter them in connection with the disclosure of documents that may have been prepared for or are relevant to parliamentary or court proceedings.

[198] Available at www.aph.gov.au.
[199] Available at www.aph.gov.au.

Apart from this Act

5.214 The effect of the words 'apart from this Act and any immunity of the Crown' is to preserve the principles of parliamentary privilege and the law of contempt of court within the operation of the FOI Act. This is achieved by ensuring that the grounds for exemption (that is, if disclosure of a document would have any of the effects in ss 46(a)-(c)), may be met notwithstanding that there may be protection from certain actions under the FOI Act (see ss 90–92), or under the protections afforded by the common law to the immunities of the Crown.

Contempt of court

5.215 A contempt of court is an action which interferes with the due administration of justice. It includes, but is not limited to, a deliberate breach of a court order. Other actions that have been found to be contempt of court include an attempt to apply improper pressure on a party to court proceedings[200] or prejudging the results of proceedings, failing to produce documents as ordered by a court or destroying documents that are likely to be required for proceedings.

5.216 Documents protected under s 46(a) include documents that are protected by the courts as part of their power to regulate their own proceedings. For example, a court may prohibit or limit publication of the names of parties or witnesses in litigation, or statements and evidence presented to the court. Because public disclosure of such documents would be a contempt of court, the documents will be exempt.

Contrary to an order or direction

5.217 Documents protected by s 46(b) are documents subject to an order prohibiting their publication made by a Royal Commission, tribunal or other body having power to take evidence on oath.[201] Royal Commissions are established for a fixed time period. However confidentiality orders continue in effect past this period.[202]

Infringe the privileges of Parliament

5.218 The term 'parliamentary privilege' refers to the privileges or immunities of the Houses of the Parliament and the powers of the Houses to protect the integrity of their processes.[203]

5.219 Section 49 of the Australian Constitution gives the Australian Parliament the power to declare the 'powers, privileges and immunities of the Senate and of the House of Representatives, and of the members and the committees of each House', and provides for the powers, privileges and immunities of the United Kingdom's

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200 *Attorney-General v Times Newspapers Ltd* [1973] 3 All ER 54 in which an article criticising the small size of an offer of settlement of a negligence claim was found to be in contempt because it improperly applied pressure to induce a litigant to settle.

201 For examples see *'KZ' and Australian Federal Police (Freedom of information)* [2017] AICmr 24 [23]–[28] and *'ABY' and Department of Defence (Freedom of Information)* [2022] AICmr 61 [23]–[29].

202 *Re KJ Aldred and Department of Prime Minister and Cabinet* [1989] AATA 148.

203 See Senate Brief No 11, available at www.aph.gov.au.

House of Commons to apply until a declaration by the Australian Parliament. The *Parliamentary Privileges Act 1987* (the Privileges Act) is such a law, addressing some (but not all) aspects of parliamentary privilege as it applies to the Commonwealth Parliament.

5.220 Section 50 of the Australian Constitution provides that each House of the Parliament may make rules and orders with respect to the mode in which its powers, privileges and immunities may be exercised and upheld. The rules and orders most relevant to FOI decision makers are those that restrict publication or restrict publication without authority. Publication contrary to such rules may amount to an infringement of privilege, providing a basis for claiming the exemption under s 46(c).[204]

5.221 Section 4 of the Privileges Act contains what amounts to a definition of 'contempt of Parliament':

> Conduct (including the use of words) does not constitute an offence against a House unless it amounts, or is intended or likely to amount, to an improper interference with the free exercise by a House or committee of its authority or functions, or with the free performance by a member of the member's duties as a member.

5.222 Accordingly, conduct that improperly interferes with the free exercise by a House of Parliament of its authority or functions, such as the contravention of a rule or order of a House of Parliament, may constitute contempt of the Parliament and infringe the privileges of the Parliament.

5.223 For s 46(c) to apply where there is no rule or order preventing publication, there must be a close connection between a document and some parliamentary purpose to which it relates which could be prejudiced by disclosure. Section 46(c) is concerned with circumstances where information provided to a House or committee of Parliament has been disclosed without authority or the disclosure otherwise improperly interferes with a member of Parliament's free performance of their duties as a member.

5.224 Disclosure of briefings to assist ministers in Parliament — namely, question time briefs or possible parliamentary questions — would not ordinarily be expected to breach a privilege of Parliament. A document of this kind, while prepared for a minister to assist them respond to potential questions raised in Parliament, is nevertheless an executive document. Unless some clear prejudice to parliamentary proceedings can be demonstrated, s 46(c) should not be claimed for briefings of this kind. Depending on the content of the briefings, other exemptions may apply.

5.225 When assessing a document that may be exempt for a limited time — for example, until a parliamentary committee either publishes or authorises publication of documentary evidence — a decision maker should consider deferring access under s 21(1)(b). For further guidance on deferring access see Part 3.

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[204] See *Seven Network (Operations) Limited and Australian Federal Police (Freedom of information)* [2019] AICmr 32.

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

5.226 Section 47 provides that a document is an exempt document if its disclosure would disclose:

(a) trade secrets or

(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.

5.227 The exemption does not apply if the information in the document is:

(a) in respect of the FOI applicant's business or professional affairs

(b) in respect of an undertaking and the FOI applicant is the proprietor of the undertaking or a person acting on behalf of the proprietor

(c) in respect of an organisation and the FOI applicant is the organisation or a person acting on behalf of the organisation (s 47(2)).

5.228 These exceptions to the exemption capture situations in which no adverse impact would result from disclosure of documents because they are being provided to the individual or entity that they concern. But the exemption may apply if the information jointly concerns the trade secrets or valuable commercial information of another individual or organisation, or another person's undertaking and that information is not severable from the document.

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

5.229 The term 'trade secret' is not defined in the FOI Act. The Federal Court 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.[205]

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

- the information is used in a trade or business
- the owner of the information must limit its dissemination or at least not encourage or permit its widespread publication
- if disclosed to a competitor, the information would be liable to cause real or significant harm to the owner of the information.[206]

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

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[205] *Department of Employment, Workplace Relations and Small Business v Staff Development and Training Company* [2001] FCA 1375 [14]; (2001) 114 FCR 301.

[206] *Lansing Linde Ltd v Kerr* (1990) 21 IPR 529 per Staughton LJ [536], cited in *Searle Australia Pty Ltd and Public Interest Advocacy Centre and Department of Community Services and Health* [1992] FCA 241 [34]; (1992) 108 ALR 163.

- 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[207]
- 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.[208]

5.232 Where the information is 'observable', such as the design features of a fishing net, the Information Commissioner has found that the information is not a trade secret.[209]

5.233 Information of a non-technical character may also amount to a trade secret. To be a trade secret, information must be capable of being put to advantageous use by someone involved in an identifiable trade.[210]

Information having a commercial value (s 47(1(b))

5.234 To be exempt under s 47(1)(b) a document must satisfy 2 criteria:

- the document must contain information that has a commercial value either to an agency or to another person or body and
- the commercial value of the information would be, or could reasonably be expected to be, destroyed or diminished if it were disclosed.[211]

5.235 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.[212] The information need not necessarily have 'exchange value', in the sense that it can be sold as a trade secret or intellectual property.[213] The following factors may assist in deciding whether information has commercial value:

- whether the information is known only to the agency or person to whom

207 See *Cordover and Australian Electoral Commission (AEC)* [2015] AATA 956, a case involving electoral software 'source code' where the AAT considered that the software supplier had taken precautions to limit dissemination of the source code and the source code has a commercial value to find that the source code is trade secret; and *'HN' and Department of the Environment* [2015] AICmr 76 [16]–[18] where the Information Commissioner considered that information relating to oil flow modelling is BP's trade secret.

208 *Re Organon (Aust) Pty Ltd and Department of Community Services and Health* [1987] AATA 396.

209 *Australian Broadcasting Corporation and Australian Fisheries Management Authority* [2016] AICmr 43 [30].

210 *Searle Australia Pty Ltd and Public Interest Advocacy Centre and Department of Community Services and Health* [1992] FCA 241 [38]; (1992) 36 FCR 111; (1992) 108 ALR 163.

211 See *Rex Patrick and Department of Defence (No 2) (Freedom of information)* [2020] AICmr 40 [10]–[38].

212 *Re Mangan and The Treasury* [2005] AATA 898; *Re Metcalf Pty Ltd and Western Power Corporation* [1996] WAICmr 23.

213 *McKinnon and Department of Immigration and Citizenship* [2012] AICmr 34 [42].

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[214]
- whether the information is still current or out of date (out of date information may no longer have any value)[215]
- whether disclosing the information would reduce the value of a business operation or commercial activity — reflected, perhaps, in a lower share price.

5.236 The time and money invested in generating information will not necessarily mean that it has commercial value. Information that is costly to produce will not necessarily have intrinsic commercial value.[216]

5.237 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.[217] Nor is it sufficient to establish that an agency or person would be adversely affected by disclosure; for example, by encountering criticism or embarrassment. It must be established that the disclosure would destroy or diminish the commercial value of the information.[218]

Consultation

5.238 Where disclosure of a document may disclose a trade secret or commercially valuable information belonging to an individual, organisation or undertaking other than the FOI applicant, the decision maker should consult the relevant parties. Section 27 of the FOI Act requires an agency or minister to consider whether that individual, organisation or undertaking might reasonably wish to contend that the document is exempt from disclosure. If the decision maker's view is that the third party might wish to make a submission, the decision maker must consult them before giving access if it is reasonably practicable to do so. Further guidance on third party

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214 *Re Cannon and Australian Quality Egg Farms* (1994) 1 QAR 491 and *Re Hassell and Department of Health of Western Australia* [1994] WAICmr 25.

215 *Re Angel and the Department of the Arts, Heritage and the Environment; HC Sleigh Resources Ltd and Tasmania* [1985] AATA 314.

216 *Re Hassell and Department of Health Western Australia* [1994] WAICmr 25.

217 See for example *'D' and Civil Aviation Safety Authority* [2013] AICmr 13.

218 *McKinnon and Department of Immigration and Citizenship* [2012] AICmr 34 [45]. In *Australian Broadcasting Corporation and Australian Fisheries Management Authority* [2016] AICmr 43 [38]–[39], information relating to the design and performance of a fishing net was found to be commercially valuable information. The information was specific technical information that had commercial value such that a competitor would be willing to pay for it, and that value would be diminished by disclosure. See also, *Rex Patrick and Department of Defence (No 2) (Freedom of information)* [2020] AICmr 40 [27]–[38].

consultation is in Parts 3 and 6 of these Guidelines.

Electoral rolls and related documents (s 47A)

5.239 A document is an exempt document under s 47A(2) if it is:

(a) an electoral roll

(b) a print, or a copy of a print, of an electoral roll

(c) a microfiche of an electoral roll

(d) a copy on tape or disc of an electoral roll

(e) a document that sets out particulars of only one elector and was used to prepare an electoral roll

(f) a document that is a copy of a document that sets out particulars of only one elector and was used to prepare an electoral roll

(g) a document that contains only copies of a document that sets out particulars of only one elector and was used to prepare an electoral roll

(h) a document (including a habitation index within the meaning of the *Commonwealth Electoral Act 1918*) that sets out particulars of electors and was derived from an electoral roll.

5.240 The exemption extends to electoral rolls (or part of an electoral roll) of a State or Territory or a Division or Subdivision (within the meaning of the Commonwealth Electoral Act) prepared under that Act (s 47A(1)).

5.241 The exemption does not apply if an individual is seeking access to their own electoral records. That is:

- the part of the electoral roll that sets out the particulars of the elector applying for access (s 47A(3))
- any print, copy of a print, microfiche, tape or disk that sets out or reproduces only the particulars entered on an electoral roll in respect of the elector (s 47A(4))
- a document that sets out only the particulars of the elector and was used to prepare an electoral roll (s 47A(5)(a))
- a copy, with deletions, of a document that sets out particulars of only one elector and was used to prepare an electoral roll (or a copy of such a document) (s 47A(5)(b))
- a copy, with deletions, of a document (including a habitation index within the meaning of the Commonwealth Electoral Act) that sets out particulars of electors and was derived from an electoral roll (s 47A(5)(b)).

FOIREQ24/00508 0721

Part 6 —

Conditional exemptions

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OAIC

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Introduction

6.1 This Part of the FOI Guidelines sets out each of the conditional exemptions in Division 3 of Part IV of the FOI Act and explains the threshold criteria that must be met before deciding that a document is conditionally exempt.

6.2 Section 11A(5) of the FOI Act provides that when a document is conditionally exempt under a conditional exemption in Division 3 of Part IV of the FOI Act, access must be given to the document unless, in the circumstances, giving access would, on balance, be contrary to the public interest (s 11A(5)).

6.3 After discussing each conditional exemption and its threshold criteria, Part 6 sets out how decision-makers should apply the public interest test, which is common to all conditional exemptions in Division 3 of Part IV.

6.4 It is important to recognise that agencies and ministers retain a discretion to provide access to a document, even if the document meets the criteria for one of the exemptions in Division 2 of Part IV (s 3A). In each case, agencies and ministers should consider the information sought and the public interest factors in favour of release of a conditionally exempt document. This process can involve factors such as the current context, the passage of time and the availability of related information.

6.5 Sections 90, 91 and 92 of the FOI Act provide protection against civil and criminal liability when documents are disclosed or published in good faith in the belief that publication or disclosure is required or permitted under the FOI Act or otherwise, whether under an express legislative power or not.

6.6 As noted in *'ACV' and Tertiary Education Quality and Standards Agency*,[1] agencies [and ministers] are not legally bound to refuse access if a document is exempt and may consider disclosure of a document if this is not otherwise legally prohibited. Such an approach is consistent with the pro-access parliamentary intention underpinning the FOI Act.

Decision making under Division 3 of Part IV

6.7 Deciding whether a document is exempt under Division 3 of Part IV of the FOI Act requires decision makers to:

- consider the document at issue and the criteria that must be established for each conditional exemption
- decide, in the context of each individual document, whether the threshold for one or more conditional exemptions is met[2]
- consider whether giving access would be contrary to the public interest test (s 11A(5)) by:
  - identifying the public interest factors favouring disclosure (s 11B(3)) (see [6.229] – [6.231])
  - identifying the public interest factors against disclosure (see [6.232] – [6.233])
  - ensuring that irrelevant factors are not considered (s 11B(4) (see [6.234] – [6.235])

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1 *'ACV' and Tertiary Education Quality and Standards Agency (Freedom of information)* [2023] AICmr 3 [89] and [90].

2 If the statutory criteria for the conditional exemption is not met, the document is not conditionally exempt. Unless another exemption applies, access to the document must be given (s 11A(5) of the FOI Act).

- weighing the relevant factors for and against disclosure to reach a decision (see [6.237] – [6.239]). It is only if the factors against disclosure outweigh those for disclosure that the document will be exempt
- make a decision and notify the applicant; and
- if refusing access to information provide written reasons for that decision which meet the requirements of s 26.

Identifying the matters that must be established for each conditional exemption

6.8 A document is conditionally exempt if it satisfies all the elements of any of the 8 conditional exemptions listed below. Conditional exemptions in Division 3 of Part IV that are subject to the public interest test relate to the following:

- Commonwealth-State relations (s 47B)[3]
- deliberative processes (s 47C)[4]
- financial or property interests of the Commonwealth (s 47D)[5]
- certain operations of agencies (s 47E)[6]
- personal privacy (s 47F)[7]
- business (other than documents to which s 47 applies) (s 47G)[8]
- research (s 47H)[9]
- the economy (s 47J).[10]

6.9 For each conditional exemptional there is a balancing of public interest factors for and against disclosure of information. For a document that is found to be conditionally exempt, the balancing test requires the decision maker to determine that release of the information would be contrary to the public interest. In circumstances where the decision maker is not satisfied that release would be contrary to the public interest, the information must be released. The use of the word contrary sets a high threshold, in summary, demonstrating that the factors against disclosure are oppositional to the public interest.

6.10 Under Division 3 a document will be conditionally exempt if its disclosure:

- would, or could reasonably be expected to, *cause damage* to relations between the Commonwealth and a State (s 47B(a))
- would have a *substantial adverse effect* on the financial or property interests of the Commonwealth or an agency (s 47D)

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3 See [6.222]–[6.45] below.

4 See [6.466]–[6.78] below.

5 See [6.79]–[6.83] below.

6 See [6.844]–[6.1158] below.

7 See [6.119]–[6.176] below.

8 See [6.1777]–[6.212] below.

9 See [6.213]–[6.2144] below.

10 See [6.215]–[6.221] below.

- 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, or on the proper and efficient conduct of the operations of an agency (ss 47E(c) and 47E(d))
- would involve the *unreasonable disclosure* of personal information about any person (including a deceased person) (s 47F)
- would disclose information concerning a person in respect of their business or professional affairs or concerning the business of commercial or financial affairs of an organisation or undertaking in a case in which the disclosure of the information would, or could reasonably be expected to, *unreasonably affect that person adversely* in respect of their lawful business or professional affairs or that organisation or undertaking in respect of its lawful business, commercial or financial affairs (s 47G(1))
- before the completion of research would be *likely unreasonably to expose the agency or officer to disadvantage* (s 47H)
- would, or could reasonably be expected to, have a *substantial adverse effect* on Australia's economy (s 47J).

6.11 Agencies and ministers must administer each FOI request individually, having regard to the contents of the document and should apply the public interest test to the particular document to decide whether to grant access at that time.[11] An agency cannot rely on a class claim contention when refusing access to a document under a conditional exemption.

Commonly used terms

6.12 Certain expressions in the FOI Act are common to several exemptions and conditional exemptions. These are explained below.

Would or could reasonably be expected to

6.13 The test 'would or could reasonably be expected' appears in the following conditional exemptions:

- Commonwealth-State relations (s 47B)
- certain operations of agencies (ss 47E(a)-(d))
- business affairs (ss 47G(1)(a)-(b))
- the economy (s 47J).

6.14 The test requires the decision maker to assess the likelihood of the predicted or forecast event, effect or damage occurring after disclosure of a document.[12]

[11] See *Crowe and Department of the Treasury* [2013] AICmr 69 [36]–[45]; *Cornerstone Legal Pty Ltd and Australian Securities and Investment Commission* [2013] AICmr 71 [32]–[41] and [53]; *'FI' and Australian Securities and Investments Commission* [2015] AICmr 28 [14]; *MacTiernan and Secretary, Department of Infrastructure and Regional Development (Freedom of Information)* [2016] AATA 506 [63]; *Dan Conifer and Department of the Prime Minister and Cabinet (No. 2) (Freedom of information)* [2017] AICmr 117 [15]; *'ABH' and Australian Transport Safety Bureau (Freedom of information)* [2022] AICmr 27 [27]; *'ZT' and the Department of Home Affairs* [2022] AICmr 4 [23]. See also discussion of class claims in *Patrick and Secretary, Department of Prime Minister and Cabinet (Freedom of Information)* [2021] AATA 2719 [230]–[244].

[12] The test 'would or could reasonably be expected' has been discussed in various decisions. For example see *Bell and Secretary, Department of Health (Freedom of information)* [2015] AATA 494 [37]; *Xenophon and Secretary, Department of Defence (Freedom of information)* [2019] AATA 3667 [98]–[103].

6.15 The use of the word 'could' is less stringent than 'would' and requires analysis of the reasonable expectation rather than the certainty of an event, effect or damage occurring. It may be a reasonable expectation that an effect has occurred, is presently occurring, or could occur in the future.[13]

6.16 The mere risk, allegation, possibility, or chance of prejudice does not qualify as a reasonable expectation.[14] There must be, based on reasonable grounds, at least a real, significant or material possibility of prejudice.[15]

Substantial adverse effect

6.17 Several conditional exemptions[16] require the decision maker to assess the impact and scale of an expected effect or event that would follow disclosure of the document. That is, the expected effect needs to be both 'substantial' and 'adverse'.

6.18 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'.[17] 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'.[18]

6.19 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)).

Prejudice

6.20 Some exemptions and conditional exemptions[19] require the decision maker to assess whether the potential disclosure of a document would be prejudicial. The FOI Act does not define prejudice. The Macquarie Dictionary definition of 'prejudice' requires:

(a) disadvantage resulting from some judgement or action of another

(b) resulting injury or detriment.

6.21 A prejudicial effect is one which would cause a bias or change to the expected results leading to detrimental or disadvantageous outcomes. The expected outcome does not need to have an impact that is 'substantial and adverse'.[20]

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13 *Re Maksimovic and Australian Customs Service* [2009] AATA 28 [28].

14 *Re News Corporation Limited v National Companies and Securities Commission* [1984] FCA 400; (1984) 5 FCR 88 per Fox and Woodward JJ; *Re Maher and Attorney-General's Department* [1985] AATA 180 [41]; (1985) 7 ALD 731 at 742.

15 *Chemical Trustee Limited and Ors and Commissioner of Taxation and Chief Executive Officer, AUSTRAC (Joined Party)* [2013] AATA 623 [79].

16 Sections 47D, 47E(c), 47E(d) and 47J.

17 See *Re Thies and Department of Aviation* [1986] AATA 141 [24].

18 See *Tillmanns Butcheries Pty Ltd v Australasian Meat Employees Union & Ors* [1979] FCA 85 [14]–[15]; (1979) 27 ALR 367 [383]; per Deane J in relation to the meaning of 'substantial loss' in s 45D of the *Trade Practices Act 1974*. Although Deane J noted that it was unnecessary that he form a concluded view, Deane J's interpretation of 'substantial' provides general guidance on the interpretation of this term under the FOI Act. See also for example *Re Marko Ascic v Australian Federal Police* [1986] FCA 260.

19 Sections 37(1)(a), 37(2)(a), 37(2)(c), 47E(a), 47E(b) and 47G(1)(b).

20 See *Re James and Ors and Australian National University* [1984] AATA 501; (1984) 6 ALD 687 per President Hall on the operation of s 32 of the FOI Act.

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Documents affecting Commonwealth-State relations (s 47B)

6.22 Section 47B conditionally exempts a document where disclosure:

- would, or could reasonably be expected to, cause damage to relations between the Commonwealth and a State (s 47B(a))
- would divulge information or matter communicated in confidence by or on behalf of the Government of a State or an authority of a State, to the Commonwealth, to an authority of the Commonwealth or to a person receiving the communication on behalf of the Commonwealth (s 47B(b))
- would divulge information or matter communicated in confidence by or on behalf of an authority of Norfolk Island, to the Government of the Commonwealth, to an authority of the Commonwealth or to a person receiving the communication on behalf of the Commonwealth or an authority of the Commonwealth (s 47B(d)) or
- would divulge information or matter communicated in confidence by or on behalf of the Government of a State or an authority of a State, to an authority of Norfolk Island or to a person receiving the communication on behalf of an authority of Norfolk Island (s 47B(f)).

6.23 For the purposes of this conditional exemption, a State includes the Australian Capital Territory and the Northern Territory (s 4(1)).

Relevance of the author of the document

6.24 A document does not have to have been supplied or written by the Commonwealth, a State agency, a State authority or an authority of Norfolk Island to fall within this conditional exemption. The content of the document (and potentially the reason why or circumstances in which the document was created) is the deciding factor, rather than the originator's identity. It follows that it is also not a relevant consideration that all the parties referred to in the document are aware of the document or of the reference to the particular agency.

Cause damage to Commonwealth-State relations

6.25 A decision maker may consider that disclosure would, or could reasonably be expected to, damage the relations of the Commonwealth and one or more States (s 47B(a)). The term 'relations' has received judicial consideration under the term 'working relations', which was found to encompass all interactions of the Australian Government and the States,[21] from formal Commonwealth-State consultation processes such as the National Cabinet through to any working arrangements between agencies undertaken as part of their day-to-day functions.

6.26 Disclosure of a document may cause damage by, for example:

21 See *Arnold (on behalf of Australians for Animals) v Queensland* [1987] FCA 148; (1987) 73 ALR 607.

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- interrupting or creating difficulty in negotiations or discussions that are underway, including in the development of joint or parallel policy[22]
- adversely affecting the administration of a continuing Commonwealth-State project
- substantially impairing (not merely modifying) Commonwealth-State programs[23]
- adversely affecting the continued level of trust or co-operation in existing inter-office relationships[24]
- impairing or prejudicing the flow of information to and from the Commonwealth.[25]

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

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

6.28 The potential damage need not be quantified,[26] but the effect on relations arising from the disclosure must be adverse.

6.29 The Administrative Appeals Tribunal (AAT) warns against applying class claims to documents under s 47B(a), explaining that this and other conditional exemptions require a closer analysis of the nature of the information in each document to determine whether a particular document is conditionally exempt.[27]

6.30 Decision makers should also consider whether all or only some of the information in the requested documents would damage Commonwealth-State relations if disclosed. For example, in *Diamond and Australian Curriculum, Assessment and Reporting Authority*, the FOI Commissioner found that disclosing school data provided by State and Territory Governments to the Australian Curriculum, Assessment and Reporting Authority for publication on the 'My School' website would damage Commonwealth-State relations.[28] Releasing the data would have breached an agreement between the Commonwealth and State and Territory Governments to keep the data confidential and might reasonably cause State and Territory Governments to decline to provide further data for the website. However, the FOI Commissioner found that release of a list of schools featured on the website would not breach the confidentiality agreement as it would not disclose any State or Territory Government data.

6.31 Guidance on the application of the public interest test to documents found to be conditionally exempt under s 47B can be found at [6.222] – [6.238] and [6.240] – [6.44].

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[22] See *Arnold (on behalf of Australians for Animals) v Queensland* [1987] FCA 148; (1987) 73 ALR 607. See also *Rex Patrick and Department of Agriculture, Water and the Environment (Freedom of information)* [2021] AICmr 57 [31] in which the conditional exemption was found not to apply because the negotiations referred to in the statement of reasons had concluded.

[23] See *Re Cosco Holdings Pty Limited and Department of Treasury* [1998] AATA 124.

[24] See *Arnold (on behalf of Australians for Animals) v Queensland* [1987] FCA 148; (1987) 73 ALR 607.

[25] See *Re Shopping Centre Council and Australian Competition and Consumer Commission* [2004] AATA 119; 78 ALD 494.

[26] See *Re Angel and the Department of Arts, Heritage and Environment; HC Sleigh Resources Ltd Tasmania* [1985] AATA 314.

[27] See *MacTiernan and Secretary, Department of Infrastructure and Regional Development (Freedom of Information)* [2016] AATA 506 [63]; also these Guidelines above at [6.11].

[28] *Diamond and Australian Curriculum, Assessment and Reporting Authority* [2013] AICmr 57.

Damage to be reasonably expected

6.32 The term 'could reasonably be expected to' is explained in greater detail at [6.13]–[6.16] above. There must be real and substantial grounds for expecting the damage to occur which can be supported by evidence or reasoning.[29] There cannot be a mere assumption or allegation that damage may occur if the document is released. For example, when consulting a State agency or authority as required under s 26A, the agency should ask the State agency or authority for its reasons for expecting damage, as an unsubstantiated concern will not satisfy the s 47B(a) threshold.

6.33 The word 'damage' in s 47B is not qualified by any adjective as to extent or character and it may refer to forms of intangible damage.[30] It can also be taken to connote a less severe effect than 'a substantial adverse effect', which is the expression used in ss 47D, 47E and 47J of the FOI Act.[31]

Information communicated in confidence

6.34 Section 47B(b) conditionally exempts information communicated in confidence to the Commonwealth Government or an agency by a State or an authority of a State. It is not necessary for the decision maker to find that disclosure may found an action for breach of confidence for this element to apply (as is required for an exemption under s 45).

6.35 This exemption only applies if disclosure would divulge information that is communicated in confidence by a State Government or authority to the Commonwealth Government or agency, and not the reverse.[32]

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

- whether the communication was ad hoc, routine, or required[33]
- whether there were any existing, implied or assumed arrangements or understandings between the Commonwealth and a State concerning the exchange or supply of information[34]

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29 See *Attorney-General's Department and Australian Iron and Steel Pty Ltd v Cockcroft* [1986] FCA 35; (1986) 10 FCR 180. See also *Community and Public Sector Union and Attorney-General's Department (Freedom of information)* [2019] AICmr 75 [22] and *Dan Conifer and National Disability Insurance Agency (Freedom of information)* [2020] AICmr 33 [28] in which the Information Commissioner stresses the need for agencies and ministers to provide evidence to support claims that there are real and substantial grounds for expecting disclosure would cause damage to Commonwealth-State relations.

30 *Diamond v Chief Executive Officer of the Australian Curriculum, Assessment and Reporting Authority* [2014] AATA 707 [103].

31 *Patrick and Secretary, Department of Prime Minister and Cabinet (Freedom of Information)* [2021] AATA 2719 [216].

32 *MacTiernan and Secretary, Department of Infrastructure and Regional Development (Freedom of Information)* [2016] AATA 506 [83].

33 See *Re Maher and Attorney-General's Department* [1985] AATA 180.

34 See *Re Maher and Attorney-General's Department* [1985] AATA 180 for agreements and *Re Queensland and Australian National Parks and Wildlife Service (Australians for Animals, party joined)* [1986] AATA 224 for assumed arrangements. See *Bradford and Australian Federal Police (Freedom of information)* [2021] AATA 3984 [146]–[151] for examples of existing arrangements and understandings.

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- how the information was subsequently handled, disclosed or otherwise published.[35]

6.37 See also the discussion on s 33(b) (international relations) in Part 5 of these Guidelines. That provision is expressed in the same language but for the relevant entities which are to have communicated the information.

6.38 It may be difficult to establish that s 47B applies if the document relates to routine or administrative matters or are already in the public domain.[36] The relevant test is whether the relevant information was communicated in confidence by or on behalf of a State. However this is not to say that the fact that the document has already been released or its contents are already known by members of the public is irrelevant deciding whether s 47B applies.[37]

A State and an authority of a State

6.39 An 'authority of a State' is an entity that has been established by the State for a public purpose, given the power to direct or control the affairs of others on the State's behalf, reports to and is under some control of the State.[38] Where there is doubt as to whether an entity is an 'authority of a State', the agency should consult the entity. The view of the State Government or the entity as to its status will be an influential, but not decisive, factor.

Consultation with a State (s 26A)

6.40 In circumstances where:

- an FOI request is made to an agency or minister for access to a document
- that originated with, or was received from, the State or an authority of the State or
- the document contains information that originated with, or was received from, the State or an authority of the State

agencies and ministers are required to consult the State or authority of the State before deciding to release the document. Consultation is only required if it appears that the State may reasonably wish to contend that the document is conditionally exempt under s 47B and that giving access to the document would be contrary to the public interest.

6.41 Consultation is to be undertaken in accordance with arrangements made between the Commonwealth and the States (s 26A(2)). Such arrangements have been made to facilitate consultation where this is required under s 26A. Agreement has been obtained from the States that all correspondence and communication should, at first instance, be with the delegated FOI contact officer of the particular agency and not directly with the author or action officer whose name may appear in the document.[39] This process has been put in place to ensure FOI requests are appropriately received and monitored, and to minimise

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35 See *McGarvin and Australian Prudential Regulation Authority* [1998] AATA 585; *Rex Patrick and Department of Agriculture, Water and the Environment (Freedom of information)* [2021] AICmr 57 [30]–[31].

36 In *Rex Patrick and Department of Agriculture, Water and the Environment (Freedom of information)* [2021] AICmr 57 [30]–[31] the requested document was shared with the Department on a confidential basis at the time of the consultation, but since then the final version of the document had been published.

37 *Diamond and Chief Executive Officer of the Australian Curriculum, Assessment and Reporting Authority* [2014] AATA 707 [98].

38 See *General Steel Industries Inc v Commissioner for Railways (NSW)* [1964] HCA 69; (1964) 112 CLR 125; *Committee of Direction of Fruit Marketing v Delegate of the Australian Postal Commission* [1980] HCA 23; (1980) 144 CLR 577.

39 See FOI Memo No. 26A dated June 1996 which is available at 17 Mar 2012 - www.dpmc.gov.au/foi/guidelines.cfm - Trove (nla.gov.au).

inconsistency across jurisdictions if a person makes FOI requests to several Australian Government and State agencies. FOI practitioners can find FOI contact information on the relevant State government agency website.[40]

6.42 Part 3 of these Guidelines provides information about consultation, including consultation with a State or an authority of a State. Part 3 also provides further information in relation to advising the State or State authority of the FOI decision, review rights and applicable timeframes. The State, or authority of the State, may apply for internal review or IC review if it disagrees with the agency's or minister's access grant decision (ss 54B and 54M).

6.43 Formal consultation under s 26A extends the time in s 15(5)(b) for deciding an FOI request by 30 days (s 15(6)). The Information Commissioner recommends that consultation be undertaken at an early stage in processing an FOI request, that is, when the agency is gathering information that would show whether the documents are conditionally exempt under s 47B.

Consultation comments to be considered when assessing conditional exemption

6.44 The decision maker must take into account any concerns raised by the consulted State, or State or Norfolk Island authority. The consulted authority does not have the right to veto access and agencies and ministers should take care that the State or authority is not under such a misapprehension. All other relevant considerations should be taken into account to ensure a sound decision is made.

6.45 The information provided during the consultation can assist the decision maker in assessing whether the document contains material that concerns Commonwealth-State relations, and to assess what damage, if any, could occur from disclosure.

Documents subject to deliberative processes (s 47C)

6.46 This conditional exemption is characterised by a 3-stage decision making process reflecting the statutory requirements. 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. The decision maker must be satisfied that of each of these requirements is met.

6.47 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
- 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)).

[40] Not all States use the term 'Freedom of Information' or 'FOI', so checking the website for 'access to information', 'right to information' or similar terms may be necessary.

6.48 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 these Guidelines).

6.49 The conditional exemption does not apply to:

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 (see [6.73] – [6.72] below)

b) reports of a body or organisation, prescribed by the regulations, that is established within an agency (currently none are prescribed)

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 (s 47C(3)).

6.50 The deliberative processes conditional exemption provides a framework through which the nature and context of the information must be examined before the conditional exemption will apply. Firstly, the information must include content of a specific type, namely deliberative matter. If a document does not contain deliberative matter, it cannot be conditionally exempt under this provision. This requires a factual determination by the decision maker as an initial step in satisfying themselves that the conditional exemption applies because the document contains deliberative matter involved in a deliberative process.

6.51 The decision-maker must also be satisfied that the information relates to a deliberative function and that that function was or was intended to be exercised by one of 3 entities: an agency, a minister, or the Government of the Commonwealth.

6.52 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).

6.53 Guidance in relation to the role of inhibition of frankness and candour when applying the public interest test to documents found to be conditionally exempt under s 47C can be found at [6.245] – [6.252].

Deliberative process

6.54 A deliberative process involves the exercise of judgement in developing and making a selection from different options:

> The action of deliberating, in common understanding, involves the weighing up or evaluation of the 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

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example, upon the wisdom and expediency of a proposal, a particular decision or a course of action.[41]

6.55 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.[42]

6.56 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.[43]

6.57 A deliberative process may include the recording or exchange of:

- opinions
- advice
- recommendations
- a collection of facts or opinions, including the pattern of facts or opinions considered[44]
- interim decisions or deliberations.

6.58 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.[45]

Assessing deliberative matter

6.59 'Deliberative matter' is a shorthand term for 'opinion, advice and recommendation' and 'consultation and deliberation' that is recorded or reflected in a document.[46] There is no

[41] See *Re JE Waterford and Department of Treasury (No 2)* [1984] AATA 67 [58]; (1984) 5 ALD 588; *British American Tobacco Australia Ltd and Australian Competition and Consumer Commission* [2012] AICmr 19 [15]–[22] and *Carver and Fair Work Ombudsman* [2011] AICmr 5 in relation to code of conduct investigations.

[42] *Patrick and Secretary, Department of Prime Minister and Cabinet (Freedom of information)* [2020] AATA 4964 ('*Patrick*') [72]. In '*Patrick*' Deputy President Britten-Jones concluded at [77] that an audit report prepared to assess the effectiveness and value for money of the Department of Defence's acquisition of light protected vehicles did not involve a deliberative process because the audit report did not involve the weighing up or evaluation of competing arguments and did not involve the exercise of judgment in developing and making a selection from different options. In so far as the audit report disclosed an opinion, the opinion was not obtained, prepared or recorded in the course of, or for the purposes of, any deliberative processes involved in the functions of the Auditor-General. As a consequence, the audit report was not found to be conditionally exempt under s 47C.

[43] See *Re Murtagh and Commissioner of Taxation* [1984] AATA 249; *Re Reith and Attorney-General's Department* [1986] AATA 437; *Re Zacek and Australian Postal Corporation* [2002] AATA 473.

[44] See *Chapman and Chapman and Minister for Aboriginal and Torres Strait Islander Affairs* [1996] AATA 210; (1996) 43 ALD 139.

[45] *Secretary, Department of Prime Minister and Cabinet and Secretary, Department of Infrastructure and Regional Development and Sanderson (Party Joined)* [2015] AATA 361 [93].

[46] As discussed by Bennett J in *Dreyfus and Secretary Attorney-General's Department (Freedom of information)* [2015] AATA 962 [18].

reason generally to limit the ordinary meanings given to the words 'opinion, advice or recommendation, consultation or deliberation'.[47]

6.60 The agency must assess all the material to decide if it is deliberative matter that relates to, or is in the nature of, the deliberative processes of the agency or minister.[48]

6.61 The presence or absence of particular words or phrases is not a reliable indication of whether a document includes deliberative matter. The agency or minister 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.

6.62 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[49]
- procedural or day to day content[50]
- the decision or conclusion reached at the end of the deliberative process[51]
- matter that was not obtained, prepared or recorded in the course of, or for the purposes of, a deliberative process.

6.63 Where material was gathered as a basis for intended deliberations, it may be deliberative matter.[52] However, if the material was obtained before there was a known requirement that the material would be considered during a deliberative process, that material would not be deliberative matter.[53]

6.64 Matter may still be deliberative even if the deliberative process has stalled or been overtaken by other events.[54]

Consultation

6.65 A consultation undertaken for the purposes of, or in the course of, a deliberative process includes any discussion between the agency, minister or government and another person in relation to the decision that is the object of the deliberative process.[55]

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[47] As explained by Forgie DP in *Wood; Secretary, Department of Prime Minister and Cabinet and (Freedom of information)* [2015] AATA 945 [39].

[48] See *Secretary, Department of Employment, Workplace Relations v Small Business and Staff Development and Training Centre Pty Ltd* [2001] FCA 1375; (2001) 114 FCR 301.

[49] See *Re VXF and Human Rights and Equal Opportunity Commission* [1989] AATA 107.

[50] See *Subramanian and Refugee Review Tribunal* [1997] AATA 31.

[51] See *Chapman and Chapman and Minister of Aboriginal and Torres Strait Islander Affairs* [1996] AATA 210; (1996) 43 ALD 139; *British American Tobacco Australia Ltd and Australian Competition and Consumer Commission* [2012] AICmr 19; *Briggs and the Department of the Treasury (No. 3)* [2012] AICmr 22.

[52] See *Secretary, Department of Employment, Workplace Relations and Small Business v Staff Development and Training Centre Pty Ltd* [2001] FCA 1375; (2001) 114 FCR 301.

[53] See *Re Susic and Australian Institute of Marine Science* [1993] AATA 97; *Re Booker and Department of Social Security* [1990] AATA 218.

[54] *Parnell & Dreyfus and Attorney-General's Department* [2014] AICmr 71 [38].

[55] *McGarvin and Australian Prudential Regulation Authority* [1998] AATA 585.

6.66 The agency should create the consultation document with the intention of initiating a 2-way exchange between at least 2 parties.[56] If the other person does not respond or participate, the consultation document may still be deliberative matter.

Purely factual material

6.67 The exclusion of purely factual material under s 47C(2)(b) is intended to allow disclosure of material used in the deliberative process.

6.68 A conclusion involving opinion or judgement is not purely factual material. Similarly, an assertion that something is a fact may be an opinion rather than purely factual material.

6.69 Conversely, when a statement is made of an ultimate fact, involving a conclusion based on primary facts which are unstated, such a statement may be a statement of purely factual material.[57]

6.70 '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.[58]

6.71 Where a decision maker finds it difficult to separate the purely factual material from the deliberative matter, both the elements may be exempt.[59] 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.[60]

6.72 The action taken by decision-makers in relation to the provision of edited copies of documents is an important element of the operation of the FOI Act. There are preconditions described in s 22(1) and in circumstances where these preconditions are met, s 22(2) provides that the agency or minister must prepare an edited copy of the document and give the FOI applicant access to the edited copy.

Reports on scientific or technical matters

6.73 As noted at [6.49] above, the s 47C conditional exemption does not apply to reports (including reports concerning the results of studies, surveys or tests) of scientific or technical experts, including reports expressing experts' opinions on scientific or technical matters (s 47C(3)(a)).

6.74 The sciences include the natural sciences of physics, chemistry, astronomy, biology (such as botany, zoology and medicine[61]) and the earth sciences (which include geology, geophysics,

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56 *Re Booker and Department of Social Security* [1990] AATA 218.

57 *Re Waterford and the Treasurer of the Commonwealth of Australia* [1984] AATA 518 [15], citing *Harris v Australian Broadcasting Corporation* [1984] FCA 8; (1984) 51 ALR 581 [586].

58 *Dreyfus and Secretary Attorney-General's Department (Freedom of information)* [2015] AATA 962 [18].

59 See *Eccleston and Department of Family Services and Aboriginal and Islander Affairs* (1993) 1 QAR 60 and *Chapman and Chapman and Minister of Aboriginal and Torres Strait Islander Affairs* [1996] AATA 210; (1996) 43 ALD 139. See *also Parnell & Dreyfus and Attorney-General's Department* [2014] AICmr 71 [40] in which the Information Commissioner found that factual material was so integral to the deliberative content that the analysis and views in the document would be robbed of their essential meaning if it was not included. Further, the Information Commissioner concluded that it would also be impractical to separate the factual material from the deliberative content, as the 2 were intertwined.

60 See *Re Harris v Australian Broadcasting Corporation* [1983] FCA 242; (1983) 78 FLR 236.

61 See *Re Wertheim and Department of Health* [1984] AATA 537.

hydrology, meteorology, physical geography, oceanography, and soil science). Technical matters involve the application of science, and includes engineering.[62]

6.75 For the purposes of s 47C(3)(a), the social sciences, or the study of an aspect of human society, are not scientific (for example, anthropology, archaeology, economics,[63] geography, history, linguistics, political science, sociology and psychology).

Interaction with Cabinet documents exemption

6.76 In some cases, a document may contain deliberative matter that relates to Cabinet in some way but is not exempt under the Cabinet documents exemption in s 34. An example would be a document containing deliberative matter that is marked 'Cabinet-in-Confidence' but nonetheless does not satisfy any of the exemption criteria in s 34.[64] Disclosing a document of this kind will not necessarily be contrary to the public interest only because of the connection to Cabinet deliberations. For example, disclosure is less likely to be contrary to the public interest if:

- the document contains deliberative but otherwise non-sensitive matter about a policy development process that has been finalised and
- the Government has announced its decision on the issue.[65]

6.77 Even if the Government has not announced a decision on the issue, disclosure of such a document is less likely to be contrary to the public interest if it is public knowledge that the Government considered, or is considering, the issue.[66] The key public interest consideration in both situations is to assess whether disclosure would inhibit the Government's future deliberation of the issue.

6.78 Examples of non-sensitive matter in this context include information that is no longer current or that is already in the public domain, or information that provides a professional, objective analysis of potential options without favouring one over the other. For guidance about the Cabinet documents exemption see Part 5 of these Guidelines.

Documents affecting financial or property interests of the Commonwealth (s 47D)

6.79 Section 47D conditionally exempts documents where disclosure would have a substantial adverse effect on the financial or property interests of the Commonwealth or an agency.[67]

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62 See *Re Harris v Australian Broadcasting Corporation and Keith Cameron Mackriell* [1983] FCA 242; (1983) 78 FLR 236 per Beaumont J.

63 See *Re Waterford and the Treasurer of the Commonwealth of Australia* [1985] AATA 114.

64 See *Combined Pensioners and Superannuants Association of NSW Inc and Deputy Prime Minister and Treasurer* [2013] AICmr 70 [17].

65 *Combined Pensioners and Superannuants Association of NSW Inc and Deputy Prime Minister and Treasurer* [2013] AICmr 70 [13]–[21]; Australian Private Hospitals Association and Department of the Treasury [2014] AICmr 4 [38]–[45].

66 *Philip Morris Ltd and Department of Finance* [2014] AICmr 27 [49]–[52]; *Sanderson and Department of Infrastructure and Regional Development* [2014] AICmr 66 [29]–[37].

67 For an example of the application of this exemption see *Briggs and the Department of the Treasury (No. 3)* [2012] AICmr 22.

Financial or property interests

6.80 The financial or property interests of the Commonwealth or an agency may relate to assets, expenditure or revenue-generating activities. An agency's property interests may be broader than merely buildings and land, and may include intellectual property or the Crown's interest in natural resources.[68]

Substantial adverse effect

6.81 For the conditional exemption to apply, the potential effect that would be expected to occur following disclosure must be both substantial[69] and adverse. This standard is discussed in more detail at [6.17] – [6.19] above.

6.82 A substantial adverse effect may be indirect. For example, where disclosure of documents would provide the criteria by which an agency is to assess tenders, the agency's financial interest in seeking to obtain the best value for money through a competitive tendering process may be compromised.[70]

6.83 An agency or government cannot merely assert that its financial or property interests would be adversely affected following disclosure.[71] The particulars of the predicted effect should be identified during the decision-making process and should be supported by evidence. 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 of these Guidelines). The effect must bear on the actual financial or property interests of the Commonwealth or an agency.[72]

Documents affecting certain operations of agencies (s 47E)

6.84 Section 47E conditionally exempts a document where disclosure would, or could reasonably be expected to, prejudice or have a substantial adverse effect on certain identified agency operations.

6.85 There are 4 separate grounds for the conditional exemption, one or more of which may be relevant in a particular case. A document is conditionally exempt if its disclosure under the FOI Act would, or could reasonably be expected to, do any of the following:

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68 See *Re Connolly and Department of Finance* [1994] AATA 167 in which the Commonwealth property was the uranium stockpile.

69 See *Harris v Australian Broadcasting Corporation* [1983] FCA 242; (1983) 78 FLR 236.

70 See *Secretary, Department of Employment, Workplace Relations and Small Business v Staff Development & Training Centre Pty Ltd* [2001] FCA 1375; (2001) 114 FCR 301.

71 See *Community and Public Sector Union and Attorney-General's Department (Freedom of information)* [2019] AICmr 75 [57]–[61] in which the Information Commissioner found that the respondent had not provided particulars to explain why disclosure of the particular material it decided was exempt under s 47D would adversely impact the ability of the government to manage its financial matters. See also *'DB' and Australian Federal Police* [2014] AICmr 105 [37]–[40] in which the acting Freedom of Information Commissioner found that the respondent had made broad assertions about the need to exempt documents containing financial and budgetary information from disclosure but had not addressed the actual contents of each document. The respondent also did not substantiate its claim that disclosure would have a 'substantial adverse impact' on its financial or property interests.

72 See *Re Hart and Deputy Commissioner of Taxation* [2002] AATA 1190; (2002) 36 AAR 279.

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a) prejudice the effectiveness of procedures or methods for the conduct of tests, examinations or audits by an agency

b) prejudice the attainment of the objects of particular tests, examinations or audits conducted or to be conducted by an agency

c) have a substantial adverse effect on the management or assessment of personnel by the Commonwealth or an agency or

d) have a substantial adverse effect on the proper and efficient conduct of the operations of an agency.

6.86 Where an agency is considering documents relating to its industrial relations activities, conditional exemptions such as s 47E(c) (management of personnel) or s 47E(d) (proper and efficient conduct of the operations of the agency) may be relevant.

6.87 Terms used in this conditional exemption are discussed below.

Prejudice

6.88 Sections 47E(a) and (b) require a decision maker to assess whether the conduct or objects of tests, examinations or audits would be prejudiced in a particular instance. The term 'prejudice' is explained at [6.20] – [6.21] above.

6.89 In the context of this conditional exemption, a prejudicial effect could be regarded as one that would cause a bias or change to the expected results leading to detrimental or disadvantageous outcomes. The expected change does not need to have an impact that is 'substantial and adverse', which is a stricter test.[73]

Reasonably be expected

6.90 For the grounds in ss 47E(a)–(d) to apply, the predicted effect needs to be reasonably expected to occur. The term 'could reasonably be expected' is explained in greater detail at [6.13] – [6.16] above. There must be more than merely an assumption or allegation that damage may occur if the document is released.

6.91 Where the document relates more closely to investigations into compliance with a taxation law or the enforcement of or proper administration of the law due to the involvement of police or the Director of Public Prosecutions, or by an agency's internal investigators, the agency may need to consider the law enforcement exemption under s 37 (see Part 5).

Reasons for predicted effect

6.92 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).

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[73] See *Re James and Ors and Australian National University* [1984] AATA 501; (1984) 6 ALD 687.

Prejudice the effectiveness of testing, examining or auditing methods or procedures (s 47E(a))

6.93 Where a document relates to a procedure or method for the conduct of tests, examinations or audits by an agency, the decision maker must address both elements of the conditional exemption in s 47E(a), namely that:

- an effect would reasonably be expected following disclosure
- the expected effect would be, overall, prejudicial to the effectiveness of the procedure or method of the audit, test or examination being conducted.

6.94 The decision maker will need to consider the content and context of the document to be able to identify the purpose, methodology or intended objective of the examination, test or audit. This operational information provides the necessary context in which to assess the document against the conditional exemption and should be included in the statement of reasons issued under s 26.

6.95 The decision maker should explain how the expected effect will prejudice the effectiveness of the agency's testing methods.[74] A detailed description of the predicted effect will enable a comprehensive comparison of the predicted effect against the usual effectiveness of existing testing methods. The comparison will indicate whether the effect would be prejudicial.

6.96 Examples of testing methods considered by the Information Commissioner and the AAT include:

- safety audits and testing regimes[75]
- licensing board examinations[76]
- risk assessment matrices[77]
- compliance audit indicators[78] and any comparative weighting of the indicators
- accident investigation techniques[79]
- tests or examinations leading to qualifications[80]
- potential fraud case assessment and analysis tools.[81]

6.97 Circumstances considered by the AAT where disclosure of the testing method may prejudice the method include:

- providing forewarning of the usual manner of audits

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[74] See for example '*ADR' and Inspector-General of Taxation (Freedom of information)* [2023] AICmr 51 [57]–[60] in which the Acting FOI Commissioner rejected a claim that a document was conditionally exempt under s 47E(a) on the basis that the Inspector-General had not explained how disclosure could prejudice the effectiveness of its review or audit methods and procedures nor why that prejudice could reasonably be expected to follow from disclosure of the document.

[75] See *Vasta and McKinnon and Civil Aviation Safety Authority* [2010] AATA 499; (2010) 116 ALD 356.

[76] *Australian Federation of Air Pilots and Civil Aviation Safety Authority (Freedom of information)* [2022] AICmr 65.

[77] See *Lobo and Secretary, Department of Education, Science and Training* [2007] AATA 1891 and *Fortitude East Pty Ltd and Australian Trade Commission* [2016] AICmr 71.

[78] *Besser and Department of Infrastructure and Transport* [2013] AICmr 19 [31]–[32].

[79] See *Vasta and McKinnon and Civil Aviation Safety Authority* [2010] AATA 499; (2010) 116 ALD 356.

[80] See *Re James and Ors and Australian National University* [1984] AATA 501; (1984) ALD 687.

[81] See *Splann and Centrelink* [2009] AATA 320.

- permitting analysis of responses to tests or examinations or information gathered during an audit
- facilitating cheating, fraudulent or deceptive conduct by those being tested or audited[82]
- permitting pre-prepared responses which would compromise the integrity of the testing process.[83]

Prejudice the attainment of testing, examination or auditing objectives (s 47E(b))

6.98 Where a document relates to the integrity of the attainment of the objects of tests, examinations or audits by an agency, the decision maker must address both elements of the conditional exemption in s 47E(b). The decision maker must be satisfied that:

a) an effect would reasonably be expected following disclosure

b) the expected effect would be prejudicial to the attainment of the objects of the audit, test or examination conducted or to be conducted.

6.99 The agency needs to conduct, or propose to conduct, the testing, examination or audit to meet particular requirements, and have a particular need for the results (the test objectives). The operational reason for conducting the test, examination or audit is the context for assessing whether s 47E(b) applies and this operational reason should be included in the s 26 statement of reasons.

6.100 Some examples of test objects include:

- ensuring only properly qualified people are flying aircraft
- ensuring the selection of the most competent and best candidates for promotion[84]
- determining suitability for highly technical positions[85]
- ensuring that an agency's expenditure is being lawfully spent through proper acquittal.[86]

6.101 The AAT has accepted that disclosure would be prejudicial to testing methods where it would:

- allow for plagiarism or circulation of questions or examination papers that would lead to a breach of the integrity of the examination system[87]
- allow for examiners to be inhibited in future marking by the threat of challenge to their marking[88]
- allow scrutiny of past test results or questions for the pre-preparation of expected/acceptable responses, rather than honest or true responses, for example in

[82] See *Re Marko Ascic and Australian Federal Police* [1986] AATA 108.

[83] See *Re Crawley and Centrelink* [2006] AATA 572.

[84] See *Re Marko Ascic and Australian Federal Police* [1986] AATA 108.

[85] *Australian Federation of Air Pilots and Civil Aviation Safety Authority (Freedom of information)* [2022] AICmr 65 [21] and [30].

[86] *Besser and Department of Infrastructure and Transport* [2013] AICmr 19 [35].

[87] See *Re Marko Ascic and Australian Federal Police* [1986] AATA 108.

[88] See *Re Marko Ascic and Australian Federal Police* [1986] AATA 108.

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psychometric testing to ascertain an applicant's eligibility for a certain pension[89] or patent examiner examinations.[90]

Substantial adverse effect on management or assessment of personnel (s 47E(c))

6.102 Where a document relates to an agency's policies and practices in relation to the assessment or management of personnel, the decision maker must address both elements of the conditional exemption in s 47E(c), namely that:

- an effect would reasonably be expected following disclosure
- the expected effect would be both substantial and adverse.

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

- the management of personnel – including broader human resources policies and activities, recruitment,[91] 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.

6.104 The terms 'would reasonably be expected' and 'substantial adverse' have the same meaning as explained at [6.13] – [6.16] and [6.17] – [6.19] above. If the predicted effect would be substantial but not adverse, or may even be beneficial, the conditional exemption does not apply. It will be unlikely that the potential embarrassment of an employee would be considered to be an effect on the agency as a whole.

6.105 The predicted effect must arise from the disclosure of the document being assessed.[92] The decision maker may also need to consider the context of the document and the integrity of a system that may require those documents, such as witness statements required to investigate a workplace complaint,[93] or referee reports to assess job applicants.[94]

6.106 The AAT has accepted that candour is essential when an agency seeks to investigate staff complaints, especially those of bullying.[95] In such cases staff may be reluctant to provide information and cooperate with investigators if they are aware that the subject matter of those discussions may be disclosed through the FOI process.[96]

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89 See *Re Crawley and Centrelink* [2006] AATA 572.

90 See *Re Watermark and Australian Industrial Property Organisation* [1995] AATA 389.

91 See *Re Dyrenfurth and Department of Social Security* [1987] AATA 140.

92 See *Re Dyrenfurth and Department of Social Security* [1987] AATA 140 [16].

93 See *Harris v Australian Broadcasting Corporation* [1983] FCA 242; (1983) 78 FLR 236; *Re Marr and Telstra Corporation Limited* [1993] AATA 328.

94 See *Department of Social Security v Dyrenfurth* [1988] FCA 148; (1988) 80 ALR 533; (1988) 8 AAR 544.

95 *De Tarle and Australian Securities and Investments Commission (Freedom of Information)* [2016] AATA 230 [42].

96 *Plowman and Australian Securities and Investments Commission (Freedom of information)* [2020] AATA 4729 [16]. See also *'LC' and Australia Post (Freedom of information)* [2017] AICmr 31 [21]; *'QM' and Australian Federal Police (Freedom of information)* [2019] AICmr 41 [36]; *'RM' and Australian Taxation Office (Freedom of information)* [2020] AICmr 1 [30].

6.107 Information relating to staff training and development, such as confidential feedback where public release could undermine confidence and inhibit candour in performance review processes, may also be conditionally exempt under this provision.[97]

6.108 Where the FOI applicant is primarily seeking documents relating to personnel management or assessment matters more closely related to their own employment and circumstances, the agency should encourage them to access the records using the agency's established procedures for accessing personnel records in the first instance (see s 15A).

Public servants and s 47E(c)

6.109 In some circumstances it may be appropriate to address concerns about the work health and safety impacts of disclosing public servants' personal information (such as names and contact details) under s 47E(c).[98]

6.110 An assessment conducted on a case-by-case basis, based on objective evidence, is required when considering whether it is appropriate to apply s 47E(c).[99] The type of objective evidence needed to found a decision that disclosure of a public servant's personal information may pose a work health and safety risk will depend on all the circumstances. For example, the security risks to operational law enforcement and intelligence agencies, and to the employees of law enforcement and intelligence agencies more generally, will be well known to the agency based on experience and understanding of the operating environment. Some agencies will already be aware of, and have documented, abusive behaviour by individuals that will be sufficient evidence not to disclose the personal information of their staff to those individuals. That information may have informed a decision by an agency to impose communication restrictions on an individual to mitigate work health and safety risks. In some cases, a public servant may be able to provide evidence of online abuse or harassment. Additionally, self-report by an individual of their health and safety concerns should this information be disclosed may be sufficient.

6.111 Relevant factors to consider when deciding whether s 47E(c) applies to conditionally exempt the names and contact details of public servants include:

- the nature of the functions discharged by the agency[100]
- the relationship between the individual public servant and the exercise of powers and functions discharged by the agency (i.e., are they a decision maker?)[101]
- the personal circumstances of the individual public servant which may make them more vulnerable to, or at greater risk of, harm if their name and contact details are released, for example – due to family violence or mental health issues
- whether the relevant information is already publicly available

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97 See, for example, *Paul Cleary and Special Broadcasting Service* [2016] AICmr 2 [25]–[27] in which the Information Commissioner upheld the exemption where feedback provided to cadet journalists was found to be given in the expectation that it feedback would be treated confidentially and public release would undermine confidence in the system of providing cadet feedback. Also *'ACT' and Merit Protection Commissioner (Freedom of information)* [2023] AICmr 1 [38].

98 *Paul Farrell and Department of Home Affairs (Freedom of information)* [2023] AICmr 37.

99 *Lisa Martin and Department of Home Affairs (Freedom of Information)* [2019] AICmr 47 [105].

100 *Paul Farrell and Department of Home Affairs (Freedom of information)* [2023] AICmr 37 [71]; *Paul Farrell and Department of Home Affairs (Freedom of information)* [2023] AICmr 37 [72]; *Paul Farrell and Department of Home Affairs (Freedom of information)* 52 [68].

101 For example, in *'NN' and Department of Human Services (Freedom of information)* [2018] AICmr 1 the FOI applicant sought access to the name of the person who completed an assessment that resulted in the cancellation of their pension.

- whether the FOI applicant has a history of online abuse, trolling or insults
- any communication restrictions the agency has imposed upon the individual
- whether the FOI applicant has a history of harassment or abusing staff.[102]

Substantial adverse effect on an agency's proper and efficient conduct of operations (s 47E(d))

6.112 An agency's operations may not be substantially adversely affected if the disclosure would, or could reasonably be expected to, lead to a change in the agency's processes that would enable those processes to be more efficient.[103]

6.113 Examples of circumstances where the AAT has upheld the conditional exemption include where it was established that:

- disclosure of the Australian Electoral Commission's policies in relation to the accepted reasons for a person's failure to vote in a Federal election would result in substantial changes to their procedures to avoid jeopardising the effectiveness of methods and procedures used by investigators[104]
- disclosure of information provided by industry participants could reasonably be expected to prejudice the Australian Competition and Consumer Commission's ability to investigate anti-competitive behaviour and its ability to perform its statutory functions[105]
- disclosure of the Universal Resource Locators and Internet Protocols of internet content that is either prohibited or potentially prohibited content under Schedule 5 to the *Broadcasting Services Act 1992* could reasonably be expected to affect the Australian Broadcasting Authority's ability to administer a statutory regulatory scheme for internet content to be displayed[106]
- disclosure of the details of a complaint made by a member of the public to the Civil Aviation Safety Authority could make potential informants reluctant to bring matters of unlawful and unsafe conduct to the attention of the regulator, thus undermining the agency's ability to effectively perform its public safety functions.[107]

6.114 The conditional exemption may also apply to a document that relates to a complaint made to an investigative body. Disclosure of this type of information could reasonably affect the willingness of people to make complaints to the investigative body, which would have a substantial adverse effect on the proper and efficient conduct of the investigative body's operations.[108] Further, disclosure of information provided in confidence by parties to a

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102 *'NN' and Department of Human Services (Freedom of information)* [2018] AICmr 1 [25]–[27].

103 For example, in *Re Scholes and Australian Federal Police* [1996] AATA 347, the AAT found that the disclosure of particular documents could enhance the efficiency of the Australian Federal Police as it could lead to an improvement of its investigation process.

104 *Re Murphy and Australian Electoral Commission* [1994] AATA 149; (1994) 33 ALD 718.

105 *Re Telstra Australia Limited and Australian Competition and Consumer Commission* [2000] AATA 71.

106 *Re Electronic Frontiers Australia and the Australian Broadcasting Authority* [2002] AATA 449.

107 *Pascoe and Civil Aviation Safety Authority (Freedom of information)* [2018] AATA 1273 [30]–[38].

108 For examples of the application of the exemption to complaints processes see *Australian Broadcasting Corporation and Commonwealth Ombudsman* [2012] AICmr 11; *British American Tobacco Australia Ltd and Australian Competition and Consumer Commission* [2012] AICmr 19; *Wilson AM and Office of the Australian Information Commissioner (Freedom of Information)* [2023] AATA 458 [47].

complaint or investigation may reduce the willingness of parties to provide information relevant to a particular complaint and may reduce their willingness to participate fully and frankly with the investigative process. In such cases the investigative body's ability to obtain all information would be undermined and this may have a substantial adverse effect on the proper and efficient conduct of the investigative body's operations.[109]

6.115 The predicted effect must bear on the agency's 'proper and efficient' operations, that is, the agency is undertaking its operations in an expected manner. Where disclosure of the documents reveals unlawful activities or inefficiencies, this element of the conditional exemption will not be met and the conditional exemption will not apply. This is for reasons including the irrelevant factors that must not be taken into account in deciding whether access to the document would, on balance, be contrary to the public interest.

Public servants and s 47E(d)

6.116 Unless an agency can establish that disclosure of public servants' personal information (for example, names and contact details) will have a *substantial adverse effect* on an agency's operations, it will not be appropriate to exempt this material under s 47E(d). In most cases the impact may be more of an inconvenience or distraction for an individual officer, rather than something that impacts substantially on the operations of the agency. Should an agency have evidence that provision of such information would, or could reasonably be expected to, have a substantial adverse effect on the proper and efficient conduct of the agency's operations, a case may be more likely to be made.

6.117 Further, for future conduct to amount to a risk that requires mitigation by refusing access to contact details from disclosure in response to an FOI request, that conduct must be reasonably expected to occur.

6.118 As discussed above at [6.109], concerns about the work health and safety impacts of disclosing public servants' personal information may be more appropriately addressed under the conditional exemption in s 47E(c).

Documents affecting personal privacy (s 47F)

6.119 Section 47F conditionally exempts a document where disclosure would involve the unreasonable disclosure of personal information of any person (including a deceased person). This conditional exemption is intended to protect the personal privacy of individuals.

6.120 This conditional exemption does not apply if the personal information is only about the FOI applicant (s 47F(3)). Where the information is joint personal information, however, the exemption may apply. For more information about joint personal information see [6.1433] – [6.145] below.

6.121 In some cases, providing indirect access to certain personal information via a qualified person may be appropriate (s 47F(5) – see [6.171] – [6.176] below).

Personal information

6.122 The FOI Act shares the same definition of 'personal information' as the *Privacy Act 1988* (Privacy Act), which regulates the handling of personal information about individuals (see

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[109] *Wilson AM and Office of the Australian Information Commissioner (Freedom of Information)* [2023] AATA 458 [47].

s 4(1) of the FOI Act and s 6 of the Privacy Act). The cornerstone of the Privacy Act's privacy protection framework is the Australian Privacy Principles (APPs), a set of legally binding principles that apply to both Australian Government agencies and private sector organisations that are subject to the Privacy Act. Detailed guidance about the APPs is available in the Information Commissioner's APP guidelines, available at www.oaic.gov.au.

6.123 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.[110]

6.124 In other words, personal information:

- is information about an identified individual or an individual who is reasonably identifiable
- says something about a person
- may be opinion
- may be true or untrue
- may or may not be recorded in material form.

6.125 Personal information can include a person's name, address, telephone number,[111] date of birth, medical records, bank account details, taxation information[112] and signature.[113]

A person who is reasonably identifiable

6.126 What constitutes personal information will vary depending on whether an individual can be identified or is reasonably identifiable in the particular circumstances. For particular information to be personal information, an individual must be identified or reasonably identifiable.

6.127 Where it may be possible to identify an individual using available resources, the practicability, including the time and cost involved, will be relevant to deciding whether an individual is 'reasonably identifiable'.[114] An agency or minister should not, however, seek information from the FOI applicant about what other information they have or could obtain.

6.128 Where it may be technically possible to identify an individual from information, but doing so is so impractical that there is almost no likelihood of it occurring, the information is not personal information.[115] In *Jonathan Laird and Department of Defence* [2014] AICmr 144, the Privacy Commissioner was not satisfied that DNA analysis of human remains could reasonably identify a World War II HMAS Sydney II crew member. In finding that the DNA sequencing information held by the Department was not personal information, the Privacy

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110 See s 4 of the FOI Act and s 6 of the Privacy Act.

111 See *Re Green and Australian and Overseas Telecommunications Corporation* [1992] AATA 252; (1992) 28 ALD 655.

112 See *Re Murtagh and Commissioner of Taxation* [1984] AATA 249; (1984) 54 ALR 313; (1984) 6 ALD 112 and *Re Jones and Commissioner of Taxation* [2008] AATA 834.

113 See *Re Corkin and Department of Immigration & Ethnic Affairs* [1984] AATA 448.

114 Explanatory Memorandum to the Privacy Amendment (Enhancing Privacy Protection) Bill 2012, p 61.

115 Australian Privacy Principles guidelines at [B.93].

Commissioner discussed that identifying the remains using DNA sequencing would be 'impractical for a reasonable member of the public'.[116]

6.129 Similarly, in a series of IC review decisions,[117] the Information Commissioner had to decide whether or not aggregate information relating to the nationality, language and religion of refugees resettled under Australia's offshore processing arrangements was the personal information of the relevant individuals. In each case, the Information Commissioner found that the individuals were not reasonably identifiable from the aggregated information.

6.130 Therefore, whether or not an individual is reasonably identifiable depends on the practicability of linking pieces of information to identify them.

Says something about a person

6.131 The information needs to be 'about' an individual – there must be a connection between the information and the person.[118] This is a question of fact and depends on the context and circumstances. Some information is clearly about an individual – for example, name, date of birth, occupation details and medical records. A person's signature, home address, email address, telephone number, bank account details and employment details will also generally constitute personal information. Other information may be personal information if it reveals a fact or opinion about the person in a way that is not too tenuous or remote. Invoices related to the purchase of alcohol for Prime Ministerial functions do not disclose personal information about the Prime Minister if it is possible that a staff member made the purchases based on something other than the Prime Minister's preferences.[119] Examples of when information is not 'about' a person and therefore the information is not personal information for the purposes of s 6 of the Privacy Act, include the colour of a person's mobile phone or their network type (e.g., 5G).[120]

Natural person

6.132 An individual is a natural person and does not include a corporation, trust, body politic or incorporated association.[121] Section 47F(1) specifically extends to the personal information of deceased persons.

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116 *Jonathan Laird and Department of Defence* [2014] AICmr 144 [17].

117 *Alex Cuthbertson and Department of Immigration and Border Protection* [2016] AICmr 18; *Alex Cuthbertson and Department of Immigration and Border Protection* [2016] AICmr 19; *Alex Cuthbertson and Department of Immigration and Border Protection* [2016] AICmr 20.

118 *Privacy Commissioner v Telstra Corporation Limited* [2017] FCAFC 4 [63].

119 In *Penny Wong and Department of the Prime Minister and Cabinet* [2016] AICmr 27 [13]–[19], the Information Commissioner discussed that there was nothing before him to indicate the former Prime Minister had any involvement with the purchase of alcohol for prime ministerial functions. Therefore, purchase invoices did not contain the personal information of the former Prime Minister. However, if it had been shown that the purchases had been made to accord with the Prime Minister's personal preferences, the Information Commissioner accepted that the alcohol brands could be the personal information of the former Prime Minster.

120 *Privacy Commissioner v Telstra Corporation Limited* [2017] FCAFC 4 [63].

121 See s 2B of the *Acts Interpretation Act 1901*.

Unreasonable disclosure

6.133 The personal privacy conditional exemption is designed to prevent the unreasonable invasion of third parties' privacy.[122] The test of 'unreasonableness' implies a need to balance the public interest in disclosure of government-held information and the private interest in the privacy of individuals. The test does not, however, amount to the public interest test of s 11A(5), which follows later in the decision-making process. It is possible that the decision maker may need to consider one or more factors twice, once to determine if a projected effect is unreasonable and again when assessing the public interest balance.

6.134 In considering what is unreasonable, the AAT in *Re Chandra and Minister for Immigration and Ethnic Affairs* stated that:

> ... whether a disclosure is 'unreasonable' requires … a consideration of all the circumstances, including the nature of the information that would be disclosed, the circumstances in which the information was obtained, the likelihood of the information being information that the person concerned would not wish to have disclosed without consent, and whether the information has any current relevance … it is also necessary in my view to take into consideration the public interest recognised by the Act in the disclosure of information … and to weigh that interest in the balance against the public interest in protecting the personal privacy of a third party ...[123]

6.135 An agency or minister must have regard to the following matters in determining whether disclosure of the document would involve an unreasonable disclosure of personal information:

a) the extent to which the information is well known

b) 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

c) the availability of the information from publicly accessible sources[124]

d) any other matters that the agency or minister considers relevant (s 47F(2)).[125]

6.136 These are the same considerations that must be taken into account for the purposes of consulting an affected third party under s 27A(2).

6.137 Key factors for determining whether disclosure is unreasonable include:

a) the author of the document is identifiable[126]

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[122] See *Re Chandra and Minister for Immigration and Ethnic Affairs* [1984] AATA 437; (1984) 6 ALN N257; *Parnell and Department of the Prime Minister and Cabinet* [2012] AICmr 31; *'R' and Department of Immigration and Citizenship* [2012] AICmr 32.

[123] See *Re Chandra and Minister for Immigration and Ethnic Affairs* [1984] AATA 437 [259]; (1984) 6 ALN N257.

[124] See *Re Jones and Commissioner of Taxation* [2008] AATA 834; *'Q' and Department of Human Services* [2012] AICmr 30.

[125] For example, where a 'care leaver' requests access to third party personal information, decision makers should note that it is government policy that a care leaver have such access. A 'care leaver' is a child in Australia in the 20th century who was brought up 'in care' as a state ward, foster child, or in an orphanage. See the government response to recommendation 12 of the report of the Senate Community Affairs References Committee (2009) *Lost innocents and Forgotten Australians revisited report on the progress with the implementation of the recommendations of the Lost Innocents and Forgotten Australians reports*, Commonwealth of Australia, Canberra.

[126] Note: s 11B(4)(c) provides that when the public interest test is considered, the fact that the author of the document was (or is) of high seniority in the agency is not to be taken into account (see these Guidelines at [6.235]).

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.[127]

6.138 As discussed in the IC review decision of *'FG' and National Archives of Australia* [2015] AICmr 26, other factors considered to be relevant include:

- the nature, age and current relevance of the information
- any detriment that disclosure may cause o 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.[128]

6.139 The leading IC review decision on s 47F is *'BA' and Merit Protection Commissioner*[129] in which the Information Commissioner explained that the object of the FOI Act to promote transparency in government processes and activities needs to be balanced with the purpose of s 47F to protect personal privacy, although care is needed to ensure that an FOI applicant is not expected to explain their reason for access contrary to s 11(2).[130]

6.140 Disclosure that supports effective oversight of government expenditure may not be unreasonable, particularly if the person to whom the personal information relates may have reasonably expected that the information would be open to public scrutiny in future.[131] It may not be unreasonable to disclose work related travel expense claims for a named government employee if this would advance the public interest in government transparency and integrity around the use of Australian Government resources.[132] On the other hand, disclosure may be unreasonable if the person provided the information to the Australian Government on the understanding that it would not be made publicly available, and there are no other statutory disclosure frameworks that would require release of the information.[133]

6.141 Deciding whether disclosure of personal information would be unreasonable should not be uniformly approached on the basis that the disclosure will be to the 'world at large'.[134]

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127 *Re McCallin and Department of Immigration* [2008] AATA 477.

128 See *'FG' and National Archives of Australia* [2015] AICmr 26 [47]–[48].

129 *'BA' and Merit Protection Commissioner* [2014] AICmr 9 [64].

130 *'BA' and Merit Protection Commissioner* [2014] AICmr 9 [64], citing M Paterson, *Freedom of Information and Privacy in Australia* (LexisNexis Butterworths, 2005) 241.

131 *'AK' and Department of Finance and Deregulation* [2013] AICmr 64 [18]–[24].

132 *Rex Patrick and Department of Defence* [2020] AICmr 31.

133 *'Z' and Australian Securities and Investments Commission* [2013] AICmr 43 [11].

134 See *'FG' and National Archives of Australia* [2015] AICmr 26 [19]–[44].

Examples of situations in which FOI applicants assert an interest in obtaining access that would not be available generally to any member of the public include:

- an FOI applicant who is seeking access to correspondence they sent to an agency or minister that contains the personal information of other people – that is, personal information provided by the FOI applicant to the agency
- an FOI applicant who is seeking access to the medical records of a deceased parent to learn if the parent had a genetic disorder that may have been transmitted to the FOI applicant
- an FOI applicant who is seeking access to their own personal information, which is intertwined with the personal information of other people who may be known to the FOI applicant (such as family members, or co-signees of a letter or application)
- a professional who is seeking access to records that include client information, and who gives a professional undertaking not to disclose the information to others (for example, a doctor who seeks patient consultation records in connection with a Medicare audit, or a lawyer who seeks case records of a client to whom legal advice is being provided)
- a 'care leaver' (meaning a child who was brought up in care as a state ward, foster child or in an orphanage) who is seeking access to third party personal information.[135]

6.142 It would be problematic in each of these instances for an agency or minister to grant access under the FOI Act if it proceeded from the premise that 'if one person can be granted access to a particular document under the FOI Act, any other person who cares to request it and to pay the relevant fees, can be granted access to it'.[136] In instances such as these, an agency or minister can make a practical and risk-based assessment about whether to provide access to a particular FOI applicant.

Joint personal information

6.143 Documents often contain personal information about more than one individual. Where possible, personal information should be dealt with separately under the conditional exemption. An individual's personal information may, however, be intertwined with another person's personal information, for example, information provided for a joint loan application, a medical report or doctor's opinion, or information about a relationship provided to Services Australia or the Child Support Agency.

6.144 Intertwined personal information should be separated where possible, without diminishing or impairing the quality or completeness of the FOI applicant's personal information.[137] Where it is not possible to separate an FOI applicant's personal information from a third party's personal information, the conditional exemption may be claimed if it is unreasonable to release the third party's personal information.

6.145 Whether it is unreasonable to release personal information may depend on the relationship between the individuals. Decisions about the release of joint personal information should be made after consultation with the third party where such consultation is reasonably practical. For more information about consultation see [6.156] – [6.163]. below.

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[135] *'FG' and National Archives of Australia* [2015] AICmr 26 [38].

[136] *Re Callejo and Department of Immigration and Citizenship* [2010] AATA 244[101]; (2010) 51 AAR 308 per Forgie DP.

[137] *Re Anderson and Australian Federal Police* [1986] AATA 79 and *Re McKinnon and Department of Immigration and Ethnic Affairs* [1995] AATA 364.

Personal information about agency employees

6.146 Documents held by agencies or ministers often include personal information about public servants. For example, a document may include a public servant's name, work email address, position or title, contact details, decisions or opinions.

6.147 In some circumstances, an individual public servant will not be reasonably identifiable from their first name alone (that is, without their family name).[138] In such circumstances the first name will not be personal information for the purposes of s 47F. However in some circumstances the first name of a public servant, without their surname, would reasonably identify them and therefore will be personal information for the purposes of s 47F.[139] Relevant factors for decision makers to consider when deciding whether the first names of staff, without their family names, would make an individual reasonably identifiable may include the particular context in which the name appears in the document, the size of the agency, the context in which the document was created and the uniqueness of the first name.

6.148 Previous IC review decisions, and previous versions of these Guidelines, expressed the view that where a public servant's personal information is included in a document because of their usual duties or responsibilities, it will not be unreasonable to disclose it unless special circumstances exist. Further, previous versions of the FOI Guidelines considered that agencies and ministers should start from the position that including the full names of staff in documents released in response to FOI requests increases transparency and accountability of government and is consistent with the objects of the FOI Act. The OAIC considered these issues in a position paper titled *'Disclosure of public servant details in response to a freedom of information request*' published in August 2020.[140] This paper noted the evolution of the digital environment and the new risks for both public servants and citizens but confirmed the Information Commissioner's view that agencies and ministers should start from the position that including the full names of staff in documents released in response to FOI requests increases transparency and accountability of government and is consistent with the objects of the FOI Act.

6.149 This position was considered but not accepted by Deputy President Forgie in *Warren; Chief Executive Officer, Services Australia and (Freedom of information)*[141] (*Warren*). In *Warren*, Deputy President Forgie accepted that the words of s 47F should be the starting point of any consideration, rather than any presumption that disclosing the full names of staff in documents increases transparency and promotes the objects of the FOI Act, or that absent special circumstances a public servant's name should generally be disclosed. Deputy President Forgie said:

> … It is important to understand the exemptions in the context of the FOI Act as enacted. Its objects, as set out in ss 3 and 3A, make no reference to accountability. Apart from objects associated directly with accessibility to information held by the Commonwealth as a public resource, the objects focus on the way in which accessibility promotes Australia's representative democracy. In particular, they focus on increasing public participation in "*Government processes*" and on increasing scrutiny, discussion, comment and review of "*Government activities*". The word "*accountability*" tends to blur

[138] *'ADM' and Services Australia (Freedom of information)* [2023] AICmr 38 [26].

[139] *AIJ' and Services Australia (Freedom of information)* [2024] AICmr 55 [77].

[140] Available on the OAIC website - Disclosure of public servant details in response to a freedom of information request | OAIC.

[141] [2020] AATA 4557.

that focus and take scrutiny to the level of scrutiny of individual APS employees and contractors. The FOI Act's objectives do not establish a separate merits review process of the activities of individuals engaged in the Government's processes or activities.

There may be cases in which disclosure of individual's names may increase scrutiny, discussion or comment of Government processes or activities. In others, the names of those responsible for the processes or activities may be neither here nor there in their scrutiny.[142]

6.150 Following this decision, IC review decisions from 2021 have adopted the considerations identified by DP Forgie in *Warren*.[143]

6.151 Concerns about the work health and safety impacts of disclosing public servants' personal information may be more appropriately addressed under the conditional exemption in s 47E(c) rather than under s 47F (see [6.109]).

6.152 When considering whether it would be unreasonable to disclose the names of public servants, there is no basis under the FOI Act for agencies to start from the position that the classification level of a departmental officer determines whether their name would be unreasonable to disclose. In seeking to claim the exemption, an agency needs to consider the factors identified above at [6.135] – [6.138] in the context of the document, rather than start from the assumption that such information is exempt.[144] A document may however be exempt for another reason, for example, where disclosure would, or could reasonably be expected to, endanger the life or physical safety of any person (s 37(1)(c)).

Information relating to APS recruitment processes

6.153 Following Australian Public Service (APS) recruitment processes, an agency may receive an FOI request from an unsuccessful candidate seeking information about the person selected for the position or about the other applicants.

6.154 The IC review decision in *'BA' and Merit Protection Commissioner*[145] offers some guiding principles for assessing an FOI request seeking access to recruitment documentation. However, an agency must consider each FOI request on its merits. A separate decision is required in each case as to whether disclosure of personal information about candidates from an APS recruitment process would be unreasonable.[146]

6.155 The Public Service Commissioner has issued guidelines to assist agencies understand how s 103 of the *Public Service Regulations 2023* affects their ability to use and disclose the personal information of staff within their agencies and with other APS agencies. Agency compliance with these guidelines will be a relevant consideration in deciding whether

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142 *Warren; Chief Executive Officer, Services Australia and (Freedom of information)* [2020] AATA 4557 [115].

143 See for example, *'YO' and Department of Home Affairs (Freedom of Information)* [2021] AICmr 67; *YQ' and Airservices Australia (Freedom of Information)* [2021] AICmr 69; *Lisa Cox and Department of Agriculture, Water and the Environment (Freedom of information)* [2021] AICmr 72; *Ben Butler and Australian Prudential Regulation Authority (Freedom of information)* [2022] AICmr 34; *ABK' and Commonwealth Ombudsman* [2022] AICmr 44; *'ADM' and Services Australia (Freedom of information)* [2023] AICmr 38.

144 *Maurice Blackburn Lawyers and Department of Immigration and Border Protection* [2015] AICmr 85 [3].

145 *'BA' and Merit Protection Commissioner* [2014] AICmr 9 [2], [89].

146 *'BA' and Merit Protection Commissioner* [2014] AICmr 9 [66].

disclosure of personal information relating to a public official would be unreasonable under s 47F and contrary to the public interest.[147]

Consultation

6.156 Where a document includes personal information relating to a person who is not the FOI applicant, an agency or minister should give that individual (the third party) a reasonable opportunity to contend that the document is exempt from disclosure before making a decision to give access (s 27A). If the third party is deceased, their legal representative should be given this opportunity.

6.157 Such consultation should occur where it appears to the agency or minister that the third party might reasonably wish to make a submission that the document is exempt from disclosure having regard to:

- 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 information
- whether the information is publicly available, and
- any other relevant matters (s 27A(2)).

6.158 Section 27A(3) provides that an agency or minister must not decide to give access to a document without giving the person concerned a reasonable opportunity to make submissions in support of an exemption contention. It follows that if the decision maker decides, after reviewing the document, that it is exempt there may be no need to consult a third party. Conversely in *Dreyfus and Attorney-General (Commonwealth of Australia) (Freedom of information)* the AAT found that where an entry in a diary disclosed the name of a person who was scheduled to meet the Attorney-General and nothing more, in the ordinary course disclosure of that fact would not involve the unreasonable disclosure of personal information, and so there would be no basis upon which people mentioned in the diary might reasonably wish to make an exemption contention.[148]

6.159 Agencies and ministers should generally start from the position that a third party may reasonably wish to make a submission. This is because the third party may bring to the agency or minister's attention sensitivities that may not have been otherwise apparent.

6.160 Consultation may not be reasonably practicable in all circumstances. Whether it is reasonably practicable to consult a third party will depend on all the circumstances including the time limits for processing the FOI request (s 27A(4)). For example, it may not be reasonably practicable if the agency cannot locate the third party in a timely way.[149] Where it

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[147] See 'Circular 2016/2: Use and disclosure of employee information' on the Australian Public Service Commissioner website www.apsc.gov.au.

[148] *Dreyfus and Attorney-General (Commonwealth of Australia) (Freedom of information)* [2015] AATA 995 [37] and [40]. The AAT's decision was upheld by the Federal Court in *Attorney-General v Honourable Mark Dreyfus* [2016] FCAFC 119.

[149] See for example, *Ray Brown and Department of Immigration and Border Protection* [2014] AICmr 146 in which the Acting Information Commissioner found that it would not be reasonably practicable for the Department to consult (for the purposes of s 27A(4)) 526 staff members because of the time and resources involved and the type of personal information contained in the document (although ultimately the Acting Information Commissioner decided that the Department could decide to give access to the document without providing staff a reasonable opportunity to make submissions under s 27A). In *Stefania Maurizi and Department of Foreign Affairs and Trade (Freedom of information)* [2021] AICmr 31 [59] the Information Commissioner found that consultation would not be reasonably practicable to undertake because of the unique personal

is not reasonably practicable to consult a third party, agencies and ministers should consider whether, in the circumstances, it is likely the third party would oppose disclosure of their personal information. The relevant circumstances may include the nature of the personal information in the document, whether the personal information has already been disclosed[150] and whether the third party is known to be associated with the information in the document.[151]

6.161 Where it appears that consultation will be required with a large number of individuals, an agency should carefully consider whether consultation is reasonably practicable before deciding that consultation is required. This is particularly the case where an agency is relying on such consultation to decide that a practical refusal reason exists (s 24) and thereby to refuse the FOI request. For example, it is impractical, and therefore unnecessary, for an agency to consult 600 individuals before making a decision whether to give access to an organisational chart.[152]

6.162 Where there is a need to consult third parties under s 27A, the timeframe for making a decision in s 15(5)(b) is extended by 30 days (s 15(6)). Agencies and minister should identify as soon as possible within the initial 30-day decision-making period whether there is a need for consultation.

6.163 To assist the third party make a submission, it may be necessary, where practical, to give them a copy of the document. This can be done by providing an edited copy of the document, for example, by deleting any material that may be exempt under another provision. Agencies and ministers should also take care not to breach their obligations under the APPs in the Privacy Act during consultation, for example, by disclosing the FOI applicant's personal information to a third party, unless the FOI applicant has consented or another exception under the APPs applies.[153]

Submissions

6.164 Where consultation occurs, a third party consulted under s 27A should be asked whether they object to disclosure and invited to make submissions about whether:

- the conditional exemption should apply and
- on balance, access would be contrary to the public interest.

6.165 An affected third party who is consulted under s 27A may contend that s 47F applies to the requested document. Where the third party contends that exemptions other than s 47F apply, it is open to the agency or minister to rely on those exemptions in its decision.[154]

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circumstances of the third party and the fact that consultation may have revealed confidential discussions between Australia and foreign governments.

[150] *Ben Butler and the Australian Securities and Investments Commission (No. 2) (Freedom of Information)* [2023] AICmr 56 [104].

[151] For example in *ADW' and Department of Health and Aged Care (Freedom of information)* [2023] AICmr 59 [47] the Acting Freedom of Information Commissioner considered that disclosure of health information, which is sensitive information for the purposes of s 6 of the Privacy Act, would be unreasonable in circumstances in which the relevant individuals had not been consulted. Similarly, in *'ADV' and Department of Home Affairs (Freedom of information)* [2023] AICmr 58 [88] the Acting Information Commissioner considered that a third party would likely oppose disclosure of sensitive personal information in circumstances in which they had not been consulted.

[152] As the Acting Information Commissioner found in *Maria Jockel and Department of Immigration and Border Protection* [2015] AICmr 70 [36].

[153] For more information about an agency's obligations regarding the disclosure of personal information, see the Guidelines to the Australian Privacy Principles at www.oaic.gov.au.

[154] See *Australian Broadcasting Corporation and Civil Aviation Safety Authority* [2015] AICmr 21 [5].

However, should the agency or minister decide to grant access to the documents, the third party does not have a right to seek review of that decision on grounds other than those specified in s 27A (that is, the decision that s 47F does not apply).

6.166 The third party should be asked to provide reasons and evidence to support their submission. The third party's submissions should address their individual circumstances – generalised submissions or assertions of a theoretical nature will make it difficult for an agency or minister to accept that s 47F applies to the document.[155]

6.167 The letter to the third party should also include information about the obligation on agencies and ministers to provide the public with access to a document that has been released to an FOI applicant (on the agency or minister's disclosure log), subject to certain exceptions such as personal or business information that it would be unreasonable to publish (s 11C).

6.168 An agency or minister must have regard to any submissions made by the third party before deciding whether to give access to the document (ss 27A(3) and 27A(4)). However, the third party does not have the right to veto access and agencies and ministers should take care to ensure the third party is not under such a misapprehension. The statement of reasons should clearly set out the weight applied to submissions and the reasons for that weight.

6.169 When an agency or minister decides to give the FOI applicant access to documents after a third party has made submissions, they must give the third party written notice of the decision (s 27A(5)). Access to a document must not be given to the FOI applicant until the third party's opportunities for review have run out, or if a review was undertaken, the decision still stands (s 27A(6)).

6.170 General information about consultation is provided in Part 3 of these Guidelines. Part 3 provides guidance about extended timeframes, notices of decision, review rights and when access to documents may be provided.

Access given to qualified person

6.171 An agency or minister may provide a qualified person with access to a document that would otherwise be provided to an FOI applicant where:

- the personal information was provided by a qualified person acting in their capacity as a qualified person (s 47F(4)(a)) and
- it appears to the agency or minister that disclosing the information to the FOI applicant might be detrimental to their physical or mental health, or wellbeing (s 47F(4)(b)).

6.172 A broad approach should be taken in considering an FOI applicant's health or wellbeing. The possibility of detriment must appear to be real or tangible.[156]

6.173 Where access is to be provided by a qualified person, the FOI applicant is to nominate a qualified person (s 47F(5)(b)). The nominated qualified person must carry on the same occupation as the qualified person who provided the document (s 47F(5)(a)).

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155 *'ADM' and Services Australia (Freedom of information)* [2023] AICmr 38 [46]–[47].

156 *Re K and Director-General of Social Security* [1984] AATA 252. See *'PT' and Aged Care Quality and Safety Commission (Freedom of information)* [2019] AICmr 3 [26] in which the Information Commissioner decided that access to certain information was to be given to a qualified person because evidence was led that a previous releases of similar information had a negative effect on the FOI applicant's well-being.

6.174 A qualified person means a person who carries on (and is entitled to carry on) an occupation that involves providing care for a person's physical or mental health or wellbeing including:

- a medical practitioner
- a psychiatrist
- a psychologist
- a counsellor
- a social worker (s 47F(7)).

6.175 Where access is provided to a qualified person, it is left to their discretion as to how they facilitate the FOI applicant's access to the document.

6.176 APP 12.6 of the Privacy Act allows agencies to give an individual access to their personal information through a mutually agreed intermediary.[157] This provision is more flexible than the equivalent provision under s 47F of the FOI Act. For example, an intermediary under APP 12 does not have to carry on the same occupation as the person who provided the information. Where giving access in accordance with APP 12.6 might more satisfactorily meet an FOI applicant's needs, an agency or minister may wish to suggest they request the information they seek under APP 12.6

Documents disclosing business information (s 47G)

6.177 Section 47G conditionally exempts documents where disclosure 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 (business information), where the disclosure of the information:

- would, or could reasonably be expected to, unreasonably affect the 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 (s 47G(1)(a)) or
- 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 (s 47G(1)(b)).

6.178 If the business information concerns a person, organisation or undertaking other than the FOI applicant, the decision maker may be required to consult that third party (see [6.201] – [6.207] below).

Exemption does not apply in certain circumstances

6.179 The conditional exemption does not apply 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

157 For more information, see Chapter 12 of the APP guidelines at www.oaic.gov.au.

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.

6.180 This conditional exemption does not apply 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).

Elements of the exemption

6.181 The operation of the business information conditional exemption depends on the effect of disclosure rather than the precise nature of the information itself. Nevertheless, the information in question must have some relevance to a person in respect of his or her business or professional affairs or to the business, commercial or financial affairs of an organisation or undertaking (s 47G(1)(a)).

6.182 For the purposes of this conditional exemption, an undertaking includes an undertaking carried on by, or by an authority of, the Commonwealth, Norfolk Island or a state or territory government (s 47G(4)). However, it has been held that the business affairs exemption is not available to a person within a government agency or undertaking, nor to the agency or undertaking itself.[158] Decision makers should be aware that the application of this conditional exemption to an agency's own business information is uncertain and should avoid relying on it, even if the agency is engaged in competitive business activities.[159] As an alternative, one of the specific exemptions for agencies in respect of particular documents in Part II of Schedule 2 may be available.

Could reasonably be expected

6.183 This term is explained at [6.13] – [6.16] above. As in other situations, it refers to an expectation that is based on reason. Mere assertion or speculative possibility is not enough.[160]

Unreasonable adverse effect of disclosure

6.184 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.[161] 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. It is possible that the decision maker may need to consider one or more factors twice, once to determine if a projected effect is unreasonable and again in assessing the public interest test. Where disclosure would be unreasonable, the decision maker will need to apply the

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158 *Harris v Australian Broadcasting Corporation* [1983] FCA 242; (1983) 78 FLR 236.

159 In *Secretary, Department of Employment, Workplace Relations and Small Business v Staff Development and Training Centre Pty Ltd* [2001] FCA 1375; (2001) 114 FCR 301 the Full Federal Court seemed to accept (without referring to *Harris*) that a government agency could claim this conditional exemption, although it did not decide the case on this point. The question therefore remains uncertain.

160 *Re Actors' Equity Association (Aust) and Australian Broadcasting Tribunal (No 2)* [1985] AATA 69 [25].

161 As explained by Forgie DP in *Bell and Secretary, Department of Health (Freedom of Information)* [2015] AATA 494 [48].

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public interest test in s 11A(5). This is inherent in the structure of the business information exemption.

6.185 'Would or could reasonably be expected' to have a particular impact demands the application of an objective test. 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.[162] 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.[163]

6.186 Section 47G(1)(a) concerns documents that relate to the *lawful* business or professional affairs of an individual, or the lawful business, commercial or financial affairs of an organisation or undertaking. To find that s 47G(1)(a) applies, a decision maker needs to be satisfied that if the document was disclosed there would be an unreasonable adverse effect, on the business or professional affairs of an individual, or on the lawful business, commercial or financial affairs of an organisation or undertaking.

6.187 These criteria require more than simply asserting that a third party's business affairs would be adversely affected by disclosure. The effect needs to be *unreasonable*. This requires a balancing of interests, including the private interests of the business and other interests such as the public interest. Where other interests, for example environmental interests, outweigh the private interest of the business this conditional exemption cannot apply.[164] Likewise, where the documents reveal unlawful business activities the s 47G(1)(a) conditional exemption cannot apply.

6.188 The AAT has said, for example, that there is a strong public interest in knowing whether public money was accounted for at the appropriate time and in the manner required, and in ensuring that public programs are properly administered.[165]

6.189 The AAT has distinguished between 'truly government documents' and other business information collected under statutory authority. The first category includes documents that have been created by government or that form part of a flow of correspondence and other documents between government and business. The AAT concluded that such documents incline more to arguments favouring scrutiny of government activities when considering

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[162] *Searle Australia Pty Ltd v Public Interest Advocacy Centre and Department of Community Services and Health* [1992] FCA 241; (1992) 108 ALR 163; 36 FCR 111.

[163] In relation to the test of reasonableness, see *'E' and National Offshore Petroleum Safety and Environmental Management Authority* [2012] AICmr 3.

[164] See Deputy President Forgie's discussions in *Bell and Secretary, Department of Health (Freedom of information)* [2015] AATA 494 particularly at [44]. The Information Commissioner has discussed and followed the *Bell* approach in a number of IC review decisions, for example *Linton Besser and Department of Employment* [2015] AICmr 67; *''VO' and Northern Australia Infrastructure Facility (Freedom of information)* [2020] AICmr 47; *Boston Consulting Group and Australian National University (Freedom of information) (No 2)* [2022] AICmr 16.

[165] As explained by Forgie DP in *Bell and Secretary, Department of Health (Freedom of information)* [2015] AATA 494 [68] and as discussed by the Information Commissioner in *Linton Besser and Department of Employment* [2015] AICmr 67.

whether disclosure would be unreasonable.[166] By implication, the conditional exemption is more likely to protect documents obtained from third party businesses.

6.190 Where disclosure would result in the release of facts already in the public domain, that disclosure would not amount to an unreasonable adverse effect on business affairs.[167]

Business or professional affairs

6.191 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'.[168]

6.192 The internal affairs of an organisation include its governance processes and the processes by which organisations are directed and controlled. For example, documents relating to member voting processes are not exempt under s 47G, because member voting forms part of the governance affairs of an organisation.[169]

6.193 In the absence of a definition in the FOI Act, 'professional' bears its usual meaning. For FOI purposes, 'profession' is not static and may extend beyond the occupations that have traditionally been recognised as professions, reflecting changes in community acceptance of these matters.[170] For example, the Information Commissioner accepts that medical and scientific researchers have professional affairs.[171] The word 'profession' is clearly intended to cover the work activities of a person who is admitted to a recognised profession and who ordinarily offers professional services to the public for a fee. In addition, s 47G(5) makes it clear that the conditional exemption does not apply merely because the information refers to a person's professional status.

6.194 Any extension of the normal meaning of 'profession' will require evidence of community acceptance that the occupation in question should be regarded as a profession. For example, the absence of any evidence indicating, at that time, community acceptance of the audit activities of officers of the Australian Taxation Office as constituting 'professional affairs' led the AAT to refuse to extend the ordinary meaning of the expression in that case.[172]

Organisation or undertaking

6.195 The term 'organisation or undertaking' should be given a broad application, including Commonwealth, Norfolk Island or State undertakings (s 47G(4)). An organisation or undertaking need not be a legal person. However, a natural individual cannot be an organisation but may be the proprietor of an undertaking, for example, when the individual

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[166] *Re Actors' Equity Association (Aust) and Australian Broadcasting Tribunal (No 2)* [1985] AATA 69 [31].

[167] *Re Daws and Department of Agriculture Fisheries and Forestry* [2008] AATA 1075 [22]*. See also DPP Pharmaceuticals Pty Ltd and IP Australia (Freedom of information)* [2020] AICmr 29 [34]*and Boston Consulting Group and Australian National University (Freedom of information) (No 2)* [2022] AICmr 16 [34]–[40].

[168] *Re Mangan and The Treasury* [2005] AATA 898 citing *Cockcroft and Attorney-General's Department and Australian Iron and Steel Pty Ltd (party joined)* (1985) 12 ALD 462.

[169] See *'GD' and Department of the Prime Minister and Cabinet* [2015] AICmr 46 [56].

[170] *Re Fogarty and Chief Executive Officer, Cultural Facilities Corporation* [2005] ACTAAT 14.

[171] In *'GO' and National Health and Medical Research Council* [2015] AICmr 56 [33] the Information Commissioner said that a 'researcher's professional affairs would usually involve working on more than a single research project and that his or her research would contribute to a body of knowledge over many years'.

[172] *Re Dyki and Commissioner of Taxation* (1990) 22 ALD 124; (1990) 12 AAR 554.

is a sole trader. The exemption may apply to information about an individual who is a sole trader to the extent that the information concerns the undertaking's business, commercial or financial affairs.

Prejudice future supply of information

6.196 A document that discloses the kind of information described at [6.177] above will be conditionally exempt if the disclosure 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 (s 47G(1)(b)).

6.197 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.[173]

6.198 There must be a reasonable likelihood that disclosure will result in a reduction in either the quantity or quality of business information flowing to the government.[174] In some cases, disclosing the identity of the person providing the business information may be sufficient to prejudice the future supply of information.[175] Disclosure of the person's identity may also be conditionally exempt under s 47F (personal privacy). In these cases, consideration should be given to whether the information may be disclosed without also disclosing the identity of the person supplying the information.

6.199 Where the business information in question can be obtained compulsorily, or is required for some benefit or grant, no claim of prejudice can be made. No prejudice will occur if the information at issue is routine or administrative (that is, generated as a matter of practice).[176]

6.200 The agency will usually be best placed to identify, and be concerned about, the circumstances where the disclosure of documents might reasonably be expected to prejudice the future supply of information to it.[177]

Consultation

6.201 Where a document includes business information relating to a person, organisation or undertaking other than the FOI applicant, an agency or minister should give that individual or organisation (the third party) a reasonable opportunity to make a submission that the document is exempt from disclosure under s 47 (trade secrets) or conditionally exempt under s 47G, and that disclosure would be contrary to the public interest, before making a decision to give access (s 27).

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173 *Re Angel and the Department of the Arts, Heritage and the Environment; HC Sleigh Resources Ltd and Tasmania* [1985] AATA 314.

174 *Re Maher and the Attorney-General's Department* [1986] AATA 16, *Re Telstra and Australian Competition and Consumer Commission* [2000] AATA 71 [15].

175 *Re Caruth and Department of Health, Housing, Local Government and Community Services* [1993] ATA 187 [17].

176 *Re Kobelke and Minister for Planning* [1994] WAICmr 5.

177 See, for example *'HZ' and Australian Securities and Investments Commission* [2016] AICmr 7 [34]; *Wellard Rural Exports Pty Ltd and Department of Agriculture* [2014] AICmr 131 [43].

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6.202 For the purposes of consulting a third party 'business information' means:

a) information about an individual's business or professional affairs

b) information about the business, commercial or financial affairs of an organisation or undertaking (s 47G(2)).

6.203 Because the requirement to consult extends to a third party who may wish to contend that a document is exempt under s 47 as well as conditionally exempt under s 47G, business information includes information about trade secrets and any business information the value of which would be destroyed or diminished if disclosed. See Part 5 of these Guidelines for further guidance on the application of s 47.

6.204 Consultation should occur where:

a) it is reasonably practicable. This will depend on all the circumstances, including the time limits for processing the FOI request (s 27(5)). For example, it may not be reasonably practicable if the agency or minister cannot locate the third party in a timely and effective way.[178]

b) it appears to the agency or minister that the third party might reasonably wish to make a submission that the document is exempt from disclosure under either s 47 or s 47G having regard to:

- 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 information
- whether the information is publicly available, and
- any other relevant matters (s 27(3)).

6.205 Agencies and ministers should generally start from the position that a third party might reasonably wish to make an exemption contention. This is because the third party may bring to the agency or minister's attention sensitivities that may not otherwise have been apparent.

6.206 Where there is a need to consult third parties under s 27, the timeframe for making a decision is extended by 30 days (s 15(6)). Decision makers should identify as soon as possible within the initial 30-day decision-making period whether there is a need for consultation. Where consultation is undertaken, the agency or minister must inform the FOI applicant as soon as practicable that the processing period has been extended (s 15(6)(b)).

6.207 General information about consultation is provided in Part 3 of these Guidelines. That Part provides guidance about extended timeframes, notices of decision, review rights and when access to documents may be provided.

Submissions

6.208 Where consultation occurs, a third party should be asked if they object to disclosure and invited to make submissions about:

- whether the conditional exemption apply

[178] For discussion of the relevant principles when there are a large number of third parties see *PL' and Department of Home Affairs (Freedom of information)* [2018] AICmr 67 [34]–[40]. See also *Christis Tombazos and Australian Research Council (Freedom of information)* [2023] AICmr 14 [45].

- whether, on balance, access would be contrary to the public interest.

6.209 An affected third party who is consulted under s 27 may contend that exemptions under ss 47 or 47G apply. Where the third party contends that exemptions other than ss 47 or 47G apply, it is open to an agency or minister to rely on those exemptions in its decision.[179] However, should the agency or minister decide to grant access to the documents, the third party does not have a right to seek review of that decision on grounds other than those specified in s 27.

6.210 The third party should be asked to provide reasons and evidence for their exemption contention. To assist them to make an exemption contention it may be necessary to provide a copy of the document. This can be done by providing an edited copy of the document, for example, by deleting any material that may be exempt under another provision. An agency or minister should take care not to breach any obligations under the Privacy Act during consultation, for example, by identifying the FOI applicant without their consent. If an edited copy of the document has been provided for consultation purposes, that copy should be clearly marked where material has been edited, and it should state that the copy has been provided for the purpose of consultation. The copy may be annotated or watermarked to indicate it is a consultation copy.

6.211 An agency or minister must have regard to any submissions made before deciding whether to give access to the document (ss 27(4) and 27(5)). The third party does not, however, have the right to veto access and agencies and ministers should take care that the third party is not under such a misapprehension. The statement of reasons will need to demonstrate the weight attributed to these submissions and their subsequent impact on the final decision.

6.212 Where an agency or minister decides to give the FOI applicant access to documents after a third party has made an exemption contention, they must give the third party written notice (s 27(6)). Access to a document must not be given to the FOI applicant until the third party's opportunities for review have run out, or if review did occur, the decision still stands (s 27(7)).

Research documents (s 47H)

6.213 Section 47H conditionally exempts material where:

a) it contains information relating to research that is being, or is to be, undertaken by an officer of an agency specified in Schedule 4 of the Act (that is, the Commonwealth Scientific and Industrial Research Organisation and the Australian National University) and

b) disclosure of the information before the completion of the research would be likely to unreasonably to expose the agency or officer to disadvantage.

6.214 There are no AAT or court decisions on this provision.

179 See *Australian Broadcasting Corporation and Civil Aviation Safety Authority* [2015] AICmr 21 [5] and s 27(1)(b) of the FOI Act.

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Documents affecting the Australian economy (s 47J)

6.215 Under s 47J(1) a document is conditionally exempt if its disclosure under the FOI Act would, or could reasonably be expected to, have a substantial adverse effect on Australia's economy by:

a) influencing a decision or action of a person or entity or

b) giving a person (or class of persons) an undue benefit or detriment, in relation to business carried on by the person (or class), by providing premature knowledge of proposed or possible action or inaction of a person or entity.

6.216 The economy conditional exemption reflects the need for the government to be able to maintain the confidentiality of certain information if it is to carry out its economic policy responsibilities, including the development and implementation of economic policy in a timely and effective manner.

6.217 Section 47J(2) makes it clear that a 'substantial adverse effect on Australia's economy' includes a substantial adverse effect on a particular segment of the economy, or the economy of a particular region of Australia (s 47J(2)). For example, the disclosure of the results of information regarding the impacts of economic conditions or policies on particular sectors of the market may distort investment decisions within that sector and, in turn, adversely affect the Government's ability to develop and implement economic policies more generally.

6.218 In this exemption, a 'person' includes a body corporate and a body politic (for example, the government of a State or Territory) (s 22 *Acts Interpretation Act 1901*).

6.219 The types of documents to which s 47J(1) applies includes documents containing matters related to any of the following:

- currency or exchange rates
- interest rates
- taxes, including duties of customs or of excise
- the regulation or supervision of banking, insurance and other financial institutions
- proposals for expenditure
- foreign investment in Australia
- borrowings by the Commonwealth, a State or an authority of the Commonwealth, Norfolk Island or of a State (s 47J(3)).

6.220 The terms 'reasonably be expected' and 'substantial adverse effect' are explained in greater detail at [6.13] – [6.16] and [6.17] – [6.19] above. There must be more than an assumption, allegation or possibility that the adverse effect would occur if the document were released.

6.221 A decision maker must focus on the expected effect on Australia's economy if a document is disclosed. The types of circumstances that would, or could reasonably be expected to, lead to a substantial adverse effect could include:

- premature disclosure of information could compromise the Government's ability to obtain access to information

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- disclosure of information could undermine confidence in markets, financial frameworks or institutions
- disclosure of information could distort the Australian economy by influencing investment decisions or giving particular individuals or businesses a competitive advantage.[180]

The public interest test

6.222 Section 11A(5) provides that an agency or minister must give access to a 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.

6.223 To decide whether giving access to a conditionally exempt document would, on balance, be contrary to the public interest under s 11A(5), the factors set out in s 11B must be considered. Some of these factors must be taken into account (where relevant) and some factors must not be taken into account. Decision makers are required to balance the factors for and against disclosure and decide whether it would be contrary to the public interest to give access to the requested document(s).

What is the public interest?

6.224 The public interest is considered to be:

- something that is of serious concern or benefit to the public, not merely of individual interest[181]
- not something of interest to the public, but in the interest of the public[182]
- not a static concept, where it lies in a particular matter will often depend on a balancing of interests[183]
- necessarily broad and non-specific[184] and
- related to matters of common concern or relevance to all members of the public, or a substantial section of the public.[185]

6.225 It is not necessary for an issue to be in the interest of the public as a whole. It may be sufficient that the issue is in the interest of a section of the public bounded by geography or another characteristic that depends on the particular situation. An issue of particular

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180 See Explanatory Memorandum to the Freedom of Information Amendment (Reform) Bill 2010, pp. 21–22. For an example of the application of this exemption see *Washington and Australian Prudential Regulation Authority* [2011] AICmr 11.

181 *British Steel Corporation v Granada Television Ltd* [1981] AC 1096. The 1979 Senate Committee on the FOI bill described the concept of 'public interest' in the FOI context as: 'a convenient and useful concept for aggregating any number of interests that may bear upon a disputed question that is of general – as opposed to merely private – concern.' Senate Standing Committee on Constitutional and Legal Affairs, *Report on the Cth Freedom of Information Bill 1978*, 1979, [5.25].

182 *Johansen v City Mutual Life Assurance Society Ltd* [1904] HCA 43; (1904) 2 CLR 186.

183 As explained by Forgie DP in *Wood; Secretary, Department of Prime Minister and Cabinet and (Freedom of information)* [2015] AATA 945 [54] citing *McKinnon v Secretary, Department of Treasury* [2005] FCAFC 142 [231]; (2005) 145 FCR 70; 220 ALR 587; 88 ALD 12; 41 AAR 23 per Jacobson J with whom Tamberlin J agreed, citing *Sankey v Whitlam* [1978] HCA 43; (1978) 142 CLR 1 [60] per Stephen J.

184 Because what constitutes the public interest depends on the particular facts of the matter and the context in which it is being considered.

185 *Sinclair v Maryborough Mining Warden* [1975] HCA 17 [16]; (1975) 132 CLR 473 at 480 (Barwick CJ).

interest or benefit to an individual or small group of people may also be a matter of general public interest.

Applying the public interest test

6.226 A decision maker is not required to consider the public interest test (s 11A(5)) until they have first determined that the document is conditionally exempt. A decision maker cannot withhold access to a document simply because it is conditionally exempt. Disclosure of a conditionally exempt document is required unless in the particular circumstances and, at the time of the decision, it would be contrary to the public interest to give access to the document.

6.227 The pro-disclosure principle declared in the objects of the FOI Act is given specific effect in the public interest test, as the test is weighted towards disclosure. If a decision is made that a conditionally exempt document should not be disclosed, the decision maker must include the public interest factors they took into account in their statement of reasons under s 26(1)(aa) (see Part 3 of these Guidelines).

6.228 Applying the public interest test involves the following sequential steps:

- Identify the factors favouring access
- Identify any factors against access
- Review to ensure no irrelevant factors are taken into account
- Weigh the relevant factors for and against access to determine where the public interest lies (noting that the public interest test is weighted in favour of disclosure).

More information about each of these steps is provided below.

Identify the factors favouring access

6.229 The FOI Act sets out 4 factors favouring access that must be considered if relevant. They are that disclosure would:

a) promote the objects of the FOI Act

b) inform debate on a matter of public importance[186]

c) promote effective oversight of public expenditure[187]

d) allow a person to access his or her personal information (s 11B(3)).

6.230 For example, disclosure of a document that is conditionally exempt under s 47G(1)(a) might, in the particular circumstances, both inform debate on a matter of public importance and promote effective oversight of public expenditure. These would be factors favouring access in the public interest. Similarly, it would be a rare case in which disclosure would not promote the objects of the FOI Act, including by increasing scrutiny, discussion, comment and review of the government's activities.

6.231 The 4 factors favouring disclosure are broadly framed but they do not constitute an exhaustive list. Other factors favouring disclosure may also be relevant in the particular circumstances. The FOI Act recognises the temporal nature of the public interest test

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[186] See *Janet Rice and Department of Health and Aged Care (Freedom of information)* [2024] AICmr 41 [45]–[47].

[187] See *Janet Rice and Department of Health and Aged Care (Freedom of information)* [2024] AICmr 41 [45]–[47].

through references to factors and considerations 'at a particular time'. Accordingly, the decision maker must consider factors of public interest relevant to the document sought together with the context and the pro-disclosure object of the FOI Act. A non-exhaustive list of factors is listed below.

Public interest factors favouring access

a) promotes the objects of the FOI Act, including to:

 i) inform the community of the Government's operations, including, in particular, the policies, rules, guidelines, practices and codes of conduct followed by the Government in its dealings with members of the community

 ii) reveal the reason for a government decision and any background or contextual information that informed the decision

 iii) enhance the scrutiny of government decision making

b) inform debate on a matter of public importance,[188] including to:

 i) allow or assist inquiry into possible deficiencies in the conduct or administration of an agency or official[189]

 ii) reveal or substantiate that an agency or official has engaged in misconduct or negligent, improper or unlawful conduct

 iii) reveal deficiencies in privacy or access to information legislation[190]

c) promote effective oversight of public expenditure[191]

d) allow a person to access his or her personal information, or

 i) the personal information of a child, where the applicant is the child's parent and disclosure of the information is reasonably considered to be in the child's best interests

 ii) the personal information of a deceased individual where the applicant is a close family member (a close family member is a spouse or partner, adult child or parent of the deceased, or other person who was ordinarily a member of the person's household)

e) contribute to the maintenance of peace and order

f) contribute to the administration of justice generally, including procedural fairness[192]

g) contribute to the enforcement of the criminal law

h) contribute to the administration of justice for a person

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188 *Rex Patrick and Department of Agriculture, Water and the Environment (Freedom of information)* [2021] AICmr 57 [66]–[72].

189 See also *Carver and Fair Work Ombudsman* [2011] AICmr 5.

190 See *'FG' and National Archives of Australia* [2015] AICmr 26.

191 For example, *Linton Besser and Department of Employment* [2015] AICmr 67 [25]–[26] and [53]; *Rex Patrick and Department of Agriculture, Water and the Environment (Freedom of information)* [2021] AICmr 57 [72]; *Janet Rice and Department of Health and Aged Care (Freedom of information)* [2024] AICmr 41 [27].

192 This refers to administration of justice in a more general sense. Access to documents through FOI is not intended to replace the discovery process in particular proceedings in courts and tribunals, which supervise the provision of documents to parties in matters before them: *'Q' and Department of Human Services* [2012] AICmr 30 [17].

i) advance the fair treatment of individuals and other entities in accordance with the law in their dealings with agencies

j) reveal environmental or health risks of measures relating to public health and safety and contribute to the protection of the environment

k) contribute to innovation and the facilitation of research.

Identify any factors against access

6.232 The FOI Act does not list any factors weighing against access. These factors, like those favouring disclosure, will depend on the circumstances. However, the inclusion of the exemptions and conditional exemptions in the FOI Act recognises that disclosure of some types of documents will, in certain circumstances, prejudice an investigation, unreasonably affect a person's privacy or reveal commercially sensitive information which may, on balance be contrary to the public interest. Such policy considerations are reflected in the application of public interest factors that may be relevant in a particular case.

6.233 A non-exhaustive list of factors against disclosure is provided below.

Public interest factors against access

a) could reasonably be expected to prejudice the protection of an individual's right to privacy,[193] including where:

   i. the personal information is that of a child, where the applicant is the child's parent, and disclosure of the information is reasonably considered not to be in the child's best interests

   ii. the personal information is that of a deceased individual where the applicant is a close family member (a close family member is a spouse or partner, adult child or parent of the deceased, or other person who was ordinarily a member of the person's household) and the disclosure of the information could reasonably be expected to affect the deceased person's privacy if that person were alive

   iii. the personal information is that of a government employee in relation to personnel management and the disclosure of the information could reasonably be considered to reveal information about their private disposition or personal life.[194]

b) could reasonably be expected to prejudice the fair treatment of individuals and the information is about unsubstantiated allegations of misconduct or unlawful, negligent or improper conduct

c) could reasonably be expected to prejudice security, law enforcement, public health or public safety[195]

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[193] *'PX' and Australian Federal Police (Freedom of Information)* [2019] AICmr 8 [119]–[120]; *Paul Farrell and Department of Home Affairs (Freedom of information)* [2023] AICmr 31 (28 April 2023) [41]–[46].

[194] See *'GC' and Australian Federal Police* [2015] AICmr 44, *Paul Cleary and Special Broadcasting Service* [2016] AICmr 2. As noted at [6.156], agency compliance with guidelines issued by the Australian Public Service Commission to assist agencies understand how s 103 of the Public Service Regulations 2023 affects their ability to use and disclose the personal information of staff within their agencies and with other APS agencies will be a relevant consideration in deciding whether disclosure of an employee's personal information would be unreasonable (for the purposes of s 47F) and contrary to the public interest.

[195] For example, *Bradford and Australian Federal Police (Freedom of information)* [2021] AATA 3984 [202]–[203].

d) could reasonably be expected to impede the administration of justice generally, including procedural fairness

e) could reasonably be expected to impede the administration of justice for an individual

f) could reasonably be expected to impede the protection of the environment[196]

g) could reasonably be expected to impede the flow of information to the police or another law enforcement or regulatory agency[197]

h) could reasonably be expected to prejudice an agency's ability to obtain confidential information[198]

i) could reasonably be expected to prejudice an agency's ability to obtain similar information in the future[199]

j) could reasonably be expected to prejudice the competitive commercial activities of an agency[200]

k) could reasonably be expected to harm the interests of an individual or group of individuals[201]

l) could reasonably be expected to prejudice the conduct of investigations, audits or reviews by the Ombudsman or Auditor-General[202]

m) could reasonably be expected to discourage the use of agency's access and research services[203]

n) could reasonably be expected to prejudice the management function of an agency[204]

o) could reasonably be expected to prejudice the effectiveness of testing or auditing procedures.

Ensure no irrelevant factor is considered

6.234 The decision maker must take care not to consider factors that are not relevant in the particular circumstances. The FOI Act specifies certain factors that must not be taken into account.

6.235 The irrelevant factors are:

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196 *Australian Broadcasting Corporation and Secretary, Department of Industry, Science, Energy and Resources (Freedom of information)* [2022] AATA 1451 [101].

197 *Outside the Square Solutions and Australian Skills Quality Authority (Freedom of information)* [2019] AICmr 33 [24]–[28]; *'PX' and Australian Federal Police (Freedom of Information)* [2019] AICmr 8 [119]–[120]; *Wilson AM and Office of the Australian Information Commissioner (Freedom of Information)* [2023] AATA 458 [66].

198 *Outside the Square Solutions and Australian Skills Quality Authority (Freedom of information)* [2019] AICmr 33 [24]–[28]; *'PX' and Australian Federal Police (Freedom of Information)* [2019] AICmr 8 [119]–[120].

199 *Wilson AM and Office of the Australian Information Commissioner (Freedom of Information)* [2023] AATA 458 [66].

200 *MacTiernan and Secretary, Department of Infrastructure and Regional Development (Freedom of Information)* [2016] AATA 506 [134] and [142].

201 *Washington and Australian Prudential Regulation Authority* [2011] AICmr 11 [27]–[29]; *Paul Farrell and Department of Home Affairs (Freedom of information)* [2023] AICmr 37 [93].

202 See *Australian Broadcasting Corporation and Commonwealth Ombudsman* [2012] AICmr 11 [33].

203 See *'FG' and National Archives of Australia* [2015] AICmr 26.

204 *Paul Farrell and Department of Home Affairs (Freedom of information)* [2023] AICmr 37 [93].

- access to the document could result in embarrassment to the Commonwealth Government, or cause a loss of confidence in the Commonwealth Government
- access to the document could result in any person misinterpreting or misunderstanding the document
- 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
- access to the document could result in confusion or unnecessary debate (s 11B(4)).

Weigh the relevant factors to determine where the public interest lies

6.236 The decision maker must determine whether giving access to a conditionally exempt document is, at the time of the decision, contrary to the public interest, taking into account the factors for and against access. The timing of the FOI request may be important. For example, it is possible that certain factors may be relevant when the decision is made, but may not be relevant if the FOI request were to reconsidered some time later.[205] In such circumstances a new and different decision could be made.[206]

6.237 In weighing the factors for and against access to a document, it is not sufficient simply to list the factors. The decision maker's statement of reasons must explain the relevance of the factors and the relative weight given to them (s 26(1)(aa)) (see Part 3 of these Guidelines).[207]

6.238 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.[208]

6.239 As noted in *Jonathan Sequeira and Australian Broadcasting Corporation (No. 3) (Freedom of information)*:

> Access must be provided unless the degree of that harm is such that it outweighs the public interests in disclosure that underpin the FOI Act and apply in the particular case. The test is not whether disclosure would be positively in the public interest. Rather it is whether, on balance, disclosure would be contrary to the public interest, that is, that some harm or damage to the public interest which outweighs the benefit to the public in disclosure would ensue.[209]

[205] *Rovere and Secretary, Department of Education and Training* [2015] AATA 462 [67].

[206] See *Wood; Secretary, Department of Prime Minister and Cabinet and (Freedom of information)* [2015] AATA 945 [78]–[79]; *Raymond Williams and Department of Defence (Freedom of information)* [2023] AICmr 26 [61]–[64].

[207] See for example the weight given to individual public interest factors and how these are balanced to determine whether disclosure would be contrary to the public interest in *'AHZ' and the Australian Securities and Investments Commission (No. 1) (Freedom of Information)* [2024] AICmr 45 [114]–[118]; *'AHZ' and the Australian Securities and Investments Commission (No. 2) (Freedom of Information)* [2024] AICmr 47 [79]–[83].

[208] *'PM' and Department of Industry, Innovation and Science (Freedom of information)* [2018] AICmr 70 [35].

[209] *Jonathan Sequeira and Australian Broadcasting Corporation (No. 3) (Freedom of information)* [2023] AICmr 30 [90].

The public interest test and s 47B (Commonwealth-State relations)

6.240 When applying the public interest test to a document considered to be conditionally exempt under s 47B(a), it may be relevant to take into account whether disclosure would, or could reasonably be expected to, cause damage to Commonwealth-State relations. However, the fact that damage may result from disclosure is not determinative of whether it would be contrary to the public interest to give access to the conditionally exempt document.[210] Other public interest factors may also be relevant (such as the desirability of allowing scrutiny of government activities).

6.241 Conversely, in relation to another provision of s 47B, such as 47B(b) and information or matter communicated in confidence, where disclosure of a document may reasonably be expected to have a positive or neutral effect on Commonwealth-State relations, then that may be a public interest factor in favour of disclosure.

6.242 It is not uncommon that documents considered to be conditionally exempt under s 47B(b) are documents shared between law enforcement agencies. In such cases factors favouring access will include:

- promoting the objects of the FOI Act
- enhancing the scrutiny of government operations or decision making and promoting governmental accountability and transparency
- informing debate on a matter of public importance
- [and in some cases] allowing applicants to access their own personal information.

6.243 Countervailing factors may include:

- inhibiting the future supply of information, which would prejudice the conduct of future investigations
- prejudicing an agency's ability to obtain confidential information and
- prejudicing an agency's ability to obtain similar information in the future.

6.244 When balancing these public interest factors, the factors against access will often outweigh those in favour. While the public interest is served by promoting the objects of the FOI Act, the risk of damage to relations between law enforcement agencies is often very high and could have serious and lasting effects on the effectiveness of agency operations in the future.

Inhibition of frankness and candour

6.245 Prior to the FOI Act reforms of 2010, a common factor considered to weigh against access of deliberative matter (s 47C) was that giving access would inhibit the giving of frank and candid advice by public servants. Frankness and candour arguments have been significantly affected by the 2010 reforms to the FOI Act, as demonstrated by a number of AAT and Information Commissioner decisions.[211]

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[210] *Patrick and Secretary, Department of Prime Minister and Cabinet (Freedom of Information)* [2021] AATA 2719 [224].

[211] In particular, *Rovere and Secretary, Department of Education and Training* [2015] AATA 462; *'GI' and Department of the Prime Minister and Cabinet* [2015] AICmr 51; *Wood; Secretary, Department of Prime Minister and Cabinet and (Freedom of Information)* [2015] AATA 945 and *Dreyfus and Secretary Attorney-General's Department (Freedom of information)* [2015] AATA 962.

6.246 The ability of public servants to provide robust and frank advice (often referred to as frank and fearless advice) is still often identified as a public interest factor against access by decision makers. Decision maker should exercise caution if this is the only public interest factor identified as being against access. The Australian Information Commissioner said in *'GI' and Department of the Prime Minister and Cabinet*:

> ... a more recent decision of the Administrative Appeals Tribunal, *Rovere and Secretary, Department of Education and Training* [2015] AATA 462 has held that 'A frankness and candour claim, made in circumstances where there is no (other) factor against access ... cannot be a factor against access when applying the public interest test' (at 52). I read that as a comment only that a confidentiality or candour claim carries no weight by itself but must be related to some particular practice, process, policy or program in government.[212]

6.247 In *Rovere and Secretary, Department of Education and Training* the AAT said that in relation to pre-decisional communications, a frankness and candour claim cannot be a public interest factor against access.[213] The Information Commissioner reads *Rovere* as authority for the proposition that a confidentiality or candour claim carries no weight by itself but must be related to some particular practice, process, policy or program in government.[214]

6.248 The Information Commissioner considers that frankness and candour in relation to s 47C may have some application as one public interest factor against disclosure in combination with other factors. However frankness and candour may be the sole factor where the public interest is clearly, heavily weighted against disclosure of a document of a minister, or a document that would affect the effective and efficient functioning of government.

6.249 Public servants are expected to operate within a framework that encourages open access to information and recognises Government information as a national resource to be managed for public purposes (ss 3(3) and (4)). In particular, the FOI Act recognises that Australia's democracy is strengthened when the public is empowered to participate in Government processes and scrutinise Government activities (s 3(2)). In this setting, transparency of the work of public servants should be the accepted operating environment and fears about a lessening of frank and candid advice correspondingly diminished.

6.250 Agencies should therefore start with the assumption that public servants are obliged by their position to provide robust and frank advice at all times and that obligation will not be diminished by transparency of government activities.[215]

6.251 The AAT has said there is an 'essential balance that must be struck between making information held by government available to the public so that there can be increased public participation leading to better informed decision-making and increased scrutiny and review of the government's activities and ensuring that government may function effectively and efficiently'.[216]

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212 *'GI' and Department of the Prime Minister and Cabinet* [2015] AICmr 51 [20].

213 As per Popple SM in *Rovere and Secretary, Department of Education and Training* [2015] AATA 462 [42] and [48]–[53]. In *Dreyfus and Secretary Attorney-General's Department (Freedom of information)* [2015] AATA 962 [100] Bennett J appears to give her approval to the position taken by Popple SM in *Rovere*.

214 *'GI' and Department of the Prime Minister and Cabinet* [2015] AICmr 51 [20].

215 *Raymond Williams and Department of Defence (Freedom of information)* [2023] AICmr 26 [65]–[76]; *Justin Warren and Services Australia (Freedom of information)* [2023] AICmr 13 [66]–[71].

216 As per Forgie DP in *Wood; Secretary, Department of Prime Minister and Cabinet and (Freedom of Information)* [2015] AATA 945 [69].

6.252 While frankness and candour claims may still be contemplated when considering deliberative material and weighing the public interest, they should be approached cautiously and in accordance with ss 3 and 11B. Generally, the circumstances will be special and specific.

Incoming government briefs and the public interest test

6.253 An incoming government brief is a briefing prepared by an Australian Government department during the caretaker period before a federal election. Incoming government briefs play an important role because ministers are considered to be immediately responsible for the portfolios they hold and therefore require comprehensive and frank briefs. Their purpose is to enable a smooth transition from one government to another following a general election.

6.254 The incoming government brief is prepared before the election outcome and the identity of the new Minister are known. As a result, incoming government briefs differ from other advice that may be prepared at the Minister's request or as part of the department's normal support and advising function.

6.255 In *Crowe and Department of the Treasury* the Information Commissioner found the claim that all incoming government briefs should be exempt under s 47C would fail on the basis that s 47C is a conditional exemption and access must be given unless disclosure of the document 'at the time would, on balance, be contrary to the public interest'.[217] Accordingly, each FOI request for access to an incoming government brief must be considered separately and with consideration to the public interest factors that apply at the time of the decision.

6.256 However, it will usually be contrary to the public interest under s 11A(5) to release deliberative matter in an incoming government brief, having regard in particular to the special purpose of the brief to provide frank and helpful advice to a new Minister at a critical juncture in the system of responsible parliamentary government.[218]

6.257 Special treatment is given to the brief prepared for a party that does not form government.[219] This brief is not provided to the party, which does not have the opportunity to consider and respond to it. Relevant public interest considerations may include:

- The confidentiality of discussions and briefings provided to the new Minister are essential at that early stage in developing a relationship that accords with the conventions of responsible parliamentary government. Public release of any portion of the brief would compromise the department's role in managing the transition from one government to another.

- It is important, in the early days of a new government, that the public service is not drawn into political controversy, or is required publicly to defend the advice provided to a new government.[220]

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217 *Crowe and Department of the Treasury* [2013] AICmr 69 [40].

218 *Parnell & Dreyfus and Attorney-General's Department* [2014] AICmr 71 [82]; *Dreyfus and Secretary Attorney-General's Department (Freedom of information)* [2015] AATA 962 [102].

219 *Crowe and Department of the Treasury* [2013] AICmr 69 [91].

220 *Crowe and Department of the Treasury* [2013] AICmr 69 [85].

- It is unfair to the party that did not form government to make public the assessment of its policies by a department, when the party has not had an opportunity to adjust or implement those policies.

6.258 It is a convention of Cabinet government that the Cabinet papers of one government are not available to the Ministers of another. By extension, the high-level advice that was prepared for a party in the expectation that it may (but did not) form government should not be released publicly under the FOI Act.[221]

6.259 However the Information Commissioner found that the same considerations also applied to incoming government briefs prepared for the party that forms government, and may also apply where the previous government is re-elected. In so finding, The Information Commissioner said that consideration of the damage that is likely to arise from disclosure of the incoming government brief should not be limited to damage relating to the relationship between current agencies and ministers in the present government, but should also include the likelihood of damage to relationships between agencies and their respective ministers in the future.[222]

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[221] *Crowe and Department of the Treasury* [2013] AICmr 69 [91]–[92}.

[222] *Dan Conifer and Department of the Prime Minister and Cabinet (No. 2) (Freedom of information)* [2017] AICmr 117 [35]; Dreyfus and Secretary Attorney-General's Department (Freedom of information) [2015] AATA 962 [102], [105] , [107].

PART 7 — AMENDMENT AND ANNOTATION OF PERSONAL RECORDS

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PART 7 – AMENDMENT AND ANNOTATION OF PERSONAL RECORDS

7.1 The FOI Act and the Privacy Act both generally allow individuals to seek access to their personal information and to have that information corrected or annotated. Part V of the FOI Act gives individuals the right to apply to an agency or minister to amend or annotate an incorrect record of their personal information kept by the agency or minister. The Australian Privacy Principles (APPs) in the Privacy Act give individuals the right to request an agency[1] to correct, or associate a statement with, their personal information held by the agency. An agency is also required by the APPs, independently of any request from an individual, to take reasonable steps to ensure that the personal information it holds is correct.

7.2 The amendment and annotation provisions in the FOI Act and Privacy Act coexist but operate independently of one another. Agencies are not required to advise individuals to proceed with an amendment request under the FOI Act rather than the Privacy Act. However, the FOI Act procedures, criteria and review mechanisms differ in important respects from those that apply under the APPs. Those differences are considered below at [7.6]–[7.8].

7.3 Neither the FOI Act nor the Privacy Act prevent an agency from correcting personal information under an informal administrative arrangement, provided the arrangement satisfies the minimum requirements of the Privacy Act.[2] For example, an agency may allow individuals to correct their personal information through an online portal.

Amendment and annotation of personal records under the FOI Act and Privacy Act

7.4 A fundamental principle of information privacy is that individuals are entitled to have access to their own personal information held by agencies, except where the law provides otherwise (APP 12 in the Privacy Act). Agencies must also take reasonable steps to correct personal information to ensure that, having regard to the purpose for which it is held, it is accurate, up-to-date, complete, relevant and not misleading (APP 13 in the Privacy Act). Agencies are expected to take all reasonable steps to ensure compliance. If an agency fails to comply with either APP 12 or APP 13, an individual may complain to the Information Commissioner under the Privacy Act.

7.5 The FOI Act provides a complementary procedure that gives individuals a legally enforceable right of access to documents (under Part III) and the right to request correction or update (Part V) of their personal information in agency records or the official documents of a minister. Part V enables records that are incomplete, incorrect, out of date or misleading to be amended on application by the affected person. An applicant may also ask for the record to be annotated to include a statement explaining their objection to the record of their personal information and the reasons for their objection (s 51).

Comparison of FOI Act procedures and APP 13

7.6 Part V of the FOI Act operates alongside the right to amend or annotate personal

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[1] In the Privacy Act 'agency' includes a minister.

[2] For more information about APP 13 minimum procedural requirements, see Chapter 13 of the Information Commissioner's APP Guidelines at www.oaic.gov.au.

information in APP 13. There is substantial overlap between the FOI Act and APP 13 procedures, but also some noteworthy differences.

7.7 While APP 13 sets out minimum procedural requirements, these are not as detailed as in the FOI Act. However, in two respects APP 13 goes further than the FOI Act:

- The grounds for correction in APP 13 are that the personal information is 'inaccurate, out-of-date, incomplete, irrelevant or misleading'. The additional ground in APP 13 is that the information is 'irrelevant'. The other wording difference — 'inaccurate' in APP 13, 'incorrect' in the FOI Act — is not substantive.
- If an agency corrects personal information the agency must, if requested by the individual, take reasonable steps under APP 13 to notify that change to any APP entity to which the personal information was previously disclosed unless it is unlawful or impracticable to do so. This requirement applies regardless of whether the correction was made under the Privacy Act or the FOI Act.

7.8 The options available to individuals to challenge a decision under the FOI Act and APP 13 also differ:

- Under the FOI Act, an individual may apply for internal review or IC review of an agency's or minister's decision to refuse to amend or annotate a record in accordance with the person's request. The Information Commissioner may affirm, vary or set aside the agency or minister's decision to amend or annotate a record.
- Under the Privacy Act, an individual may complain to the Information Commissioner about an agency's failure to take reasonable steps to correct personal information (Privacy Act s 36). After investigating, the Commissioner may find that an agency has failed to take reasonable steps to correct personal information or to comply with the minimum procedural requirements under APP 13. The Commissioner may make a determination to that effect, and require, for example, the agency to correct the personal information or to comply with the minimum procedural requirements (Privacy Act s 52).

7.9 It is open to an individual to decide whether to make an application under the FOI Act or to make a request under APP 13. Agencies could ensure, in appropriate cases that people are made aware of both options and the substantive differences. An agency could refer to the FOI Act in the agency's APP Privacy Policy.[3] More detailed information could be provided by an agency in other ways. For instance, a separate document that sets out the procedures for requesting correction of personal information, through an 'Access to information' icon on the agency's website,[4] or on a case-by-case basis as the need arises.

7.10 As explained in Part 3 of these Guidelines, agencies should consider establishing administrative access arrangements that coexist but operate independently of the FOI Act and that provide an easier and less formal means for individuals to make information access requests (including requests to correct personal information).

7.11 The remainder of this Part deals with the amendment and annotation provisions in

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[3] APP 1 requires all APP entities to have a clearly expressed and up-to-date APP Privacy Policy about how it manages personal information.

[4] See the OAIC's Guidance for agency websites: 'Access to information' web page at www.oaic.gov.au.

the FOI Act. For more information about the operation of APP 13, see the APP Guidelines, Chapter 13.

Records that may be amended or annotated

7.12 A request for amendment or annotation of a record of personal information in a document under s 48 must meet all of the following criteria[5]:

- the document must be a document of an agency or an official document of a minister containing personal information about the applicant
- the document must be one to which the applicant has already been lawfully provided access, whether as a result of an access request under the FOI Act or otherwise
- the personal information in the document must be incomplete, incorrect, out of date or misleading
- the personal information has been used, is being used or is available for use by the agency or minister for an administrative purpose.

Applies only to personal information

7.13 The right to request amendment or annotation only extends to the applicant's personal information within the document.[6] For example, a person cannot apply for correction or annotation of a policy document that contains no personal information about them.

7.14 An application for correction or annotation differs from the usual scheme of the FOI Act in that it is concerned with records of personal information about the applicant contained in documents, rather than the documents as such. A request for amendment or annotation extends to any record of personal information about the applicant that the agency or minister holds, if the information is used or is available for use for an administrative purpose (s 48(b)). For example, an applicant may claim that an agency document wrongly records their date of birth. The right to have that personal information about the applicant corrected extends to all active records of the applicant's date of birth that the agency has kept for administrative purposes.

7.15 The personal information must be:

- information (such as date of birth or residential address), or
- an opinion (such as a medical opinion)

about an identified individual, or an individual who is reasonably identifiable (s 4(1) of the FOI

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5 See Agency Resource 3 'Processing requests for amendment or annotation of personal records' for further guidance.

6 See *'EG' and Department of Human Services* [2014] AICmr 149 [16]-[20] where the Information Commissioner found that information about the costs borne by the applicant in negotiations and dispute with the Child Support Agency was the applicant's personal information despite the Department's submissions to the contrary. In *Grass and Secretary, Department of Immigration and Border Protection* [2014] AATA 751 [26]-[28], [30]-[31] Britton SM found that information that could be described as an expression of opinion about the manner in which an officer of the Department handled the FOI applicant's citizenship application was not personal information. Accordingly, the power to amend those records could not be exercised.

Act and s 6(1) of the Privacy Act).

7.16 Part V applies broadly to information that has been used, is being used, or is available for use for an administrative purpose. This includes information that was only used once.

Information incomplete, incorrect, out of date or misleading

The right to request amendment arises only where the applicant's personal information in the record is incomplete, incorrect, out of date or misleading. The request may relate to several different pieces of information in one or more documents, or it may relate to only a single piece of information. A different reason may be claimed for each amendment sought. For example, the applicant may claim that part of the information is incorrect, another part is out of date and therefore the whole record is misleading.

Incorrect

7.17 'Incorrect' has its normal everyday meaning. Personal information is incorrect if it contains an error or defect. An example is inaccurate factual information about a person's name, date of birth, residential address or current or former employment.

7.18 An opinion about an individual given by a third party is not incorrect by reason only that the individual disagrees with that opinion or advice. The opinion may be 'correct' if:

- it is presented as an opinion and not objective fact,
- it correctly records the view held by the third party, and
- is an informed assessment that takes into account competing facts and views.

7.19 Other matters to consider where there is disagreement about the soundness of an opinion are whether the opinion is 'complete', 'up to date' and 'not misleading'.

Incomplete

7.20 Personal information is incomplete if it presents a partial or misleading picture, rather than a true or full picture. For example, a statement that an individual has only two rather than three children will be incomplete if that information is held for the purpose of, and is relevant to, assessing a person's eligibility for a benefit or service.

Misleading

7.21 Information is misleading if it could lead a reader into error or convey a second meaning which is untrue or inaccurate. For example, an applicant may claim that a record of opinion or advice is misleading because it does not contain information about the circumstances surrounding that opinion or recommendation. The applicant may seek to have incorporated in the document information that sets out the context for that opinion or recommendation.

Out of date

7.22 Personal information is out of date if it contains facts, opinions or other pieces of

information that are no longer current.[7] An applicant may request that more recent information be inserted into the record as their circumstances change. For example, an applicant may request amendment of a statement that the applicant lacks a particular qualification or accreditation that they have subsequently obtained.

7.23 Personal information about a past event may have been accurate at the time it was recorded, but have been overtaken by a later development.[8] Whether that information is out of date will depend on the purpose for which it is held. If point in time information from the past is required for the particular purpose, the information will not be out of date for that purpose. In these circumstances, an agency or minister must still ensure that the information is complete and not misleading.

Amendment of recorded opinions

7.24 An agency or minister should be careful where a request for amendment relates to a document containing advice, recommendations or opinions of a third party (including a group). Such records should be amended only if the information is incorrect or incomplete, or if the author was shown to be biased or unqualified to form the opinion or to have acted improperly, or if there is some other clear impropriety in the formation of the opinion. The applicant's disagreement with the opinion is not a sufficient reason to amend the record.[9] This approach is consistent with the limitations on the Information Commissioner's power to direct amendments of records in s 55M of the FOI Act (see Part 10 of these Guidelines). The agency or minister should consider consulting the person who provided the advice, opinion or recommendation before amending it.

Amendment or annotation contingent on prior access

7.25 A person only has a right to seek amendment or annotation under the FOI Act if they have lawfully been provided with access to the document(s) in question (s 48). Lawful access includes access:

- granted under Part III of the FOI Act
- provided under an agency's general discretion to allow access to its documents
- required or permitted under any other law of the Commonwealth.

By contrast, a person does not need to have had access to a record of personal information to seek correction under the Privacy Act (APP 13).

7 In *Grass and Secretary, Department of Immigration and Border Protection* [2014] AATA 751 [46]-[49], Britton SM considered the applicant's request to amend a document recording a decision by the Migration Review Tribunal on the basis that this decision did not accord with an FOI decision and was therefore 'out of date'. Britton SM indicated that where a decision-maker reaches a different finding to an earlier decision-maker, this does not render the earlier decision 'out of date' and the issue was not whether the finding by the Migration Review Tribunal was 'correct' but whether the statement correctly recorded the finding by the Migration Review Tribunal.

8 In *Grass and Secretary, Department of Immigration and Border Protection* [2014] AATA 751 [52]-[56], Britton SM found that it would be open to exercise the power to amend file covers and an internal email that recorded an asserted date of birth that was found to be incorrect. Britton SM did not agree with the Secretary's argument that the information must be read in context and these documents were correct factual records of an historical event or historical data based on information provided at that time.

9 See *Grass and Secretary, Department of Immigration and Border Protection* [2014] AATA 751 [39]-[44] per Britton SM.

How to apply for amendment or annotation

7.26 Sections 49 and 51A provide that an application for amendment or annotation must:

- be in writing
- specify certain information (discussed in more detail below at [7.31]–[7.33])
- provide an Australian address to which a notice can be sent
- be sent by post to the agency's or minister's office address, or be delivered to an officer in the agency or in the minister's office.

7.27 This differs from the Privacy Act (APP 13) which does not require a request for amendment to be in writing.

Sending an application and providing a return address

7.28 The application requirements for amendment or annotation are, in two respects, worded differently to the requirements for FOI access requests under Part III. As to FOI access requests, the FOI Act expressly provides that a request may be sent by electronic communication (s 15(2A)(c)) and that an applicant may provide an electronic address for service of notices (s 15(2)(c)). As to amendment and annotation applications, the FOI Act provides only that an application must be in writing (ss 49(a), 51A(a)) and must specify an Australian address to which a notice may be sent (ss 49(c), 51A(d)).

7.29 An application for an amendment or annotation to personal records under the FOI Act is not invalid because it takes place wholly or in part by means of electronic communication such as email (s 8 of the Electronic Transactions Act (ETA) 1999). The requirement for the application to be in writing can be satisfied by electronic communications such as email. Applicants may consent to receiving information from the OAIC by electronic communications such as email (s 9(1) of the ETA 1999).

7.30 Agencies and ministers should allow for the same electronic communication procedures that apply to access requests under Part III to applications under s 48 for amendment and annotation of personal information (see procedures in ss 49 and 51A). Specifically, an agency or minister should accept an application by email, and should accept an email address for service of notices.

Information which must be specified

7.31 Section 49 provides that a request for amendment should as far as practicable specify:

- the document(s) containing the information requiring amendment
- the relevant information to be amended and whether it is claimed to be incomplete, incorrect, out of date or misleading
- the applicant's reasons for claiming the information is incomplete, incorrect, out of date or misleading
- the amendments being requested.

7.32 Section 51A provides that a request for annotation should:

- specify as far as practicable the document(s) which require(s) annotation
- be accompanied by a statement which specifies:
  - the information that is claimed to be incomplete, incorrect, out of date or misleading and whether it is claimed to be incomplete, incorrect, out of date or misleading
  - the applicant's reasons for so claiming
  - any other information that would make the information complete, correct, up to date or not misleading.

7.33 The express obligation on agencies in s 15(3) to help applicants to make a request that complies with the FOI Act applies only to access requests. There is no corresponding provision applying to requests for amendment or annotation. Nevertheless, it is good administrative practice for agencies to treat those requests in the same way. Adopting an informal approach, for example by discussing matters with applicants by telephone, can help to resolve problems and minimise delay in making a decision.

Making amendment decisions

7.34 When assessing whether the information in the document is incomplete, incorrect, out of date or misleading, a decision maker should consider:

- the nature of the information the applicant seeks to amend
- the evidence on which the decision is to be based, including the circumstances in which the original information was provided
- the consequences of amendment, where relevant.

7.35 An agency should apply its own procedures to satisfy itself of the person's identity before deciding whether to amend the record. Agencies should only seek the minimum amount of personal information required to establish the person's identity.

The evidence on which a decision should be based

7.36 As noted above at [7.31]–[7.32], an applicant must give particulars of the amendments being requested and the reasons for their request (ss 49 and 51A).

7.37 A decision to amend a record must be supported by a finding that the record is incorrect, incomplete, out of date or misleading (s 50). This requires a decision maker to undertake a reasonable investigation and to assess the available evidence. If an applicant does not provide evidence in support of their claim, an agency would be justified in refusing to amend the record. However, before refusing a request, a decision maker should give the applicant an opportunity to provide further evidence to substantiate their claims. For example, if the applicant claims that the information is out of date, the decision maker should ask the applicant for evidence of the current position.

7.38 The material that an applicant needs to provide to support their claim will vary according to each case. If an applicant can produce a document that supports the request, they should do so. An agency should also search its own records or other sources to find any evidence supporting an applicant's claims. The applicant's opinion is not determinative; it is for the agency to be reasonably satisfied that the applicant's claims are correct.

7.39 An agency or minister need not conduct a full, formal investigation into the matters that an applicant claims are incorrect or misleading. An investigation is required that is adequate to enable the agency or minister to be reasonably satisfied that an applicant's claims are either correct or incorrect, justified or not justified.

7.40 Agencies should give applicants reasonable assistance if it seems that an applicant has not pursued all likely avenues for obtaining evidence. This may require the agency to notify the applicant of the supporting material it requires and where this information may be obtained. Furthermore, applicants should be given a reasonable opportunity to comment on any adverse inferences drawn when the authenticity or relevance of the material they provide is assessed.

Assessing the evidence

7.41 When processing an application to amend personal information, it is the responsibility of an agency or minister to be reasonably satisfied that a current record of personal information is either not correct or should not be amended.[10]

7.42 The weight of evidence required to satisfy the agency or minister that the current record of personal information is incorrect depends on the significance of the amendment. On a more practical level, the evidentiary weight to be given to documents is assessed based on the circumstances in which the information was first provided and the determined authenticity of the documents.

Requisite weight of evidence

7.43 Generally, the more significant the effect of the amendment sought, the greater the weight of evidence that would be required to justify the amendment.[11]

7.44 In *'NA' and Department of Immigration and Border Protection* [2017] AICmr 112, the applicant sought an amendment to his date of birth of just under two years and in *'CT' and Department of Immigration and Border Protection* [2014] AICmr 94 the applicant sought an amendment of 2 years to his date of birth. The lesser weight of evidence required to justify the amendment in these cases reflects that these amendments are relatively minor.[12]

7.45 If the amendment sought is not significant, the weight of the evidence required to justify the amendment would be less than for a more significant amendment. Accordingly, this would make it more difficult for the agency to discharge its onus of establishing that its decision to refuse the amendment is justified, or the Commissioner should give a decision adverse to the applicant (s 55D).

Circumstances in which information was first provided

7.46 In assessing what weight to give to evidentiary documents, the decision maker

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[10] See *'K' and Department of Immigration and Citizenship* [2012] AICmr 20.

[11] See *'NA' and Department of Immigration and Border Protection* [2017] AICmr 112 [30], '*M' and Department of Immigration and Citizenship* [2012] AICmr 23 [8].

[12] *'CT' and Department of Immigration and Border Protection* [2014] AICmr 94 [41], *'NA' and Department of Immigration and Border Protection* [2017] AICmr 112 [30].

should consider the circumstances in which the information was first provided.[13] This is particularly important where the applicant has no documents to support their application for amendment other than a statutory declaration stating their case. For example, incorrect information may have been placed in a record because the applicant or others (such as parents or relatives) misunderstood the questions they were asked, or made an error in supplying the information.[14] Alternatively, the person collecting the information may have made a mistake, such as an error in translation, miscalculation of a date of birth or misspelling of a name.

7.47 In such cases, an amendment may be appropriate even if the alternative information is not supported by reliable documentation. This is because the information that is being amended is no more reliable than the information that replaces it.[15] However, an agency must first make a finding as to the correctness of the information it has on record. The threshold question is not which piece of information is more reliable but whether the currently recorded information is incorrect.[16]

Authenticity of documents

7.48 It can be difficult to establish the authenticity of documents provided in support of an application for an amendment. While it may be unrealistic to insist on presentation of originals, an agency may give less weight to a copy, particularly where the authenticity of the original document is in question.[17] Factors an agency or minister may wish to consider when weighing evidentiary documents include:

- whether a copy of a document has been certified and the identity and reliability of the certifier[18]
- whether a document is based on information reported by the applicant (self-reported information)[19]

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13 For example, in *'CI' and Department of Immigration and Border Protection* [2014] AICmr 79 [50]-[56] and [72,] the Information Commissioner took into account the fact that while the applicant had initially reported the recorded date of birth, this was during the resettlement process and found that it was not improbable that a person would be unwilling to correct it until after the resettlement process was complete in order to avoid any delays. The Information Commissioner took this approach again in *'NA' and Department of Immigration and Border Protection* [2017] AICmr 112 [79] and stated that he had previously accepted that individuals may be reluctant to amend records of personal information during the resettlement process for fear of delaying the process.

14 In *'FD' and Department of Immigration and Border Protection* [2015] AICmr 22 [43], the Information Commissioner accepted the applicant's explanation that he did not know his date of birth and chose the recorded year of birth because he was told he looked young. Nonetheless, in that matter the Information Commissioner found that the Department's record of the applicant's year of birth was not incorrect. In *'NA' and Department of Immigration and Border Protection* [2017] AICmr 112 [57], the Information Commissioner accepted as plausible the applicant's explanation that the Department's record was incorrect because the relatives who prepared his migration application may have estimated his date of birth in the absence of documentary evidence or information from his parents at that time.

15 See *'K' and Department of Immigration and Citizenship* [2012] AICmr 20 [41].

16 See *'NA' and Department of Immigration and Border Protection* [2017] AICmr 112 [86] – [88]; *'N' and Department of Immigration and Citizenship* [2012] AICmr 26 [21].

17 See *'O' and Department of Immigration and Citizenship* [2012] AICmr 27 [16].

18 See *'T' and Department of Immigration and Citizenship* [2012] AICmr 35 [13], *'IE' and Department of Immigration and Border Protection* [2016] AICmr 12 [22].

19 See *'AU' and Department of Immigration and Border Protection* [2013] AICmr 90 [14], [22], *'CU' and*

- where there appears to be little or no basis upon which the information could have been recorded accurately at the time the document was created[20]
- the reliability of other documents issued by the same agency, organisation or individual[21]
- the quality of a translation of an original document and whether the translator is known or reputable[22]
- damage to the document and/or an indication of tampering with the document[23]
- previous statutory declarations that agree with or contradict a later statutory declaration by the same individual.[24]

7.49 How far an agency goes to check a document's authenticity depends on how relevant it is to establishing the applicant's claims. Where a document is crucial and its authenticity is in doubt, the decision maker should seek the help of their agency fraud prevention services if available. If doubt remains about a document's authenticity, it may be preferable to annotate rather than amend the record.

Government records should reflect the closest approximation of the correct information

7.50 It is important that government records are as accurate as possible. Incorrect information recorded by an agency can have significant adverse consequences for individuals, including in relation to their eligibility for services or benefits.[25] An agency may be satisfied that a record of personal information is incorrect, but find it difficult to establish what the correct information is with certainty. In these circumstances, the agency should record the closest possible approximation of the correct information.[26] When an agency receives an application for amendment of personal records, it is not necessary that the agency be satisfied that the new information proposed by the applicant is correct before it can amend its record under s 50.[27] If the agency makes a finding that the existing

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Department of Immigration and Border Protection [2014] AICmr 95 [51], *'CY' and Department of Immigration and Border Protection* [2014] AICmr 101 [45]-[50] and *'FD' and Department of Immigration and Border Protection* [2015] AICmr 22 [26] and [28].

20 In *'CT' and Department of Immigration and Border Protection* [2014] AICmr 94 [31], the Information Commissioner found that little weight could be given to a letter from the Office of the Surgeon General that certified the date of birth of an applicant in circumstances where the applicant had submitted that the original birth documents were either destroyed or unavailable and it was not clear on what basis the hospital was able to provide this information. In *'NA' and Department of Immigration and Border Protection* [2017] AICmr [39], the Information Commissioner gave little weight to a church-issued birth certificate as evidence of the applicant's date of birth in circumstances where the document had not been issued by an official government authority and may have been issued on the basis of recent self-reported information.

21 See *'U' and Department of Immigration and Citizenship* [2012] AICmr 36 [12].

22 See *'A' and Department of Immigration and Citizenship* [2013] AICmr 7 [22].

23 See *'AU' and Department of Immigration and Border Protection* [2013] AICmr 90 [16], *'FD' and Department of Immigration and Border Protection* [2015] AICmr 22 [27]-[28].

24 See *'P' and Department of Immigration and Citizenship* [2012] AICmr 29 [11].

25 An agency should also be mindful of its obligation under the Privacy Act to take reasonable steps to ensure the quality of the personal information it collects, uses or discloses, independent of any amendment request from an individual.

26 See *'K' and Department of Immigration and Citizenship* [2012] AICmr 20 [39].

27 See *'K' and Department of Immigration and Citizenship* [2012] AICmr 20 [39]. In *'NA' and Department of Immigration and Border Protection* [2017] AICmr 112 [23] – [25], the Information Commissioner explained

information in the record is incorrect, it should amend the record in accordance with the applicant's request if:

- the amendment proposed by the applicant is more likely to be correct than the information currently recorded, and
- there is no other amendment that is more likely to be correct.[28]

7.51 It is open to an agency or minister to amend a record, under s 50, in a way that is different to the amendment proposed by the applicant, provided it is more likely to be correct than any other amendment option. For example, an agency may determine that an applicant's recorded date of birth is incorrect but be unable to determine with certainty that the new date proposed by the applicant is correct.[29] In this case, the agency should record the closest possible approximation of the correct date, whether this is the date proposed by the applicant, or another date that the agency believes, on reasonable grounds, is closer to the correct date. If the exact date of a person's birth cannot be established with certainty, a key consideration should be consistency of dates across the records held by multiple government agencies.[30]

Consequences of amendment

7.52 Once it is determined that a record of personal information is incorrect and there is information that is more likely to be correct, the decision maker should take into consideration the consequences of the amendment being made and the amendment not being made.[31]

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that in the IC review the onus is on the Department to demonstrate that the date of birth it has recorded is not incorrect or that it should not be amended. Where the Department is unable to establish, on the balance of probabilities, that the recorded date is 'correct', then the Department bears the onus of establishing that the incorrect date in its records should not be amended. The Information Commissioner disagreed with the approach taken by the AAT in *HFNB; Secretary, Department of Immigration and Border Protection (Freedom of information)* [2017] AATA 870. In that case the Member, Dr Gordon Hughes, found that the date of birth recorded was incorrect but that the proposed date of birth was not 'correct'. His view was that there is no power under the FOI Act to amend records of personal information to make information 'closer to correct' or 'more likely to be correct' ([30] – [34]). However in *'NA'* the Information Commissioner considered that the approach in *HFNB* shifts the burden of onus from the agency to the applicant in the external review processes, and this is inconsistent with ss 55D(1) and 61(1) of the FOI Act ([24]).

[28] See *'K' and Department of Immigration and Citizenship* [2012] AICmr 20 [39].

[29] See for instance *'JP' and Department of Immigration and Border Protection* [2016] AICmr 65 [47]-[49], where the Information Commissioner found that there was little reliable evidence to support either date of birth, but given the consistency with which the applicant had reported the date of birth he was seeking, the Information Commissioner found that that was more likely to be closer to the correct date of birth than the date on record. This decision was set aside by the AAT in *HFNB; Secretary, Department of Immigration and Border Protection (Freedom of information)* [2017] AATA 870. However, the Information Commissioner respectfully maintains that this approach, originally explained in *'K' and Department of Immigration and Citizenship* [2012] AICmr 20 and adopted in *'JP'* and *'NA' and Department of Immigration and Border Protection* [2017] AICmr 112 is consistent with the operation of s 50.

[30] See *'AM' and Department of Immigration and Border Protection* [2013] AICmr 73 [21].

[31] See *'IE' and Department of Immigration and Border Protection* [2016] AICmr 12 [41]-[42]. In *'IE' and Department of Immigration and Border Protection* [2016] AICmr 12, the applicant applied for his date of birth to be amended. The Department recorded the applicant's date of birth as 16 years of age at the time. On the basis of the applicant's contended date of birth, the applicant was 13 years of age at the time. The Information Commissioner took into account the applicant's mother's submissions that the applicant

7.53 However, the fact that an amendment of a record may benefit an applicant, and provide an incentive to make an amendment application, is generally not evidence for or against the correctness of the personal information in a record.[32]

7.54 Sometimes an amendment to a record could have other unintended legal consequences. For example, if an applicant has previously provided incorrect information in a visa application and the information is amended, the visa may be liable to cancellation under the *Migration Act 1958*. If the agency or minister is aware of such possibilities, they should draw them to the applicant's attention. An agency or minister should also make the applicant aware that the amended information will be used in their future dealings. However, in giving such advice, the agency or minister should be careful to avoid appearing to dissuade an applicant from exercising their right to seek amendment. At the same time, an agency or minister is not obliged to represent the applicant's interests. The object is to ensure as far as possible that an applicant can make an informed decision.

Recording and notifying amendment decisions

7.55 An agency or minister who is satisfied the information is incomplete, incorrect, out of date or misleading and that the information has been used, is being used or is available for use for an administrative purpose justified may decide to amend the record as requested (see [7.61]–[7.71] below). It is good practice to note on the relevant file, database or other appropriate place why the decision was made to amend the information, so that the reasons are clear to those who later use the information.

Notifying the applicant

7.56 Where an agency or minister has made a decision, they must give the applicant written notice of the decision (s 51D).[33] The notification should set out:

- the evidence (for and against the request) that the decision maker has examined
- the weighting given to the evidence

would be eligible to drive a car at the age of 13. The Commissioner considered that the applicant would also not be subject to legal age restrictions on obtaining access to alcohol, cigarettes and financial services if his date of birth was not amended. The Commissioner stated that 'Conversely, the negative consequences of making the amendment appear less significant. While potentially the applicant might remain a minor beyond his 'true' age of majority, and this may or may not unfairly entitle the family to some limited extra Government assistance, it appears the key concern is that a child is properly assessed for age and skills appropriate schooling'. In addition, the amendment to the applicant's date of birth would ensure that the applicant's birth certificate and the records held by various institutions including government agencies were consistent. The Commissioner took into account the challenges that the applicant could face in obtaining further identification documents if his date of birth was not consistent across existing records. In *'NA' and Department of Immigration and Border Protection* [2017] AICmr 112 [85], the applicant applied for his date of birth to be amended. On the basis of the Department's recorded date of birth, the applicant was 19 years old at the time of the IC review decision. On the basis of his contended date of birth, the applicant was 17 years old. The Information Commissioner accepted the applicant's father's submissions that the difference between 17 years old and 19 years old may have an impact on whether the applicant is treated as a child or an adult, and may affect his educational and vocational opportunities.

[32] See *'A' and Department of Immigration and Citizenship* [2013] AICmr 7 [26].

[33] For further guidance on notifying a decision, see Part 3 of these Guidelines.

- the reasons for refusal
- information about the applicant's review rights, and
- information about the right to complain to the Information Commissioner about how the request was handled (s 26 as applied by s 51D(3)).

7.57 The agency or minister has the onus of justifying the decision on review by the Information Commissioner (s 55D(1)). The agency or minister need not prove the information was correct, but must establish that the Commissioner should affirm the decision or give a decision that is adverse to the applicant.

Implementing amendment decisions

7.58 The FOI Act does not specify how records are to be amended. Each agency can therefore adopt the procedure best suited to its record keeping practices.

7.59 Where an agency or minister decides to amend a record in response to a request, all relevant active records must be amended in whatever form those records are kept. It may be that only a central record, such as a database containing client details, need be amended rather than all related records. The records may be amended by correcting or updating them or by adding new information to make the record complete.

7.60 Care must be taken, however, to preserve the integrity of the record. Agencies and ministers should remember that the information being amended still has value as an historical record, and therefore should be retained as far as possible. Section 50(3) requires an agency or minister when making an amendment to ensure, as far as practicable, that the amendment does not obliterate the text of the record, as it originally existed. Removing or destroying part of a record would prejudice the record's integrity as an account of the information originally supplied. Such a record may still be necessary to explain an action taken on the basis of the original information. If this is not possible, the agency should keep a careful account of any changes made, cross-referencing to the file or database that contains the record of the amendment decision.

Amending paper records

7.61 Information on a paper document could be corrected by:

- ruling through the incorrect information
- writing the correct information next to, above or below the incorrect information
- inclusion of explanatory words such as: 'Amended on (insert date) under s 50 of the FOI Act'
- inclusion of cross-references to the amendment by adding the words 'see folio (x) of file (x)', and
- pre-printed stickers with the appropriate wording if there are a large number of amendments.

7.62 Additional or updated information can be recorded in a similar way with the words: 'Additional information provided under s 48 of the FOI Act on [insert date]' or 'updated under the FOI Act on [insert date]'. The date of amendment must always be recorded. The notation could refer to s 51 (where a prior application for amendment was unsuccessful) or

s 51B (where an application for annotation is made under s 48 without first seeking amendment).

7.63 A note that merely states the applicant's views without making a finding on the accuracy of the information the agency or minister holds is insufficient to constitute an amendment for the purposes of the FOI Act (see [7.37] above).

7.64 Where information cannot be amended on the document or in the database, the folio(s) or record(s) which contains this information should clearly cross-reference to the relevant file containing the correct information.

Amending electronic and other records

7.65 Non-paper records (for example, computer data and microfilm) should be amended where possible. As with paper records, where information cannot be altered on the document or in the database, the folio(s) or record(s) which contain this information should be clearly cross-referenced to the relevant place where the correct information is held.

7.66 Although information should be amended in a way that does not obliterate the original text of the record (see [7.60] above), this may not always be possible with electronic records. Agencies should consult their systems administrators or record managers for guidance on amending or annotating electronic records.

Making and implementing annotation decisions

7.67 A person can apply at any time for an annotation to a record. They do not have to apply for an amendment to the record first (s 48(d)).

7.68 Where an agency or minister has declined to amend a record either wholly or partly in accordance with a request, the applicant must be given an opportunity to submit a statement seeking annotation of the record that they claim is incorrect, incomplete, out of date or misleading (s 51(1)). Section 51A (discussed at [7.32] above) sets out the matters that an applicant needs to include in their submission.

7.69 The general rule is that an agency or minister must annotate a record as requested, as annotation, unlike amendment, is not discretionary. However, agencies or ministers are not obliged to annotate a record if they consider the applicant's statement is irrelevant, defamatory or unnecessarily voluminous (s 51(2)).

7.70 Whether a statement is unnecessarily voluminous will depend on the circumstances. For example, a longer statement may be appropriate in some instances, such as where there is a large volume of personal information that the agency has refused to correct. Where it is not reasonable for the agency to add an extensive statement to the personal information, the agency should give the applicant an opportunity to revise the statement. If it is not otherwise practicable to add an extensive statement to the personal information or create a link to the statement, a note could be included on, or attached to, the information referring to the statement and where it can be found.

7.71 Annotation is effected by adding the applicant's statement to the record, cross-indexed to the material claimed to be incorrect, incomplete, out of date or misleading. It does not entail changing the record itself. The statement should be added to all records

containing the information claimed by the applicant to be incorrect.

7.72 Agencies are encouraged to ensure that the existence of an annotation is clearly displayed on the cover of the applicant's active paper files and flagged against all relevant electronic files such as through a central customer database. This will assist future users of the records by drawing their attention to the information the applicant has supplied.

Other procedural matters

Transfer of amendment or annotation applications

7.73 An agency or minister may transfer an amendment or annotation application to another agency or minister who holds the documents requiring amendment or annotation or where the relevant documents contain subject matter which is more closely related to the other agency's or minister's functions (s 51C(1)).

7.74 The receiving agency or minister must agree to accept the transfer before it can take place — and, as a general rule, can be expected to agree to a transfer, unless there are exceptional circumstances. For further information on transfers see Part 3 of these Guidelines.

Mandatory transfer of documents from exempt agencies

7.75 Certain requests for amendment or annotation of personal information must be transferred as follows.

Table 1: Transfer requirements for documents originating with or received from an agency listed in Schedule 2

Document originated with...	and the document is more closely connected with...	the document must be transferred to...
an exempt agency listed in Division 1, Part I, Schedule 2 (eg, Auditor-General, Australian Secret Intelligence Service)	the functions of the exempt agency	the responsible portfolio department (s 51C(2)(c)).
an exempt agency that is a part of the Department of Defence listed in Division 2, Part I, Schedule 2 (eg, Australian Signals Directorate)	the functions of the exempt agency	the Department of Defence (s 51C(2)(d)).

an agency exempt in respect of particular documents, as listed in Part II or Part III of Schedule 2 (eg, documents in respect of commercial activities)	documents in respect of which the listed agency is exempt	the agency (s 51C(3)).

7.76 Because transfers to Schedule 2 agencies are mandatory, agencies and ministers should carefully examine the documents connected with an application for amendment or annotation early in the assessment process to ensure that they do not overlook any documents requiring transfer. For detailed advice about exempt and partly exempt agencies, see Part 2 of these Guidelines.

Transfer of applications involving multiple documents

7.77 Where a person applies for amendment or annotation of personal information held in multiple documents, a transfer provision may apply to one or more of the documents. In that case, the agency or minister can treat the application as though the person had applied separately to amend or annotate each document to which a transfer provision applies (s 51C(4)).

Notification of transfer

7.78 An agency or minister who transfers a request must advise the applicant (s 51C(5)(a)). The transferred request is treated as having been made to the receiving agency or minister (s 51C(6)). Transferring a request does not extend the processing period, which remains at 30 days from the date the application was first received by an agency or minister (s 51C(6)(b)).

7.79 An agency or minister who accepts a transfer of a request and decides to amend or annotate a record must notify the transferring agency or minister of the decision and the amendments or annotations made (s 51C(7)). The transferring agency or minister receiving such a notice must in turn amend or annotate in the same way any documents that they hold that contain the record of personal information to which the application relates (s 51C(8)).

Time limits

7.80 A decision must be made and notified as soon as practicable but not later than 30 days from the day after the request for amendment or annotation was received (s 51D(1)). Failure to comply with the time limit will result in a deemed refusal (s 51DA(2)). A deemed refusal is reviewable by the Information Commissioner (s 54L).

7.81 The provisions in Part III of the FOI Act for extending the processing period for access requests do not apply to requests for amendment or annotation. However, an agency or minister may apply to the Information Commissioner in writing for an extension of the processing period after the initial period has expired (s 51DA(3)). An agency or minister can also seek the applicant's informal agreement to an extension of time. If the applicant agrees to an extension the agreement will not be binding (unlike

an agreement with an applicant on an access request under s 15AA). The applicant is entitled to treat the agency's failure to decide within the 30 days as a deemed refusal under ss 51DA(1)–(2) and to apply for review by the Commissioner (see Part 10 of these Guidelines). However, the applicant's prior agreement is a factor that the Commissioner would take into account in deciding whether to give the agency an extension of time under s 51DA(3).

7.82 An agency should not normally seek an applicant's agreement to an extension of time longer than 30 days. If the agency believes a longer extension will be needed, it would be more appropriate to apply for an extension under s 51DA(3). The Commissioner may grant a period of extension that the Commissioner considers appropriate (s 51DA(4)). The Commissioner may also impose any conditions the Commissioner considers appropriate (s 51DA(5)). If the agency or minister fails to make a decision within the extended period or to comply with a condition, the decision is treated as a deemed refusal at the end of the extended period (s 51DA(7)).

7.83 All references to 'days' in Part V of the FOI Act are to calendar days, not business (working) days. The processing time starts from the day after the agency or minister receives the request. The following table sets out the time of receipt.

Table 2: Time of receipt of the application by the agency based on mode of delivery

Mode of delivery	Time of receipt (processing period commences on following day)
Pre-paid post to a specified address of the agency or minister	The time at which the letter would be delivered in the ordinary course of post[34]
Delivery to a central or regional office	The date of delivery
Electronic communication to a specified email or fax address	The date the communication is capable of being retrieved by the agency at the specified email or fax address.[35]

7.84 As noted above at [7.79]–[7.80], an agency or minister can seek an extension of time from the Information Commissioner if the initial 30-day period has expired (s 51DA(3)). In deciding whether to allow an extension of processing time, the Commissioner will take into account any non-working days falling within the original period.

7.85 Processing a request for amendment can take a considerable period of time if the material is complex or the authenticity of claims or evidence needs to be verified. If it appears that more than 30 days may be necessary, the agency or minister should

34 *Acts Interpretation Act 1901* s 29.

35 The time of receipt of electronic communications derives from s 14A of the Electronic Transactions Act 1999, which provides that an email or similar electronic communication is received at the time it is capable of being retrieved by the addressee. This is assumed to be the time it reaches the addressee's designated electronic address (this day could be a weekend or public holiday). This rule may be varied by a voluntary and informed agreement between the sender (the applicant) and the addressee (the agency or minister).

advise the applicant of the expected delay and their intention to apply to the Information Commissioner for an extension of time.

Acknowledging receipt

7.86 The FOI Act does not require agencies and ministers to acknowledge receipt of a request for amendment or annotation of personal information. However, it is good administrative practice for agencies and ministers to acknowledge receipt of an amendment or annotation request within 14 days, as required with requests for access to documents under the FOI Act.

Authorised decision making

7.87 Like decisions relating to requests for access to documents under Part III of the FOI Act, all decisions on the amendment of records held by agencies must be made by:

- the responsible minister
- the principal officer of the agency, or
- persons authorised under s 23 of the Act to make those decisions (see Part 3 of these Guidelines).

7.88 Requests made to ministers are treated differently. Section 23 does not provide for a minister to authorise decision makers. In practice, however, it is open to a minister to authorise a staff member in the minister's office or the responsible portfolio department to act on the minister's behalf. It would be prudent for such arrangements to be in writing. A decision maker in these circumstances will be acting as an agent of the minister and the decision will be regarded as a decision of the minister.

Charges

7.89 There are no charges for processing applications for amendment or annotation of records because they concern the applicant's own personal information (reg 5 of the Charges Regulations). For further guidance on charges see Part 4 of these Guidelines.

Comments on annotations

7.90 An agency or minister must attach a requested annotation to an applicant's document or file unless the annotation is irrelevant, defamatory or unnecessarily voluminous.

7.91 Section 51E provides that the agency or minister may also attach their own comments to an annotation under ss 51 or 51B. This would be appropriate if the annotation is complex or requires further explanation. Adding a relevant comment will help to ensure that the record presents a comprehensive picture to later readers who may not be aware of the circumstances leading to the annotation.

Reviews and complaints

7.92 A decision maker must advise the applicant of their review rights in the statement of reasons if a request for amendment or annotation is refused (see [7.55] above). Review

rights include internal review and IC review. A complaint can also be made to the Information Commissioner about the handling of a request.

7.93 Further guidance on the review and complaint processes, including AAT review of IC review decisions, is in Parts 9, 10 and 11 of these Guidelines.

7.94 A person may also complain to the Information Commissioner under the Privacy Act.[36]

[36] The Privacy Act sets out a number of Australian Privacy Principles. In general, where an organisation breaches one of the principles, the individual can complain. APP 10 concerns the quality of personal information. APP 10.1 provides that 'An APP entity must take such steps as are reasonably necessary in the circumstances to ensure that the personal information that it collects is accurate, up-to-date and complete' and APP 10.2 provides that 'An APP entity must take such steps (if any) as are reasonable in the circumstances to ensure that the personal information that the entity uses or discloses is, having regard to the purpose of the use or disclosure, accurate, up-to-date, complete and relevant'. A person may complain to the Information Commissioner about a breach of APP 10.1 or 10.2.

FOIREQ24/00508 0795

Part 9 —

Internal review

OAIC

FOIREQ24/00508 0796

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Availability and purpose of internal review

9.1 Part VI of the FOI Act provides for internal review of agency decisions in 2 circumstances:

- an FOI applicant whose FOI request is refused may apply to the agency for review of its original decision. The internal review can extend to a decision to refuse access either in full or in part, to defer access to a document, to a decision about FOI charges, to give access to a document to a qualified person, or to a refusal to amend or annotate a personal record.
- a third party who is affected by a decision to grant access to a document in accordance with an FOI request may apply to the agency for internal review of its decision to grant access.

9.2 As a merits review process, an internal review is a new decision-making process in which an independent internal review decision-maker remakes the original access refusal or access grant decision.

9.3 The internal review decision-maker has all the powers of the original decision-maker, including clarifying the scope of the FOI request with the FOI applicant, searching for documents within the scope of the FOI request, redoing work done at the original decision-making stage, producing documents under s 17 of the FOI Act, providing a different form of access and consulting affected third parties.

9.4 The internal review decision-maker is not limited to the evidence before the original decision-maker and must have regard to any change in circumstances or new information or evidence that has come to light since the original decision was made.

Choice between internal review or IC review

9.5 An FOI applicant or affected third party who is dissatisfied with an agency's original decision can apply for either internal review or Information Commissioner (IC) review of that decision. The FOI applicant or affected third party is not required to apply for internal review before applying for IC review. The purpose of giving the option of proceeding straight to IC review, without first applying for internal review, is to encourage agencies to make the best decision in the first instance.[1]

9.6 The Information Commissioner is of the view that it is usually better for a person to seek internal review of an agency decision first, before applying for IC review. Internal review can be quicker than external review and enables an agency to take a fresh look at its original decision. An internal review also enables agencies to monitor and improve its systems for managing FOI process at the earliest possible juncture.

9.7 The Information Commissioner therefore suggests that agencies include in the advice they send to FOI applicants about their review rights, information to the effect that the agency commits to expeditious processing of internal reviews in accordance with s 54C(3) (that is, within 30 days), noting that a timeframe for completion does not apply to the Information Commissioner under the FOI Act. An agency will be able

[1] See the Explanatory Memorandum to the Freedom of Information Amendment (Reform) Bill 2009

to consider the request more quickly if they apply for internal review in the first instance, rather than applying for external review by the Information Commissioner.

9.8 FOI applicants and affected third parties should not apply for internal review and IC review at the same time. The FOI applicant or affected third party may first apply for internal review and, following completion of the internal review, apply for IC review.[2] The FOI Act anticipates that only one review will be conducted at a time. If an FOI applicant has applied for internal review, they should wait for an internal review decision to be made before applying for IC review. Alternatively, the FOI applicant or affected third party may proceed directly to IC review, bypassing internal review.

9.9 An internal review is not available if the original decision was made:

- by a minister (or a person the minister has authorised to make a decision on their behalf)[3] or
- personally, by the principal officer of an agency

This includes a deemed access refusal decision made by a minister or principal officer of the agency (see [9.18] below). For this reason, a person dissatisfied with the original decision will need to apply for IC review.

Decisions subject to internal review

9.10 Internal review is available to both an FOI applicant dissatisfied with an access refusal decision (see [9.11]) and an affected third party dissatisfied with an access grant decision (see [9.13]).

Access refusal decisions

9.11 An access refusal decision is defined in s 53A to include any of the following:

a) a decision refusing to give access to a document in accordance with an FOI request

b) a decision giving access to a document but not giving, in accordance with the FOI request, access to all documents to which the request relates

c) a decision purporting to give access to all documents to which an FOI request relates, but not actually giving that access

d) a decision to defer the provision of access to a document (other than a document that a minister thinks should first be provided to Parliament in accordance with s 21(1)(d))

e) a decision under s 29 relating to the imposition of a charge or the amount of a charge

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2 See [1.17] of the 'Direction as to certain procedures to be followed by applicants in information commissioner reviews' which is available on the OAIC website www.oaic.gov.au.

3 See Part 2.26 of the FOI Guidelines for further information about authorising a person to make FOI decisions on behalf of a minister.

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f) a decision to give access to a document to a qualified person under s 47F(5)

g) a decision refusing to amend a record of personal information in accordance with an application made under s 48

h) a decision refusing to annotate a record of personal information in accordance with an application made under s 48.

9.12 An internal review of an access refusal decision can reconsider the entire decision and is not limited to the FOI applicant's contentions regarding the decision.

Access grant decisions

9.13 An access grant decision is defined in s 53B and includes the following decisions:

a) a decision giving the FOI applicant access to a document, or an edited copy of a document, where consultation with a State is required under s 26A.

b) a decision giving the FOI applicant access to a document, or an edited copy of a document, where consultation with a person, organisation or proprietor of an undertaking is required under s 27.

c) a decision giving the FOI applicant access to a document, or an edited copy of a document, where consultation with a person or their legal representative is required under s 27A .

9.14 An internal review of an access grant decision is limited to considering the affected third party's contentions in relation to the specified exemptions. This is because affected third parties are only consulted on the application of s 47B (State-Commonwealth relations) (under s 26A), s 47F (personal information) (under s 27A) and ss 47 and 47G (trade secrets or business information) (under s 27).

9.15 Where there is more than one affected third party internal review application, the internal review decision-maker should deal with each application separately. This is because an internal review of an access grant decision is limited to the affected third party's contentions about the original decision and the grounds for review in the case of each affected third party are likely to be different.

Who can apply for internal review?

9.16 An FOI applicant may apply for internal review of an access refusal decision (s 54(2)).

9.17 The following are affected third parties who may apply for internal review of an access grant decision (s 54A(2)):

- the State consulted under s 26A in relation to documents affecting Commonwealth-State relations
- the person or organisation consulted under s 27 in relation to documents containing business information or trade secrets
- the person consulted under s 27A in relation to documents containing personal information about a living person

- the legal personal representative consulted under s 27A in relation to documents containing personal information about a deceased person.

9.18 Internal review is not available where:

- a State, person or organisation was invited to make a submission in relation to documents affecting Commonwealth-State relations (s 26A), documents containing business information (s 27) or documents containing personal information (s 27A), but did not do so. There is no requirement to notify the State, person or organisation of the access grant decision if they failed to make a submission.
- a State, person or organisation was not consulted under ss 26A, 27 or 27A. A State, person or organisation is not entitled to apply for internal or IC review of an access grant decision. (A third party who believes they should have been consulted can complain to the Information Commissioner. For further information about FOI complaints see Part 11 of these Guidelines.)
- an access refusal decision or access grant decision was made by a minister or a person the minister has authorised to make a decision on their behalf (ss 54(1) and 54A(1)) or made personally by the principal officer of an agency (ss 54(1) and 54A(1))
- a foreign government or international organisation was consulted under s 15(7)
- a decision is not made within the statutory timeframe and consequently a decision is deemed to have been made refusing access to a document under s 15AC, or refusing to amend or annotate a personal record under s 51DA (s 54E(b)) or
- where the original decision has already been the subject of an internal review (s 54E(a)).

Procedure in an internal review

Making an application for internal review

9.19 An application for internal review must:

- be in writing (electronic communications are considered to be in writing under the *Electronic Transactions Act 1999*) and
- be made within the specified time limit (s 54B(1)).[4]

9.20 If the applicant for internal review includes their reasons for applying for internal review, this will allow the agency to conduct the internal review more quickly and efficiently. For example, the applicant for internal review may ask for additional

[4] Subsection 15(2A) provides that the original FOI request must be sent to an officer of an agency, or a member of staff of the minister, at the address of any central or regional office of the agency or minister specified in a current telephone directory. The FOI Act contains no comparable requirement for internal review applications but it is recommended that applicants for internal review follow this procedure.

searches to be undertaken or they may contest the application of a specific exemption as part of their internal review application.

9.21 An internal review applicant cannot expand the scope of their FOI request during an internal review. This is to ensure that the internal review is not used to create a new FOI request or to change the scope of the request as agreed during the s 24AB request consultation process.

Time for applying

9.22 A person or entity has 30 calendar days after being notified of an agency's access refusal or access grant decision to apply for internal review (s 54B(1)(a)).

9.23 Access is not always provided to documents at the same time as an FOI decision is made under s 26, for example, where charges are outstanding at the time of notifying a decision. To avoid prejudice if an agency fails to provide access to documents at the same time as notifying its decision, a period longer than 30 days may apply to the following access refusal decisions (see [9.25]):

- a decision giving access to documents in accordance with a request but which does not give access to all the documents to which the request relates (s 53A(b))
- a decision purporting to give access to documents in accordance with a request but not in fact doing so (s 53A(c)) or
- a decision giving access to documents to a qualified person rather than the applicant (s 53A(f)).

9.24 In these cases, the time limit for applying for internal review is either 30 calendar days after the day the FOI applicant is notified of the original decision (or such further period as the agency allows), or 15 calendar days after access to documents is given or purported to be given, whichever period is longer (s 54B(1)(b)). A period longer than 30 days will apply if access was given or purported to be given more than 15 calendar days after notification of the original decision.

Extension of time for applying

9.25 Sometimes when an internal review applicant is seeking an extension of the time to apply for internal review, their application will already be out of time. An agency may extend the period for an applicant to apply for internal review, even if the statutory period has already expired (s 54B(2)).

9.26 The FOI Act does not specify any criteria that an agency must consider however an agency is encouraged to adopt a liberal approach and grant an extension of time unless there are sound reasons not to do so.

9.27 The following factors should be considered when deciding whether to grant an extension of time:

- there is urgency in providing the FOI applicant with access to the requested documents, for example, the documents may be needed for imminent legal

proceedings or to support an application that is subject to a timeframe that would be missed if the extension of time was not granted

- the time elapsed since the original decision and any adverse impact upon the agency caused by the passage of time, for example administrative difficulties or prejudice in conducting the internal review
- the applicant has not satisfactorily explained the reason for the delay
- there would be no practical benefit in extending the time to apply for internal review of an access grant decision because the documents have already been released

9.28 Where an extension of time is sought by an affected third party, it is important to communicate with the FOI applicant so they are aware of the process and notified that provision of access to the requested documents will be delayed until an internal review decision is made. In some cases, for example where an FOI applicant has sought access to their own personal information which comprises joint personal information, it may be appropriate to consult the FOI applicant when deciding whether to grant the affected third party additional time to apply for internal review.

9.29 In granting an extension of time to apply for internal review, it is reasonable for an agency to require an applicant to apply for internal review within a short and specified time, for example, 20 days.

9.30 A decision to refuse an extension of time to apply for internal review of an access refusal decision is an IC reviewable decision (s 54L(2)(c)). The agency bears the onus of establishing that the refusal to grant extra time was justified (s 55D).

9.31 Affected third parties to access grant decisions should be advised to apply for internal or IC review before the relevant statutory timeframes expire. If they fail to do so, the agency may release the requested documents in accordance with the decision, making the option of internal or IC review of no practical effect.

9.32 An affected third party cannot apply for IC review of an agency's refusal to extend the time to apply for internal review of an access grant decision. However, the affected third party can apply to the Information Commissioner for an extension of time to apply for IC review under s 54T of the FOI Act.

The internal review decision-maker

9.33 An agency must, as soon as practicable after receiving an application for internal review, arrange for a person other than the original FOI decision-maker to make the internal review decision (s 54C(2)). The person must be an officer of the agency, appointed as an authorised officer under arrangements approved by the minister or principal officer of the agency under s 23.

9.34 The role of the internal review decision-maker is to bring a fresh, independent and impartial mind to the internal review.

9.35 To the extent that it is possible, the internal review decision-maker should be senior to the original decision-maker and not involved in making the original decision. However, an internal review decision-maker at the same level may be appointed if

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they have had no prior involvement in the decision that is subject to internal review. If no suitable person can be appointed, the agency should consider discussing with the applicant the option of applying for IC review.[5]

9.36 It is desirable that any person appointed to conduct an internal review have a background in administrative decision making and have undertaken FOI training so they can bring an independent mind to the internal review and are not reliant on the original decision-maker for guidance in applying the FOI Act.

Internal review decision-making

9.37 The FOI Act does not prescribe any procedure or criteria for internal review decision-making[6] but the usual administrative decision-making principles apply. The internal review decision-maker:

- makes a new decision
- exercises all the powers available to the original decision-maker
- should have access to all the material that was available to the original FOI decision-maker and may also consider any additional relevant material or submissions not considered by the original decision-maker
- must consider all issues raised by the applicant for internal review and may contact that person to seek further information or to discuss the issues raised by the application
- must bring an independent mind to the internal review and must not act at the direction or behest of any other officer.

9.38 Internal review of an access refusal decision may consider all of the original decision to refuse access and is not limited to the refusal of access to specific documents or the applicant's contentions.

9.39 Internal review of an access grant decision is limited to review of the original decision to grant access to specific documents, and the affected third party's contentions regarding the decision to grant access.

9.40 An internal review decision-maker has all the powers of the original decision-maker and can do any of the following:

- undertake further searches for documents
- reconsider all the material available to the original decision-maker and any additional relevant material or submissions not considered by the original FOI decision-maker
- consider all issues raised by the applicant for internal review, including by contacting that person to seek further information or to discuss the issues

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5 For more information about IC review, see Part 10 of the FOI Guidelines.

6 For further information on internal review decision-making principles, see the Administrative Review Council, Internal Review of Agency Decision Making, Report No 44 (2001).

raised by the internal review application, including the option of refining or narrowing the scope of the application

- produce documents under s 17 of the FOI Act and provide a different form of access
- if the decision-maker decides to release documents containing the personal or business information of an affected third party or information affecting Commonwealth-State relations, access to the documents must not be given until an affected third party's review or appeal opportunities have been exhausted (ss 26A(4), 27(4) and 27A(6)) (see Part 3 of the FOI Guidelines)
- undertake third party consultation where documents contain information about a person or business who was not consulted earlier, or where the consultation did not address issues that have subsequently arisen during the internal review and the affected third party might reasonably wish to make an exemption contention (ss 26A, 27 and 27A). Where an affected third party is given an opportunity to make an exemption contention, there is no extension of time to the period for notifying a decision (that is, there is no equivalent to s 15(6) in an internal review).

9.41 The internal review decision-maker may find the original decision-maker misunderstood the scope of the FOI request and that if the scope had been properly understood in the first instance, it would have attracted a practical refusal reason. In this circumstance, the internal review decision-maker may decide to commence a request consultation process (s 24AB). If this occurs, it is important to note that:

- as s 24AB(8) only provides for the consultation period to be disregarded for the purpose of working out the 30-day period in s 15(5)(b), the 30-day processing period in s 54C(3) cannot be extended as a result of consultation under s 24AB. This means consultation needs to be undertaken within the 30-day internal review timeframe.
- the estimate of the time to process the FOI request can only include the time needed to process the FOI request at the internal review stage. However, the time taken to process the original request may inform the calculation of how long it will take to process the remaining part of the request. (See Part 3 of the FOI Guidelines for more information about practical refusal decisions).

9.42 If an internal review of an access grant decision overturns the original decision and decides that the document, subject to submissions from an affected third party, is exempt from disclosure, the FOI applicant may apply for IC review of the internal review decision.

Extension of time for making an internal review decision

9.43 The agency must notify the applicant for internal review of a decision on internal review within 30 calendar days of receiving the internal review application (ss 54C(3)).

9.44 If an agency does not make an internal review decision within 30 days of the internal review application being received, the principal officer of the agency is deemed to

have made and notified a decision affirming the original FOI decision (ss 54D(2)). The applicant for internal review may then apply for IC review of the agency's deemed decision (see Part 10 of these Guidelines).

9.45 Unlike the original FOI decision-making process, the FOI Act does not provide for an extension of time to decide the internal review with the agreement of the internal review applicant.

9.46 An agency may apply to the Information Commissioner for an extension of time to finalise an internal review (s 54D(3)). An extension of time application under s 54D must be made after the internal review processing period has ended and there is a deemed internal review decision. The Information Commissioner has a discretion to extend the internal review decision-making-period as considered appropriate (s 54D(4)), and may also impose conditions (s 54D(5)), for example that the agency must give notice of the extended time to the applicant for internal review.

9.47 The FOI Act does not specify any criteria the Information Commissioner must consider when deciding whether to grant an extension of time to make an internal review decision. Generally, the Information Commissioner will consider whether it is reasonable in all the circumstances to grant an extension, having regard to the agency's reasons for making the application and any views expressed by the applicant for internal review.

9.48 Relevant factors may include:

- the scope of the FOI request and the number of documents in scope
- the work already undertaken by the original decision-maker and the amount of additional work needed to complete the internal review
- whether any other agencies or parties have an interest in the subject matter of the internal review
- the measures to be taken by the agency to ensure a decision will be made within the extended time period and to keep the applicant for internal review informed about the progress of the internal review.[7] Factors including the prejudice to the parties will also inform these decisions.

9.49 If the Information Commissioner grants an extension of time, the agency will not be deemed to have affirmed the original FOI decision (s 54D(6)) as long as the agency makes a decision within the extended time and complies with any conditions imposed (s 54D(5)). The purpose of this provision is to avoid the need for an applicant for internal review to apply for IC review.[8]

9.50 If an agency does not make an internal review decision within the extended period or does not comply with any conditions, the agency is deemed to have affirmed the original decision (s 54D(7)). In this case, the Information Commissioner has no power

[7] For guidance about applying for an extension of time, see: 'Extension of time for processing requests' at https://www.oaic.gov.au/freedom-of-information/guidance-and-advice/extension-of-time-for-processing-requests/.

[8] See the Explanatory Memorandum to the Freedom of Information Amendment (Reform) Bill 2009.

to allow a further extension of time to make an internal review decision and the applicant for internal review may apply for IC review (s 54D(8)).

9.51 If an agency is deemed to have affirmed the original decision because the statutory time to make a decision has passed, the agency is encouraged to continue processing the internal review and to release any documents administratively. This approach supports the objects of the FOI Act. However this approach is not available if the internal review applicant has applied for IC review of the deemed decision. The agency can also consider applying in writing to the Information Commissioner for further time to consider the deemed affirmation of the original decision (s 54D(3)). (See Part 10 of these Guidelines for guidance on how agencies can resolve a deemed FOI decision subject to IC review).

Notifying the applicant of an internal review decision

9.52 The agency must notify the applicant for internal review of a decision within 30 calendar days after the day the internal review application was received (ss 54C(3) and 54D). If the internal review applicant does not receive notice of the internal review decision within 30 days after the day the application was received, the principal officer of the agency is deemed to have made and notified a decision affirming the original FOI decision on the 30th day (s 54D(2)). The applicant for internal review may then apply for IC review of the agency's deemed decision (see Part 10 of these Guidelines).

9.53 A decision affirming the refusal of access to a document, or deferring access to a document, must include the following particulars specified in s 26:

- the findings on any material questions of fact, referring to the material on which those findings were based and the reasons for the decision
- the reasons for any public interest factors taken into account
- the name and designation of the person making the decision
- the internal review applicant's review rights, right to complain to the Information Commissioner, and the procedures for exercising those rights. This should be included because even if the internal review decision is to provide access to the documents requested, the applicant may wish to seek IC review on the basis that not all documents covered by an FOI request were identified by the agency. Additionally the applicant may wish to lodge a complaint.

Charges and internal reviews

9.54 Charges for processing an FOI request cannot be imposed on internal review. The *Note* to regulation 6 of the *Freedom of Information (Charges) Regulations 2019* (Regulations) states that because the FOI Act defines 'request' as an application made under s 15(1) of the FOI Act, regulation 6(a) does not apply to an application for internal review under ss 54 or 54A of the FOI Act.

9.55 Part 1 of Schedule 1 to the Regulations lists the following processing activities in respect of which agencies cannot impose a charge when conducting an internal review:

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- the time spent by the agency or minister in searching for, or retrieving, the document
- the production of a document containing information in a discrete form by the use of a computer or other equipment that is ordinarily available to the agency for retrieving or collating stored information
- the production of a written transcript
- the time spent by an agency or minister in deciding whether to grant, refuse or defer access to a document or to grant access to a copy of a document with deletions, including time spent in examining documents, consulting with a person or body, redacting a document and notifying an interim or final decision on the request.

9.56 However, charges for providing access to documents identified in Part 2 of Schedule 1 to the Regulations may be imposed on internal review.

Reporting internal reviews

9.57 Statistical data about internal reviews needs to be included at items 8B-8D on page 2 of the FOI quarterly statistical return form on the OAIC FOI statistics portal (at https://foistats.oaic.gov.au/).[9]

9.58 Agencies need to keep accurate records of internal review applications and how the internal reviews were decided. The following information must be reported on the FOIstats portal at the end of each quarter:

- the number of applications for internal review received by the agency during the quarter
- the number of internal review decisions made in the following categories:
  - where the original decision was affirmed
  - if the agency decision was varied on review, whether more access was given (access granted in full); greater access was given (access granted but not in full); access was granted after deferment; access was granted in another form; charges were reduced or not imposed or lesser access was given
  - applications withdrawn by the applicant for internal review without any concession by the agency.

9.59 The number of internal review applications and every outcome must be reported on the basis of whether the FOI request sought 'predominantly personal' or 'other' information.

[9] See the FOIstats guide - https://www.oaic.gov.au/freedom-of-information/guidance-and-advice/foistats-guide/.

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Part 10 —

Review by the Information Commissioner

Version 1.11, 1 July 2024

OAIC

FOIREQ24/00508 0809

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Overview

10.1 Part 10 of the FOI Guidelines sets out general principles and procedures for Information Commissioner review (IC review), as contained in Part VII of the FOI Act. Part 10 also provides guidance to agencies and ministers (the respondent) in relation to the practice of the Information Commissioner (IC) with respect to the steps in an IC review, the IC's decision, and relevant appeal rights.[1]

10.2 Part 10 of the FOI Guidelines should be read in conjunction with the *Direction as to certain procedures to be followed by agencies and ministers in IC reviews* and the *Direction as to certain procedures to be followed by applicants in IC reviews*.[2]

What decisions can the Information Commissioner review?

10.3 A person[3] who disagrees with an agency's or minister's decision following an FOI request for access to a document, or an application for amendment or annotation of personal records, may apply to the IC for review under Part VII. It is not necessary to apply for internal review before applying for IC review, however the IC considers it is usually better for a person to seek internal review of an agency decision before applying for an IC review.[4] Internal review by an agency gives the agency an opportunity to reconsider the initial decision, usually at a more senior level, and the result may well provide a more robust decision or facilitate the release of information. These outcomes will generally be more timely and use agency resources more efficiently than an IC review. Internal review is not available if the decision was made by a minister or personally by the principal officer of an agency.[5]

10.4 The IC can review the following decisions by an agency or minister:

- an 'access refusal decision' (s 54L(2)(a), discussed below at [10.8])
- an 'access grant decision' (s 54M(2)(a), discussed below at [10.9])
- a refusal to extend the period for applying for internal review under s 54B (s 54L(2)(c))
- an agency internal review decision made under s 54C (ss 54L(2)(b) and 54M(2)(b)).

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1 The Office of the Information Commissioner has issued a Freedom of Information Regulatory Action Policy which provides guidance on the Australian Information Commissioner's approach to the exercise of FOI regulatory powers, including in undertaking IC reviews, investigating FOI complaints and initiating investigations. The Regulatory Action Policy is available on the OAIC website - Freedom of information regulatory action policy | OAIC.

2 Both documents are available on the OAIC website www.oaic.gov.au.

3 A reference to 'person' includes a body politic or corporate as well as an individual (see s 2C of the *Acts Interpretation Act 1901* (Cth)).

4 If the FOI decision has been made personally by the principal officer of an agency, or the responsible Minister, there is no right to internal review; the person must apply for IC review if they disagree with the decision (see s 54A).

5 For detailed information about internal review see Part 9 of these Guidelines. See also Part 2 of the Guidelines which explains that a person who is authorised by the minister to make FOI decisions does so on behalf of the minister, not in their own right as an authorised person.

Deemed decisions

10.5 The IC may also review decisions that are deemed to have been made by an agency or minister where the statutory timeframe has not been met. This may happen:

- at first instance (following a request for access to documents (s 15AC) or for amendment to a personal record (s 51DA)) or
- following an application for internal review (where the original decision is taken to have been affirmed under s 54D).

10.6 An application for IC review may be made for a deemed access refusal decision. In these circumstances the IC may allow the respondent further time to make an actual decision. If the respondent makes a new decision that decision is substituted for the deemed access refusal decision for the purposes of the IC review (s 54Y(2)).

10.7 If a respondent varies their original decision that new decision becomes the subject of the IC review.

Access refusal decisions

10.8 An 'access refusal decision' encompasses more than a refusal to grant access to a document. 'Access refusal decision' is defined in s 53A to mean:

a) a decision refusing to give access to a document in accordance with a request

b) a decision giving access to a document, but not giving access to all documents to which the request relates

c) a decision purporting to give access to all documents to which a request relates, but not actually giving that access

d) a decision to defer access to a document for a specified period under s 21 (see Part 3 of these Guidelines) (other than a document covered by s 21(1)(d), that is, where Parliament should be informed)

e) a decision under s 29 relating to the imposition of a charge or the amount of a charge (see Part 4 of these Guidelines)

f) a decision to give access to a document to a 'qualified person' under s 47F(5) (when disclosing the information to the FOI applicant might be detrimental to the FOI applicant's physical or mental health or well-being — see Part 6 of these Guidelines)

g) a decision refusing to amend a record of personal information in accordance with an application under s 48 (see Part 7 of these Guidelines)

h) a decision refusing to annotate a record of personal information in accordance with an application under s 48 (see Part 7 of these Guidelines).

Access grant decisions

10.9 An 'access grant decision' is defined in s 53B to mean a decision to grant access to a document where there is a requirement to consult with a third party under ss 26A, 27 or 27A. The agency or minister will have decided that the document:

- is not exempt under s 47 (trade secrets or commercially valuable information)

- is not conditionally exempt under s 47B (Commonwealth-State relations), s 47G (business documents) or s 47F (personal privacy) or
- is conditionally exempt under ss 47B, 47G or 47F, but access would not be contrary to the public interest (see Part 6 of these Guidelines).

10.10 A decision that an applicant's FOI request falls outside the FOI Act. For example, a decision that a document is not an 'official document of a minister'[6] or a decision that a document is open to public access as part of a public register where access is subject to a fee[7] may be reviewed by the Information Commissioner.

Who can seek IC review?

10.11 Different applicants can apply for review of different decisions. In summary:

- where the respondent's decision is an access refusal decision (including a decision about charges and a refusal to amend or annotate a record of personal information) — the person who made the FOI request (that is, the FOI applicant) (s 54L(3))
- where the decision is to grant access — a third party consulted under s 26A(2) (s 54M(3)(a))
- where the decision is to grant access — a third party invited to make a submission in support of an exemption contention under ss 27 or 27A and who did so (s 54M(3)(a))
- where the decision is made after internal review of the original access refusal decision — the person who applied for internal review (that is, the original FOI applicant) (s 54L(3))
- where the agency's decision on internal review is an access refusal decision — the person who made the FOI request (that is, the FOI applicant (s 54L(2)(b))
- where the agency's decision on internal review is an access grant decision — a third party invited to make a submission in support of an exemption contention and did so (s 54M(3)(b))
- where the decision is to refuse to allow a further period to apply for internal review of an access refusal decision (under s 54B) — the person who was seeking internal review (that is, the original FOI applicant).

10.12 Another person may apply on behalf of the person who made the FOI request or the affected third party (ss 54L(3) and 54M(3)). The IC must be satisfied that the other person has authority to act on behalf of the FOI applicant or third party.

10.13 For instance, in circumstances where the representative is not a legal practitioner the IC may ask for written authority, signed by the FOI applicant, that indicates that the representative will be acting for the FOI applicant for the purposes of the IC review.

10.14 In some circumstances other legislative requirements may apply in relation to whether the information can be disclosed to the representative (for instance, see subdivision 355-B of Schedule 1 to the *Taxation Administration Act 1953).*

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6 For example, see *Philip Morris Ltd and Treasurer* [2013] AICmr 88.

7 For example, *Mentink and Australian Federal Police* [2014] AICmr 64.

Onus

10.15 The respondent has the onus of establishing that the decision is justified or that the IC should give a decision adverse to the IC review applicant in an IC review (s 15) or an application to amend personal records (s 48).[8] The respondent must also bear in mind their obligation to use their best endeavours to assist the IC to make the correct or preferable decision (s 55DA).[9]

10.16 Section 55D(1) does not operate to automatically require or support a decision against a respondent and in favour of an IC review applicant if a respondent does not engage fully with the IC review or does not provide further evidence to support the IC reviewable decision. However as noted by the FOI Commissioner in *South East Forest Rescue and Department of Climate Change, Energy, the Environment and Water*, deficiencies in engagement with the IC review process can adversely impact respondents. For example, a failure to provide submissions may lead to a decision adverse to the agency.[10] In such circumstances the IC will make a decision on the merits having regard to the evidence before them and applying all applicable administrative law principles. However, in the absence of sufficient evidence being provided by a respondent, and absent any other material provided by or relevant to a third party, maintaining the respondent's contentions in a decision on IC review may in some cases be significantly less likely than would otherwise be the case.[11]

10.17 In an IC review of an access grant decision, the affected third party (the IC review applicant) has the onus of establishing that a decision refusing the FOI request is justified or that the IC should give a decision adverse to the person who made the FOI request (s 55D(2)).

Principles of IC review

10.18 IC review of decisions about access to government documents (and amendment of personal records) is designed around several key principles. The IC review is:

- a merit review process where the IC makes the correct or preferable decision at the time of the decision
- intended to be as informal and cost effective as possible
- intended to be timely and responsive and
- intended to be proportionate.

Merit review

10.19 In the IC review the IC determines the correct or preferable decision in all the circumstances. The IC can access all relevant material, including material the respondent claims is exempt. The IC can also consider additional material or submissions not

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[8] Section 55D(1)) of the FOI Act

[9] This requirement is consistent with the general obligation of agencies to act as a model litigant. The nature of this obligation is explained in Appendix B to the *Legal Services Directions 2017*.

[10] *South East Forest Rescue and Department of Climate Change, Energy, the Environment and Water (Freedom of information)* [2024] AICmr 90 [37].

[11] *Christis Tombazos and Australian Research Council (Freedom of information)* [2023] AICmr 14 [5]. See also *Paul Farrell and Department of Home Affairs (No. 5) (Freedom of information)* [2023] AICmr 99 [13].

considered by the original decision maker, including relevant new material that has come to light since the original FOI decision was made. For example, for the purpose of deciding whether a document is conditionally exempt, the IC can take account of contemporary developments that shed light on whether disclosure would be contrary to the public interest. However, the IC cannot determine the exempt status of documents that have become documents of an agency or minister after the date of the applicant's FOI request.[12]

10.20 If the IC decides that the original decision was not correct at law or not the preferable decision, the decision can be varied or set aside and a new decision substituted. For example, the IC may decide that a document is not an exempt document under the FOI Act or that a charge was not correctly applied.

Informal

10.21 IC reviews are intended to be a simple, cost-effective method of external merit review. This is consistent with the objects of the FOI Act, which provide that functions and powers under the FOI Act are to be performed and exercised, as far as possible, to facilitate and promote public access to information, promptly and at the lowest reasonable cost (s 3(4)).

10.22 Consistent with the object of promoting public access to information, the IC will provide appropriate assistance to IC review applicants to make their applications (s 54N(3)), which includes, for example, explaining what information they must provide with their IC review application and confirming the aspects of the decision they disagree with.

10.23 Consistent with the object of providing prompt and cost-effective access to information, most reviews will be conducted on the papers rather than through formal hearings and the IC expects that general information will be shared between the parties. Although the IC has formal information gathering powers (see Division 8 of Part VII), documents may be requested informally from agencies. The IC's formal powers may be used to compel respondents who do not respond to informal requests by the OAIC.[13] This practice reflects the escalation of regulatory powers by resorting to the use of coercive powers when informal interventions are unsuccessful in eliciting a response from the respondent.

Cost-effective

10.24 To reduce formality and costs all parties are encouraged to minimise their use of legal representation in IC reviews. The IC expects to receive responses from the respondent rather than a legal representative, even where the respondent chooses to seek legal advice on particular issues.

10.25 The IC also encourages parties to reach agreement as to the terms of a decision on an IC review. The IC may then make a decision in accordance with those terms without completing the IC review (s 55F) (further information about agreements made under s 55F can be found at [10.117] – [10.121]).

Timely and responsive

10.26 IC review is intended to be efficient and lead to resolution as quickly as possible. Respondents must use their best endeavours to assist the IC to make the correct or preferable IC review decision (s 55DA). This duty is consistent with the obligation on the

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[12] *Lobo and Department of Immigration and Citizenship* [2010] AATA 583.

[13] See Australian Information Commissioner, *Direction as to certain procedures to be followed by agencies and ministers in IC reviews* [3.16] (available on the OAIC website www.oaic.gov.au).

Commonwealth and its agencies to act as model litigants — that is, with complete propriety, fairly, and in accordance with the highest professional standards as a party to proceedings, including tribunal proceedings.

10.27 To maintain efficiency, the OAIC relies on:

- respondents making genuine attempts to resolve the IC review application with applicants: The respondent may make a revised decision under s 55G (see [10.75] – [10.83] below), or the parties may agree as to the terms of a decision on an IC review. The IC may then make a decision in accordance with those terms without completing the IC review (s 55F).
- the use of directions and information gathering powers to take timely and necessary action
- timely responses to requests for the documents at issue and submissions from the parties, and
- preliminary views, which may be provided by an IC review officer, to the parties after review of the documents at issue and submissions, where appropriate.

Proportionate

10.28 In conducting an IC review, the IC will use their powers proportionately, consistent with the expectations to provide a timely and responsive IC review process.

10.29 The IC may decide to expedite an IC review application in response to a request from the IC review applicant, or for other reasons. When considering whether to expedite an IC review application, the IC may have regard to any of the following factors:

- whether expedition will best facilitate and promote prompt public access to information. For example, this factor may be relevant where the IC review application may delay the FOI applicant from accessing documents found not to be exempt. This may be relevant where an affected third party applies for IC review of an access grant decision (under s 54M) and the FOI applicant's access to the documents in dispute is delayed because of the IC review application.
- whether expedition will best facilitate public access to information at the lowest reasonable cost. For example, it is relevant to consider whether:
  - an IC review decision will address a novel issue
  - an IC review decision will resolve issues raised in a number of other related IC review applications which may result in the resolution of the other IC review applications at the lowest reasonable cost and
  - whether it is administratively more efficient and timely to consider related IC review applications or IC review applications that raise similar issues together
  - whether the decision will provide broader guidance to an agency or agencies
- the objects of the FOI Act
- any other factors the Information Commissioner considers relevant in the circumstances.

10.30 If the IC review is expedited, this may be reflected by changes to the IC review process. For example, it may be appropriate for the IC to provide the parties with shorter timeframes for responses and require the provision of submissions that can be shared with the other party

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to eliminate delays incurred when parties initially seek to only provide submissions on a confidential basis.

Procedures in an IC review

Parties to an IC review

10.31 The parties to an IC review (as specified in s 55A) are:

a) the IC review applicant (see [10.11] above)

b) the principal officer of the agency, or the minister, to whom the FOI access request was made

c) an affected third party required to be notified of an IC review application under s 54P (discussed below at [10.51] – [10.52])

d) a person who is joined by the IC to the IC review proceedings as a person whose interests are affected (discussed below at [10.54] – [10.57).

10.32 Where a minister is the respondent to an IC review and there is a change of minister during the IC review, the new minister is the respondent. The obligation to respond to the IC review does not automatically cease when the individual who holds a ministerial office changes. The IC review will continue, with the relevant minister remaining the respondent, despite a different individual holding that office. The new minister, in responding to the IC review application, needs to make factual enquiries as to whether the document at issue is in their possession. The status of the document as an 'official document of a minister' is to be decided by the facts and circumstances that existed at the time the FOI request was received.[14] However, further judicial examination of this issue is anticipated.

Application for IC review

Making an application

10.33 An application for IC review must be in writing (s 54N), which includes email. The application must:

- give details of how notices may be sent to the IC review applicant (for example, by providing an email address)
- include a copy of the notice of the decision given by the respondent under s 26.

10.34 Including a copy of the s 26 notice enables the IC to readily identify the respondent and the matters in dispute.

10.35 The IC review application may also contain particulars of the basis on which the IC review applicant disputes the reviewable decision (s 54N(2)). It will assist prompt handling of the IC review if the IC review applicant sets out the following matters in the application:

- any grounds on which the IC review applicant disputes the reasons given for a decision that a document is exempt or conditionally exempt

[14] *Patrick v Attorney-General (Cth)* [2024] FCA 268 [99].